

**A LOCALIZED RE-DEFINITION OF LEGAL JUSTICE  
The Feminine of the South in the Early Constitutional  
Transition and its Practice by the  
Consumer Protection Office of the MPDFT-Brasilia-Brazil  
A Framework for Cross-Border Disputes in  
EC Consumer Law and Policy**

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## DECLARATION

I, hereby, declare that, where otherwise stated, the research recorded in this thesis and the thesis itself were composed entirely by myself in the Faculty of Law at the Edinburgh University.

July 2009

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## ABSTRACT

This thesis presents an alternative reading of law as a way to settle conflicts and dispense justice through the eyes of the feminine and their ethics of care as elaborated by Carol Gilligan. An elective articulation between cultural feminism and postmodern ethics has been defended rather than coincidence. It shows the aporias of modernity through the reading of postmodernity, especially the undeniable exigencies of Levinas' ethics of alterity and the reading done by Derrida of Benjamin's characterization of law as violence. The challenges of postmodernity in those respects remain and then the findings of Gilligan's different voice are articulated to offer a possible *Aufhebung*. No coincidence is defended but a proper articulation is defended. This thesis defends a reconceptualisation of justice as a feminine virtue within a postmodern paradigm of law and its rematerialization and reflexiveness as well the advancement of Relational Contract Theory and Need-Oriented Contact Theory. It explores early practices of Consumer Protection Office of MPDFT-Brasilia-Brazil which were responding to a transition constitutional situation after the redemocratization of the country and were an institutional lost paradigm of justice as a feminine virtue. The desired outcome is to identify a possible framework for justice as care, considering a manifold diagnosed gap in consumer justice in the EC.

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I certainly have a lot to thank so many people for, as it was a long journey. Yet expressing such an immense debt seems a task beyond words, so perhaps I would do best to leave my thankfulness in the merciful hands of God.

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## TABLE OF CONTENTS

Declaration.....	2
Abstract .....	3
Acknowledgements .....	4
Table of Contents.....	5
Introduction .....	11
Part I: Redefining Justice: Legal Justice as a Feminine Virtue.....	17
Chapter I - Law and Justice: A post-Modern Reading of a Modern Separation .....	18
I - Is There Any Problem With Law? .....	20
I.1-From Law as Legalism to Law as Legality.....	20
I.2-The Relational Contract Law Inspiration.....	22
I.3- Yes, There is a Moral Problem with Law .....	24
II - Law and Justice: an Impossible Marriage? .....	27
II.1- The Post-Modernist Reading of Modern Impossibilities .....	28
II.1.1- A Post-Modern Entrenchment can Reconcile Law and Justice?.....	33
II.2- The Ethics of Alterity: the Other and a Possibility for Bridging Law and Morals .....	37
III-Feelings and Emotions as Exigencies of the Ethics of Alterity: a Threshold for Law? Mercy and Love as Legal Impossibilities.....	42
III.1- Mercy and Legal Justice .....	43
III.2- Love and Legal Justice .....	50
IV-Is There Anything Beyond Law? The Feminist Effort in the Path of Care Toward Justice.....	57

IV.1- The Feminine Problem as the “Sacrifice” of Justice.....	58
IV.1.1- Arrigo’s Imaginative Discourse and Experiential Feminism .....	60
IV.2- The Third Separation Thesis and its Meaning for Legal Theory: A Feminist Path .....	64
IV.3- The Path of Care: Healing Separation Toward Justice .....	67
Conclusion .....	71

Chapter II - Gilligan’s Paradigmatic Revolution –An Inspiration for the  
Life of Law .....

I- Gilligan: a Response to Lawrence Kohlberg.....	74
I.1- Kohlberg’s Stages of “Normal” Moral Development .....	75
I.2- Gilligan’s Stages of a Different Moral Development .....	77
II-Gilligan by Herself .....	78
II.1- <i>In a Different Voice</i> and Related Studies .....	79
II.2- The Two Moral Orientations .....	86
III- Gilligan’s Paradigmatic Shift .....	87
III.1- The Relational Self .....	88
III.1.1- Affective Imagination as an Epistemological Tool of the Relational Self.....	88
III.2- The Methodological Advancement.....	89
III.3- Challenging the Public/Private Dichotomy.....	90
III.4- Caring is a Relational Moral Value – The Relational Self is Feminine .....	91
IV- Problems in What Gilligan Suggests .....	92
IV.1-Gilligan as an Essentialist.....	93
IV.2- Gilligan and Moral Relativism.....	96
V- Gilligan and the Law .....	97

V.1- The challenge of the Other – A Possibility for Law Through Care .....	98
V.2- Responsibility as the Demand of the Other .....	100
V.2.1- Responsibility Without Relationship .....	100
V.2.2- Responsibility in the Female Path of Moral Growth x the Male Legal Version .....	101
V.2.3- Responsibility in the Moralities of Rights and of Care .....	103
VI- Gilligan and the Life of Law: Access to Justice as Care .....	104
 Chapter III - The Practical Life of Legal Justice as a Feminine Virtue.....	110
 I- An Institutional Practice of Justice as a Feminine Virtue .....	114
I.1- Legal Justice as Care .....	114
I.2- A Brief Experience in Consumer Protection Through the Office of the Public Prosecutor in Brasilia-Brazil (MPDFT) as a Practice of Justice as a Feminine Virtue.....	116
I.2.1-The Brazilian General Political Background .....	116
I.2.2-The Position of the <i>Ministère Public</i> in the General Political Framework.....	118
I.2.3- Care in the Consumer Protection in the <i>Ministère Public</i> in Brasilia.....	119
I.2.3.1- Interviews and some Analysis of the Practice .....	120
I.2.3.2-The Male Overtake.....	123
I.2.3.3-A Quasi-Remedy .....	124
I.2.4-Normative Considerations.....	124
 II-The Question of Legitimacy as Parties Trust in Justice as a Feminine Virtue .....	127
II.1- Parties Satisfaction and Happiness as Contours of Legitimacy of Justice as a Feminine Virtue in <i>Parquet's</i> Actions.....	128
II.1.1- Reflexive Law: Help for the Empathic Institutional Practice of Justice as Care?.....	129
 III- The Tension Between the Demands of Legitimacy and its Promises .....	132

Part II: The European Context .....	136
Chapter IV– Understanding the Gap.....	137
I - Bridging Parts I and II .....	137
II- Defining the Problem .....	140
II.1- The Centrality of Consumer Issues for the European Legal and Political Armoury .....	140
II.2- The Purposeless of Consumer Legislation .....	143
II.3- Consumer Protection as a Moral Responsibility of the Market .....	143
II.4- The Role of Courts .....	144
III – The Gap under the Rules of Private International Law (PIL)-The Provisions on Consumer Contracts of the Brussels and Rome Conventions and the Council Regulation 44/2001 .....	146
III.1 – The Rome Convention on the Law Applicable to Contractual Obligations-The Case for Consumers.....	148
III.2 – The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters Converted into the Council Regulation no. 44/2001 - The Case for Consumers .....	154
III.3 – The Rome and The Brussels Conventions on Consumer Protection and the Gap in the Light of the Europeanisation of Conflict Rules and Private Law – A Modest Account .....	161
III.4 – The Costs of Legal Proceedings and of their Barriers in the EU and its Weight in the Configuration of the Gap for European Consumer in Cross-Border disputes .....	166
IV – The Out-of-Court Project: the Gap Persists .....	170
IV.1- The Directive no. 1999/44 .....	172
IV.2- The Directive no. 2000/31 .....	173
IV.3- Further Improvements .....	174



Chapter V – Enquiring about Availability .....	176
I - Article 153 and the Policy of Negative Law.....	178
II - Article 153 and the Policy of Soft Law .....	182
III- Article 153 and the Principle of Subsidiarity .....	187
III.1- Subsidiarity as a Hurdle .....	188
III.2- Subsidiarity as a Duty to Act.....	191
IV – The Out-of-Court Project as a Solution? .....	195
IV.1- The Case for e-Commerce .....	195
IV.2- The Case for the EEJ-NET .....	198
V – Analysis of Article 153.....	200
VI – Article 153 and Articles 2,10, 94, 95 and 308, as Legal Availability .....	204
 Chapter VI – Looking at Evolution .....	 209
I- Until the First Three-Year Action Plan for Consumer Policy in the EC .....	 210
II – Under the Aegis of the First Three-Year Action Plan .....	215
III– Under the Aegis of the Second Three-Year Action Plan .....	217
IV – Under the Aegis of the Third Three-Year Action Plan .....	222
V – Under the Aegis of the Fourth Three-Year Action Plan .....	227
 Chapter VII – Translating Legal Justice as Care into EU Context.....	 234
I- The Challenge of Transferability as “Translation”.....	235
I.1- Diversity as the European Peculiarity .....	236
I.2- Need-Oriented Theory: A Framework to Inform Translation? .....	237
I.3- The Legitimacy Question of the Market Itself as a Facilitator for Translation .....	240
I.4- Gibt es ein Deutsches Problem damit? .....	242
II- The Framework .....	244
II.1- A European Agency .....	245
II.2- The Practice, its Tools and Legitimacy .....	248
II.3- Legality as Safety Net.....	251

II.4- A Glance at the Suitability of the Framework For Financial Services and E-Commerce.....	253
II.5- Is There any Necessity for Criminalisation?.....	255
Chapter VIII – Two European Experiences of Out-of-Court Justice in the EU: A Brief Description.....	257
I-The Lisbon Arbitration Centre (LAC).....	258
I.1- The Centre’s History.....	258
I.2- Characteristics and Structure of the Centre.....	258
I.3- Procedures and Principles of the Centre.....	259
I.4- Analysis and Criticism about the Centre.....	259
I.5- Two Cases Revisited.....	261
II- The Danish Consumer Ombudsman (DCO).....	262
Conclusion.....	265
Annex.....	274
References .....	276

## INTRODUCTION

This work was born of an early and general concern regarding interpersonal relationships, the conflicts they raise and the issues of justice they entail and of an equally early but very specific dissatisfaction with the common way they are handled, especially in public realms.

This was indeed a puzzle so complex and structureless that finding its solution appeared hopeless. It had to stay this way for long years until a basic framework for its resolution came about. It happened during the search for career improvement still in the midst of nappies, baby sleeplessness, unbalanced relationships, many irremediable losses, a typical female fear of success and the unrenounceable commitment to the domestic, the private and the relational.

*“You have given me the freedom that the loner cannot have  
You have made me indestructible because with you I do not end in myself”<sup>1</sup>*

Relationships and a concern for the Other, for the Otherness of the South, of the feminine were the defining characteristics of the research behind this work which opposes male and modernist legal theory, which has relentlessly colonised justice as a feminine virtue. The main aim of this thesis is to offer an alternative (post-modern and feminine) reading of law as a way to dispense justice as care, out of the traditional legal remedies for legal disputes through legal proceedings in courts of law.

*Julius stopped in front of his friend. “Listen Rupert.  
If there were a perfectly just judge  
I would kiss his feet and  
accept his punishments upon my knees.  
But these are merely words and feelings.  
There is no such being and even the concept of one  
is empty and senseless. I tell you, Rupert,  
it’s an illusion, an illusion.”  
“I don’t believe in a judge”, said Rupert,  
“but I believe in justice.  
And I suspect you do too,  
or you wouldn’t be getting so excited.”  
“No, no, if there is no judge there is no justice,  
And there is no one, I tell you, no one.”<sup>2</sup>*

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<sup>1</sup> Pablo Neruda in Kozyris, 1991: 436.

Then, the main field, in which this thesis belongs and in which it ought to be read and understood, is legal theory. The main inquiry of this thesis address a practical gap to be feasibly bridged by the theoretical outcomes which this thesis hopefully success in furnishing. It should be stressed that the thesis does not turn on its practical applicability or the feasibility of the alternative institutional model it outlines, but on the way it open up questions located at the border of the theoretical and the practical. The last Chapter, nonetheless, summarily describes two European experiences of out-of-court justice to furnish this thesis with empirical evidence that the alternative method of consumer disputes resolution which are outlined in the theoretical chapters can work, and that they enhance and improve significantly the mechanisms of out-of-court consumer dispute resolution which already exist.

It should be taken as unquestionable that the empirical model presented in Chapter III was not abandoned in Brasilia-Brazil for essentially political reasons but that its failure corroborates the fragility of the feminine in patriarchal institutions and, more acutely, in male legal sites. Its “failure” is, in fact, most revealing and should be understood in its own terms and considered within the methodology most suitable for anthropological analysis and, especially, Gilligan’s convincingly analysis of the female different voice as a contestation of the conclusions of Kohlberg’s human moral development theory. Furthermore, the Brazilian example is not aimed as a model for informing EU policy. It intends to stress the features of a practice of law able to dispense justice as care.

The experience of the Danish Consumer Ombudsman (DCO) is described in Chapter VIII in order to reinforce the discussions of Chapters V and VII on the politics of soft law in EU consumer law and policy and the role of the “EU Ombudsman as a novel source of soft law in EU” (Bonnor:2000) respectively. Chapter VIII shows how the DCO is an important paradigm for the creation of an EC consumer protection ombudsman.

The legal remedies of male legal dogmatics also soon showed their inability to encompass human, moral and political dimensions of the encounters among strangers in a market as diverse and complex as the EU’s. Furthermore, the EU resolution of the gap confronts us with the limits of its “imagination” and calls for another rationality, another way to see the old problem and to imagine a sensible approach, calling forth its peculiar adaptability to embrace a redefinition of justice forged in the context of a different voice: the cultural feminism of Carol Gilligan and her findings about an ethic of care, which stresses the value of relationships and responsibility.

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<sup>2</sup> In Wolfe, 1992:361.

*“The salvation of this human world lies nowhere else than in the human heart, in human meekness, and in human responsibility... We are still incapable of understanding that the only genuine backbone of all our actions – if they are to be moral – is responsibility. Responsibility to something higher than my family, my country, my firm, my success.”<sup>3</sup>*

In the context of the thesis’s post-modern and feminine reading of the inabilities of modernist and male theory of law, Chapters V and VI deal substantively with key aspects of EC consumer law and policy. Chapter V thoroughly discusses the constitutional background of a necessary EU justice for consumers. The substance of art 153 of EC Treaty is analysed in detail. Chapter IV considers art. 153, as a programmatic norm, in the context of the history of EC consumer law and police concerning access to justice, which shows a favoured framework to adopt justice as care for basically two reasons. Firstly, because of the chosen out-of-court justice system and secondly, because of the language used throughout Commission’s Action Plan, Green Papers, etc, whose texts were discussed in their substance and constitutional background. Chapter V discusses also the inevitably national resistance or “jealousy” regarding the EU’s ever-growing powers and, following Weatherill’s known positions, identifies art. 153 as a wide enough constitutional basis to establish subsidiarity as duty to act. Chapters IV and VI identifies harmonization as something of a lynchpin in EC market dynamics but only as safety net and absolutely unworthy as a politics of added-rights without reliable channels to guarantee access to justice. The introduction of Chapter IV identifies a common sense point in consumerism which is about the irrelevancy of consumers’ petition of rights or legislation (through harmonization for example) without an office as the DCO or the Brazilian MP. Nevertheless, Chapter IV analyses harmonization as the normal legal way to protect consumers and Chapter VII brings need-oriented theory to inform EC consumer protection. Chapter IV identifies cross border disputes for the application of justice as care exactly because they almost inevitably entail differences.

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<sup>3</sup> In Journal for Anthroposophy, number 51, Fall 1990. Vaclav Hazel, Czechoslovakian President and writer, in an address to the U. S. Congress, February, 1990 (Taken from a notice board at The Rudolf Steiner School of Edinburgh)

Part II is developed under the common sense assumption that consumer law occupies the borderline between private and public law and is characterised by a timid development of EU consumer law due to the lack of political will of EU institutions to interfere with traders in their ambiguity of defending their own national privileges and the freedom and benefits of a common market.

The weaker position of consumers is another common sense point that will be tackled in this thesis. In truth, it should not play any important role given the parameters established especially in Chapter I namely the somewhat problematic formalisation of substantive reasons and the ethics of alterity, made feasible through the feminine ethics of care. Responsibility for the Other is a much more encompassing moral stand for legal practices than any formal protection that might overlook needs. The weaker position of the consumer is anyhow an assumption which is totally acknowledged when a powerful public authority as the DCO is in charge and defended to be a paradigm for the creation of a European consumer ombudsman.

Given the exposition of Chapter IV, this thesis could have been dedicated to improving the existing system. Nevertheless, this thesis' main object is not "access to justice for consumers in the EU" but to provide an alternative (post-modern and feminine) reading of the problems of justice that confronts male and modernist legal syntaxes. EU access to justice for consumers is just the challenge to any feminine endeavour of being pragmatic, realist while inclusive and satisfactory.

This thesis could have been elaborated instead through, for instance, the discussions on informalism (Abel) or on the uneasiness of ADR for settling situations marked by power imbalances (Laura Nader). However, all that still represents normal (in Thomas Kuhn's theory) parameters of science and law. Furthermore, the cross-cultural dimension of the gap cannot be overcome by modernist legal theory whilst indicating a post-modern character of the philosophical query on the existence and features of its possible solution.

A highly relevant experience of settling consumer disputes was recalled and it seemed to fit quite well the paradigm proposed by Gilligan. The empirical experience described in Chapter III unveils the feminine and postmodern characteristics of the project and informs both the outline of a possible EU agency responsible for justice for consumers and the analysis of two successful European experiences in out-of-court justice.

It is certainly time for the feminine, for the South that was feminised through silence and domination.

*"Meditation, the art of being fully responsible, will have to become the normal training for everyone performing a significant function."*

*And when that happens, finally, after aeons of male domination, the age of the feminine qualities will be upon us.*

*From aggression and competition to receptivity and co-operation –this poor planet and its tortured species could do with some loving, nurturing energy.*

*It is time, indeed.”<sup>4</sup>*

The consideration of the feminine raised the issue of separation as the fundamental shortcoming of the modernist and male paradigm especially when it is applied to legal problems. The feminine suggested the need to consider the personal, the urgency of “contaminating” the public with the uniqueness of the private, the domestic and the relational.

In the thesis I argue for an “*elective affinity*” and “*elective articulation*” between cultural feminism and post-modern ethics rather than a *coincidence*. Chapter I shows the aporias of modernity through the reading of postmodernity, especially the undeniable exigencies of Levinas’ ethics of alterity and Derrida’s reading of Benjamin’s characterization of law as violence. The challenges of postmodernity in those respects remain and then the findings of Gilligan’s different voice are articulated to offer a possible *Aufhebung*. This work has made it clear; it does not defend a coincidence but a proper articulation is undertaken in its two first chapters.

*“En lo más profundo del mar se encuentran riquezas incalculables,  
pero si buscas la seguridad, quedate en la orilla”<sup>5</sup>*

A redefinition of justice would have to deal with postmodern irresolution and the “banality” of Gilligan’s cultural feminism inserted in daily needs as the first appeal of recognizing the Other as human. Then, it was necessary to defend love as *institutional will*, which would require an extensive retraining of legal professionals toward a new practice of law. This practice would have to be postmodern in the punctuality<sup>6</sup> and contextuality of its approaches and outcomes; it would have to be feminine in its understanding of responsibility vis-à-vis the Other understood not as autonomous and modernist. The relational ethics behind this practice of law defines morality not as a set of rules and principles but as one responding to the Other in his own terms. The translation of the Other is defended not as a hermeneutical endeavour but as an ethical undertaking. The post-modern and the feminine displace the Kantian

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<sup>4</sup> OSHO Times, India-Bombain-Puna. Vol. VIII, 9, September 1, 1995, page 40.

<sup>5</sup> Persian poet from the XIII century, in the Spanish Magazine “Cuerpomenta” no. 70, February 1998, Barcelona: Printer S.A. “In the deepest sea are invaluable richness, but if you search for security stay on the shore”.

<sup>6</sup> See footnote 1 of Chapter III.

and male unitary and conventional morality of rules, principles and universal categorical imperatives in order to install a morality of the self who approaches the Other with care and responsibility in relationships.

Chapter I challenges the male, modernist paradigm which currently informs both moral and legal practices. The initial attack appeared unavoidable even when the argument progresses towards the recognition of the indispensable role of hard law and harmonisation in EU consumer justice as a safety net for justice as care. The conviviality between male hard law as safety net and justice as care as practice of law is an exigency of the method of inclusion which informs female moral reasoning.

What follows is an attempt to present another reading of law as a way to settle conflicts and dispense justice through the eyes of the feminine and in terms of an ethics of care. The intended outcome is a framework to bridge the gap in access to justice for consumers in cross-border disputes in EC consumer policy and law. The thesis is developed in two parts. Chapter I considers the pitfalls of modernist, male legal theory based on three separation theses: of law from morals, law from justice, and among human beings in general. It argues for the necessity of a different voice to promote re-connection as a feminine way to redress the shortcomings of justice in legal proceedings, especially in consumer disputes. Chapter II presents Carol Gilligan's findings as the paradigmatic revolution the feminine could provoke in law. Chapter III explores an empirical experience of a feminine justice for consumers surrounded by institutional will as love and *interesse*.

Part II of the thesis is devoted to examining European conditions as the environment for the adoption of a feminine practice of law i.e. justice as a feminine virtue. It has five chapters. Chapter IV analyses the gap. Chapter V explores the existence of legal basis in EU to embrace a feminine practice of law to settle consumer disputes. Chapter VI shows the development of the theme in European consumer policy and law until 2001. Chapter VII offers a translation of the empirical experience described in Chapter III into the European environment. Chapter VIII analyses two European experiences of out-of-court justice.

The references at the end of the thesis are quoted in the main text of the thesis with the author's surname, year of publication and page number after the quotation. Those citations not included in the references section are detailed in footnotes on each page; related pages are mentioned in the main text after the quotation.



**Redefining Justice:  
Legal Justice as a Feminine Virtue**

## CHAPTER I

### Law and Justice: A Post-Modern Reading of a Modern Separation

This thesis elaborates an alternative reading of law as a way to settle conflict and dispense justice through the eyes of the feminine and their ethics of care regarding the ever legal deficit of justice and the insurmountable reductive and stalling effects of law as effects of its male, modernist and patriarchal framework. This discussion aims to articulate the resolution between the findings of both postmodernism and Gilligan's ethics of care towards responding the following question: "Which justice for consumers in cross-border disputes in the European internal market?" The goal is to justify the necessity of such a discussion with its urgent and practical features. Justice for consumers and cross-border disputes in a common market seem to be the ideal elements of the practical background which is able to justify the theoretical central problem object of this thesis.

The articulation of this resolution represents the positive side of this thesis. By contrast, its critical side undertakes a refutation of the modernist male conception and practice of law regarding access to justice. This first chapter aims to demonstrate the devastating consequences of separation, isolation and autonomy (as liberal and modernist values) for a practice of law compromised with justice. Separation is the touchstone of a pervasive pattern of rationality that this thesis identifies as modernist and masculine. The pervasiveness of this masculine and modernist paradigm is not confined only to liberalism, but also to its legal expressions of positivism or legal 'naturalism'<sup>7</sup>, which explains the uselessness of attacking them as examples of the modernist legal theory. Instead, it is necessary a conception of justice based upon a feminine practice of law, called justice as care which should be able to respond to needs, achieve satisfaction and happiness and not simply silence conflicts and stabilise expectations. Separation<sup>8</sup> describes the problem addressed in this chapter. The re-

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<sup>7</sup> In a post-modern reading, the tension between a positivist and a naturalist understanding of law or between a conceptual and a normative jurisprudence is deemed to be flawed because despite the difference, for instance, regarding the separation thesis, both approaches share the same untouchable cornerstone of modernism: "both express faith in the Enlightenment search for a universal method to resolve law's many problems" (Minda, 1995:6). Both, legal positivism and natural law theory, as the Enlightenment for Jung, are born of fear (Jackson, 1996:288). A well-founded fear of the Other or fear of Justice? (Douzinas&Warrington, 1991&1994) Moreover, conceptual and normative jurisprudence share equally the kingdom of the autonomous self and transcendental object, which amounts to the detachment of the subject from the object. In this sense, the bearer of rights is dislocated, depersonalised and deprived as individual, self and Other (Ibid, 20-23/80).

<sup>8</sup> The separation thesis in law has its history in modern times and its foundation mark in the ideas of the Enlightenment, regarding the necessity to contain and organise diversity around the unitary legal order of nation-states, thereby endowing those new legal orders with certainty and security, deemed necessary for

definition of justice demands the resolution of separation as a legal problem, a human phenomenon, a moral failure and a problem for science.<sup>9</sup>

This discussion about law and justice is undertaken into the limits of the so-called moral crisis of law by applying a feminist reading which understands separation as a moral failure. For that, one may modify jurisprudence<sup>10</sup>, thereby enlarging legal theory in order to legitimise a practice of law as a feminine virtue. A sort of post-modern question is put since the separation between law and justice is to be resolved through the reinsertion of moral and ethical<sup>11</sup> standpoints in a given conception of law (Veitch, 1997). Despite positing such a post-modern query, a very old way to respond to it through the findings of women's moral development theory. The elderly path encompasses a much forgotten claim of the value of the feminine for the social equation of interpersonal conflicts.

The present analysis of modernist theories of law aims, deliberately, "to reframe and shift the analysis of (...) [justice] away from legal positivism and to supplant it with a more meaningfully lived account of diverse and intimate situations" (Arrigo, 1995a:89). Another goal is to state that it is not the loss of faith in universal rules that characterises the moral crisis of law, despite being this also another symptom, but the loss of the Other understood in a perspective of care and responsibility in relationships.

This chapter will be developed in four sections. The first one characterises separation as the problem of law or its moral failure concerning Shklar's argumentation against legalism and the findings of the relational contract theory. The second section discusses the troublesome relationship between law and justice, the first separation, as a consequence of the second separation between law and morals and explores a post-modern diagnosis and a possible solution. The third section investigates the problems that mercy and love suggest when brought into legal spaces. The fourth section examines the theme of justice as a matter beyond law under the light of a feminist theory, and the ethic of care, defended by Carol Gilligan, as an alternative way for the reconciliation of law and justice in dispute resolution. The third and fundamental separation thesis, which informs liberal modernist social organisations, will be identified as another crack to be mended toward a more emancipatory legal practice of justice as a feminine virtue.

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the development of capitalism. The history of separation recalls a lot of the history of the suppression of the feminine from the culture, as the annulment of the order of nature.

<sup>9</sup> See the work of Bortoft (1996) on the theme of separation in science.

<sup>10</sup> Arrigo's project on experiential feminism and its imaginative discourse is embraced here because her project aims at "re-conceptualizing justice and de-centering law" as a central concern of "a feminist jurisprudence" and a very much post-modern project (1992:13).

<sup>11</sup> See Finnis (1998:68) about Habermas' differentiation between the ethical (Wertorientierungen) and the moral (Verpflichtungen) orders (1998:26). Habermas uses this distinction to disqualify Gilligan's theory of moral development, by reputeding it to the fringes of morality or to the realm of the ethics of good life.

## **I-Is There a Problem with Law?**

Before tackling the configuration of law as a practice in need of revision, this discussion may be placed around two different theoretical backgrounds: the work of Shklar on “Legalism” and the general conceptions of the relational contract theory, as helpful tools to shape the object of this chapter.

### **I.1-From Law as Legalism to Law as Legality<sup>12</sup>**

Shklar, when offering suggestions “for alternative ways of thinking about law” through criticising legalism, places her discourse into a discussion “about the relations of law to morality” (1986:viii). She argues that legalism is the conservative force of law that insulates law from morals and from politics. The politics of legalism is toward “law as ‘there’, as a discrete entity” (Ibid., 9). The insulation of law from morals, says Shklar, has led law to an excessive formalism, especially under the positivist account of law (Ibid., 7). This chapter argues that legalism, formalism and the insulation of law from morals are problems of law and that they entail a justice failure. Separation as a legal problem explains why law, when called upon to settle disputes and dispense “justice”, perverts the particularities involved in disputes by imposing its own criteria based on the dichotomy of what is legal or illegal.

Legalism, as one of the social ethos, defines the way legal institutions are structured and how they function. Shklar calls legalism the “operative outlook of the legal profession” (Ibid., 8). Without describing in detail that outlook, she considers legalism as a conservative practice, “because law is itself a conservatizing ideal and institution” (Ibid., 10). Legalism is a morality; “one morality among others; (...) the morality of rule following” (Ibid., 2/87). She attributes to legalism a scale of legalistic values, naming courts of law and the rules they follow as “its most highly articulate and refined expressions” (Ibid., 3). This idea of degrees of legalism justifies her defence of legality as a correct understanding and practice of norms or rules which guarantees democracy, for instance (Ibid., 117).

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<sup>12</sup> Bankowski aims “to save legality from the attack on legalism and show how a reliance on rules do not necessarily lead to the admittedly negative ideology of legalism” (1996a:16); and also to defend legality as “(...) a version of legalism (...) [n]ot the negative concept that Judith Shklar (1986) attacked in her book on ‘Legalism’ but rather a practical ethical concept which needs to be defended morally” (1991:101/2). However, it appears that the moral defence of legality, made by modernist phallogocentric rationality, would not save legalism neither legalism could be morally justified through a correct understanding of “nomianism”, which is called “legality” and defended by Bankowski (1996a:27). His position reminds Shklar’s suggestion upon “degrees of legalism” (1986:22). How could rules save rules? One might need a different tool than the master’s tool to dismantle the master’s house. Natural law theories also would not help since, as Shklar says, like positivism, they “allow judges [and everyone else] to believe that there always is a rule for them to follow” (Ibid., 12).

The level of human problematic situations, which nowadays law must respond to, seems to require a radical departure from the axis of legalism. It would demand a more profound manifestation of human rationality in law -which is behind legalism in all its forms, including legality- and in favour of a radically different possibility of the institutional practice of justice as a feminine virtue. The modernist and male legality, legalism and formalism in law, based on the “predisposition to discover, construct, and follow rules (...) [as] the distinguishing mark of European culture”, would refrain to allow its female counterpart to speak, not as “kadi justice of China and Islam” but as “the inner-worldly ethic of the Orient” (Ibid., 21)<sup>13</sup>. The refusal of the universalism of the western legal culture seems to call for the particularism of Chinese social relations, including business and trade, structured among personal networks (Appelbaum, 1998: 173)<sup>14</sup>.

Shklar offers another element when she talks about the “policy of justice” as one of the noblest aims of legalism. The policy of justice in legalistic terms involves “the independence of the judiciary, the separation of powers, the preservation of fundamental rights, or just fairness (...)” (Ibid., 13). The principles of equality and impartiality may be added to it. This list entails a great deal of formalism in the attainment of justice through legalism in any of its degrees. That policy of justice identifies justice with adjudication through the judicial application of law: against that this thesis argues.

Shklar finishes her book without any definitive conclusion but one sole suggestion about the fundamental question on the very nature of what is truly law and which involves the insulation of law from non-law, moral and politics. She concludes arguing that this discussion pertains to the realm of legalism and that legalism would be better understood as a scale with many degrees. She defends it since it has the advantage of liberating us to search for what is law. Nevertheless, this strategy seems not of use to respond to the moral crisis of law demands which require a solution to be searched outside the stream of legalism and its masculine and modernist rationality.

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<sup>13</sup> Rephrasing Shklar, the de-emotionalisation of law as an institutional discourse needs to be softened because it is already time for the institutions of law and power to function in accordance with a new ethic, able to approach the psychological nakedness in which we stand before one another. The unity of the market society, vis-à-vis the diversity it tries to unify under common rules and common economic interests, accentuates this nakedness, beyond any possibility of refrain (Shklar, 1986:26-7).

<sup>14</sup> See the work of Appelbaum for his description of the concept of guanxi which “means literally ‘a relationship’ between objects, forces, or persons”. He says that guanxi is in the foundations of a problem-solving strategy in business in China –which is aggregationist- in opposition to a problem-finding characteristic of western legal formalism –which is separatist. See footnote no. 3 about the same phenomenon in science.

## **I.2-The Relational Contract Law Inspiration**

After having rejected legality as a possible encompassing view of the separation problem whilst accepting legalism's insulation policy as the fundamental cause of that problem, the findings of relational contract theory of Macaulay and Macneil should be analysed.

Macneil argues against the conception of contract as a pure encounter between strangers and isolated parties. He says that "contract between totally isolated, utility-maximizing individuals is not contract, but war" (In Wheeler&Shaw, 1994:50). Instead, he defends that any contractual relationship is deemed to entail relations of co-operation between interdependent people and that relational contracts are treated as marriage rather than as "discrete relations" between totally isolated parties. These ideas are based on the empirical work of Macaulay on contract and dispute resolution in business relationships, whose conclusions show that contractual rules are not relevant for relational transactions because firstly "the substance of the contract is never finally fixed, but always open and mutable" and conflicts are resolved towards the continuation of the relationship (In Ibid., 74-5). Furthermore, in a relational environment or caring practice of law, "there is little need for rules of recognition to identify the rules" to settle eventual disputes (Gottlieb, 1983:604). In Macaulay's words, "even discrete transactions take place within a setting of continuing relationships and interdependence. The value of these relationships means that all involved must work to satisfy each other. Potential disputes are suppressed, ignored, or compromised in the service of keeping the relationship alive" (1985:466).

"Relational contract theory offers a challenge to the modern paradigm" (Wheeler&Shaw, 1994:67) and comprises the core of most conventional scholarship. It demands that one overcomes intellectual barriers of neo-classical habits about understanding contract centred exclusively on promise, which obscures relational aspect of the real life or contractual relationships (Macneil, 1985:485/525). It has a demolition force to destroy the classical positivist understanding or the myth, "that legal sanctions, or fear of them constitute the social glue" (Ibid., 509). It challenges the Wizard of Oz principle of jurisprudence, under which law operates as a discrete institution guided by the illusion of abstracted principles and universal rules (Macaulay, 1985:469/477).

Charles Fried identifies in relationalism a moral principle that informs the dynamics of contractual relationships. He calls it the principle of sharing which make the parties in a contract no longer strangers to each other (In Macneil, 1985:519-20). The principle of sharing works together with the openness of the contract, whose object changes as the commitment and the interdependence between the parties grow. The

changes of the circumstances, which surround the contract, transform the content of contract, thereby requiring from the parties that they “lend one another mutual support, rather than standing on their rights” (Gordon, 1985:569).

The relational contract theory escapes the stream of legalism more effectively than the discussion proposed by Shklar and developed by Bankowski.

Macaulay and his empirical findings demonstrate the gap between the theory of contract and real life of business and argues that “doctrine (...) offers arguments rather than answers (...) [and that] litigation remains a game of chance”, thereby impeding the parties to work out their own solutions (Ibid., 469-70/76). He calls attention to the marginality of legal rules or “state-enforced norms and sanctions in the governance” of business contractual practice and in dispute resolution, “altering the foundations of the subject” (Gordon, 1985:565). This alteration is rather profound since it touches the Kantian, liberal, “classical” foundation of contractual law which is about freedom of contract, autonomy of the parties (isolated selves), protection of the free formation of contractual intention, among others (Joerges, 1985:610). In this sense, relational contract theory, applied to delivering of justice, also challenges legalism and its policy of justice, thereby highlighting the contours of the moral crisis of law. These contours become crystal-clear in one of the references that Shklar uses about “[a]n English judge [who] is said to have remarked that some of the most cruel things he had ever seen were mere enforcements of rights granted by valid contracts” (In Shklar, 1986:75).

The relational contract theory seems to be highly compatible with the findings of feminist theories, regarding the dissatisfaction or discontentment with the application of the principle of equality especially in gender matters. Equality seems to require a monosexual culture from where the feminine was suppressed, silenced, and made voiceless<sup>15</sup>. Relational contract theory could furnish any discourse of law that refuses, for instance, the principle of equality as a measure of personal justice, with tools to understand the injustice inserted in decisions that apply general rules without responding to particularities.

Macaulay’s conclusion, on which rest the developments of the relational contract theory, demonstrated that business arrangements tend to be performed in a quite unlawful, illegal or unorthodox way, in a way that is relevant to the moral crisis of law here outlined. Businessmen tend to avoid law and lawyers to resolve their problems. “If something comes up (...) you get the other man on the telephone and deal with the problem. You don’t read legalistic contract clauses at each other if you ever want to do

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<sup>15</sup> Irigaray proposes that instead of equality the feminist movement should fight for equivalence of rights since “equality is impossible anyway for many reasons, in part physiological”. Besides, equality deepens the silence and suffering of the feminine, insofar as it disregards the feminine in its specificity (in Schwab, 1996:152).

business again. *One doesn't run to lawyers if he wants to stay in business because one must behave decently*" (In Cotterrell, 1992:32)<sup>16</sup> (My emphasis).

When one wants "to stay in business", one decides to keep and preserve a relationship. It would not be wise to focus only on the preoccupation of making profit because sometimes business is about investing and postponing profit. Therefore, the relationship behind any business seems to be the essential point. It has to be preserved and then one should not run to lawyers because it is not decent. The raw conclusion at that point would be that law is about undermining or destroying relationships because one does not behave decently or morally if one takes the legal position of insisting upon rights and contractual rules on reciprocal rights and duties, especially through lawyers. Therefore, the language and tools of law cannot favour the continuity of the relationship that one wants to preserve. A strong moral position is revealed by refusing law as a "non-decent" way of behaviour in business and by the decision itself to keep the relationship.

On the other hand, the initial part of the quotation reveals that the problem must be confronted and a solution negotiated, regardless law. Another language will be necessary to resolve the problem for both parties beyond or even against legalistic terms of contracts and legal proceedings. The resolution of the problem is still pursued and it will occur in the realm of good and bad (a moral realm), concerning the convenience of the parties, but the parameters for that will be of another nature and colour (an ethical one)<sup>17</sup>. The businessmen, in the case reported here, talking about a problem involving their business relationship, would try to find the best compromise to realise the good for all of them. The moral connotation of the background of such a conversation is easily noticed and one could already suggest that a quality called "just" would permeate any agreement settled by the parties in dispute in view of their needs, satisfaction and happiness and, more important, the preservation of the relationship. Justice is to be achieved through a peaceful resolution of the dispute. Therefore, law and lawyers must be avoided in the name of the relationship that requires decent behaviour. The most important lesson of that quotation seems to be that "lawyers' law" (Ibid.) is inconvenient if one wants to preserve a given relationship.

### **I.3- Yes, There is a Moral Problem with Law**

In the limits of this chapter, "law" means a set of institutional rules which consists of official or state form of social regulations and includes private contracts, social practices and also judicial decisions.

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<sup>16</sup> Cotterrell seems not to do justice to the richness of the findings of Macaulay's conclusions.

<sup>17</sup> See footnote no. 5.



The crisis of law emerges in the debate about the end of the rule of law insofar as law and the rule of law express a common ideal, which is essentially about treating like cases alike, through a reasoning marked by impartiality and universality. Law and the rule of law also share the same set of values: certainty and security for social relations to evolve in a peaceful, stable and controlled environment. The crisis of law and the end of the rule of law could be perceived as the failure of rules, as a universal or intersubjective category, to settle disputes, as demonstrated by the refusal of using legalistic arguments to overcome contractual or business difficulties which were named relationship's problems. To see the end of the rule of law or the crisis of law in the failure of the welfare state or in the replacement of law as autonomy by law as responsiveness in a bankrupt welfare state does not encompass the entire phenomenon. Law and the rule of law are disregarded as preferred ways to establish justice in relationships, thereby understanding that the mentioned crisis of law is a moral crisis to be overcome through an ethical position which this thesis characterises as "care and responsibility in relationships".

Separation as a legal problem, therefore, could be formulated around rules or lawyer's law. To value law as a neutral arbitrator of disputes seems to be somewhat problematic especially when one considers the damages law can inflict on relationships or intimate human conviviality, which cannot be easily, if at all, mended. Once a conflict is made legal by being brought into the realm of legality, the relationship behind it is almost always irreparably broken. Law itself cannot do any good to the relationship involved in a dispute. The possibility one can see for mending a relationship will be rather the human ability of the adjudicator, arbitrator, conciliator or mediator in charge rather than a legal talent. Therefore, it appears that the problem with law is that law is pervasive but it is not human. Law is about rules, treating like cases alike, certainty and security, equality and impartiality.

The problem with law has been diagnosed as a present and progressive impossibility for law to be conceived as separated from morality and politics. Law is not to be respected for its own sake neither for being moral when it is performed in respect to formal exigencies, as Fuller suggested in his morality of law. Law has been called to play a more sophisticated role in society and in the life of individuals who find themselves in position of disputes within relationships. Social and individual peace seem to remain outside the boundaries of law despite its pervasiveness and ironically due to its demands of generality. For law to embrace all the richness of the particulars in relation to one another, it is necessary to build another framework for law, different from the modernist one. Moral and political contamination in law appears to be unavoidable. Real life cannot be grasped by the rigidity, neutrality and universality of law. The pervasiveness of law does not take enough account of real life, which

undermines law and forces it to be reconceived on different grounds and in different terms, for instance, vis-à-vis morality or politics.

The problem with law puts into question the traditional features of law as universal and autonomous, insulated from politics and morality or ethics, to the extent that law is led to a condition of self-questioning. Law reflects upon its own identity in order to embrace a complementary set of features that would approximate law to justice, love, mercy and particularities. In this sense, what one requires from law is that it renounces the modern promise of universality and equality in order to tackle the challenges of the post-modern condition. The tension between the two opposite sets of features (modernist and post-modernist), which law intends or pretends to be attached to, is acknowledged but by no means resolved in the realm of legal theory, at least as an epistemological problem. The tension is likely to be invalidated as non-legal and to be disregarded as a question of a different nature if law is to be understood within legal paradigms. The crisis of law is identified precisely when an ethical or moral position suspends the legal pattern of discourse and makes the businessman avoid using legalistic reasoning to resolve disputes around a relationship he wants to preserve. The law, which sees its own realisation happening if and only if one has a certain suspension of ethics or morals, collapses into a crisis when the suspension required is of law itself.

The autonomy<sup>18</sup> of law, understood as the insulation of law from different orders of the social human organisation (such as morality and politics) leads law to confront a moral failure or crisis. Law faces its own failure, as its autonomy supports a sort of amoral coldness of “do not think about it” (Bankowski, 1996:1)<sup>19</sup>.

The legalism, which intends to insulate law from ethics, morals, politics or any other influence, condemns law to a moral crisis as a tool that decent (moral) people must avoid. That moral crisis cannot be alleviated by formalism, which characterises law as “a system of perfect clear and consistent rules. (...) Law is treated as a self-contained and autogenerative system, which needs to be kept distinct from politics [morals and ethics] to organize our lives. (...) Rules save the day and evade personal

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<sup>18</sup> It seems necessary to pay some attention to one problem that could be characterised as merely linguistic but that has also roots in the recent development of sociological studies. It is the difference between autonomy and heteronomy in law. Classically law is understood as heteronomous because it regulates human behaviour from without. Morality, by its turn, does the same from within and then it is called autonomous. Notwithstanding, law has been characterised as autonomous in the sense that “legal decisions are to a large extent generated solely from within the law by methods of legal reasoning that draw from legal sources and apply practical reasoning in a distinctively legal-professional way” (MacCormick, 1996:69).

<sup>19</sup> In addition, the moral irresponsibility is also represented by “I didn’t know” as part of the fragmented knowledge characteristic of bureaucratic morals or amoral bureaucracy. Somebody else should know and then the possibility to ascribe responsibility at both personal and institutional levels seems to become a bureaucratic organisational task which “parcel[s] out morally significant knowledge among various individuals” (Luban et alli, 1992:2352/55-56). Thus, nobody knew, therefore nobody could be ascribed responsible.

responsibility” (Ibid., 2). In this sense, law is thrown into a moral crisis, which could be overcome through the ontological, epistemological and practical reinsertion of ethics.

The criticism of the first part of this thesis is against a quite strong “sanctification of the judicial function” especially in Anglo-American jurisprudence. (Kozyris, 1991:427)<sup>20</sup>; against the centrality of law at the expense of the complexity of relationships<sup>21</sup> and justice itself. The moral failure of law is characterised by separation.

Modernist discussions and especially Anglo-American jurisprudence have deep trust in judge’s role and sense of justice as ways to overcome the pitfalls of law. A post-modern perspective is sceptical about that and reframes the discussion around the aporias of justice vis-à-vis law, thereby arguing for the excarnation<sup>22</sup> of justice and the re-ethicisation of law through the ethics of alterity.

Thus, the position of justice and law as a difficult couple needs to be problematized.

## II- Law and Justice: an Impossible Marriage?

The perspective that underpins this discussion and its assumptions is that justice as a prisoner of law. The path of ex-carnation has the aim at giving back to justice its own “body” and identity in order to be in a creative relationship with law through the incarnation of justice into law but the ex-carnation of justice from the bowels of law, not to make justice only a horizon, but a reality with which law would be practically engaged. Justice as a horizon is indeed a trap. This section contrasts the understandings of modernist and post-modernist readings of the relationship between law and justice,

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<sup>20</sup> The improvement of judicial activity is a large field of concern in jurisprudence. Nevertheless, this thesis mainly denies that justice can have full expression in proceedings of law. Then, a line is drawn here, to refuse Minow’s work concerning the judicial consideration of differences, since she cannot do any better than to base her approach on “general commitments”, in order to save it from being called relativist and consequently of practical inapplicability in the normal legal science and practice. Minow’s clear aim is to improve judicial activity even when she argues with Elizabeth V. Spelman that the contextual thinking “requires one to refrain from judging *until* one has examined all of the relevant contexts and looked at the situation from all of the relevant perspectives” (In Orff, 1995:1219). (My emphasis) The suspension of judgement is limited, while in a more radical approach this suspension would have to be unconditional. Minow’s judge keeps “general commitments” whilst shifting from context to context, being more sensible to the particularity of the parties in dispute. Thus, this judge is not a post-modernist judge because Minow knows that any judging is based upon a sort of transcendental reasoning to the extent that the facts have to be translated into legally relevant terms, or be subsumed under legal framework. Moreover, a radical post-modern project “endangers the whole concept of judging” (Ibid., 1221).

<sup>21</sup> Throughout the chapter, law and relationship are opposed and it shall be a characteristic of the whole thesis, for one of its central arguments is, that law does not create relationships, even marriage, because the relationship that informs marriage is previous to its formalisation. Following the findings of relational contract theory, law is a discrete institution that regulates discrete transactions and not relationships. Law, as an instrument of social pacification and normalisation of human behaviour and human encounters , destroys relationships.

<sup>22</sup> “Excarnation” or “ex-carnation” is used as the opposite of “incarnation” in the sense of possessing a body.

characterised, respectively, as an incarnation and an ex-carnation approach. A post-modern reading of the problem of law and justice will contest the conception of justice as a horizon arguing further that law and justice are not the same. A modernist understanding, by its turn, conceives justice as a threshold or horizon, thereby claiming for its separation from or re-insertion in law.

## II.1- The Post-Modern Reading of Modern Impossibilities

“What, then, is justice?”, asks Shklar. She answers it, using, firstly, Professor Hart’s words, saying that justice is “the most legal of virtues”. Nevertheless, she goes further and better yet in the characterisation of justice as a legal virtue, or in the legal characterisation of justice in the sense that law bears justice and promotes it through its legal way of being. “[Justice] is the sum of legalistic aspirations. (...) *Justice is the commitment to obeying rules, to respecting rights, to accepting obligations under a system of principles.* (...) [F]ollowing rules impartially is a virtue. (...) Men who try to apply rules impartially, whatever the rules may be, are just. *They are the heroes of legalism.* (...) Justice presupposes an identifiable rule and the disposition to follow it. It is a state of mind no less than a policy, and as such it is the thread that ties legalistic morals, legal institutions, and legal politics into a single knot. (...) [L]egal equality, implying that rules be applied alike to like cases, *is only another term for justice as an attitude.* (...) *Impersonality* (...) *is the necessary concomitant of justice*” (Shklar, 1964:113-123). (My emphasis)

The quotation above exemplifies a kind of legalistic conception of legal justice this thesis challenges and tries to overcome, in response to the diagnosed moral crisis of law, insofar as in this context, law reifies justice because law in its historical development had reified life. Law has separated justice from life by colonising justice (Auerbach, 1983). That separation is performed by the entombment of justice in the bowels of law, from whence justice cannot be heard unless it speaks the language of law or is spoken by the mouths of law.

A modernist understanding of justice postulates that formal justice “comes down to the correct application of a rule [and] is inconceivable without rules” (Perelman, 1963:39-41). Modernist discourses of justice identifies this moral virtue with the principle of “treating like cases alike” (Hart), or desert (natural law theory) or of entitlement (a certain positivism). Against this framework, a post-modern discourse about justice vis-à-vis law will abandon the election of principles and will condemn the identification of justice with rules. Justice will be, in this way, a response, a personal response to the Other; it integrates the discourse of Otherness into the establishment discourse. This post-modern approach appears to be irrelevant, if not dangerous, to the

principles of equality, impartiality, rule of law and even legal certainty. Nevertheless, for a modernist approach, “justice is dangerous (...) because it robs us of predictability and security. Justice undoes all the good that law has done; it transforms legality into nihilism” (D’Amato, 1993:536).

A post-modernist approach to justice and law in courtrooms would find justice in the stories behind the facts subsumed into the framework of law.<sup>23</sup> The story is violated and made legally relevant when subsumed under the legalistic provisions applicable to it. The story is reduced to a sum informed by precise and clear rules. The danger of justice does not only consider what in the story does not fit into law; the danger resides in the power of justice or of the story to push the limits of law beyond law, to force the latter to embrace the former with plastic arms, without force or violence.

The image of justice personified as a woman blindfolded fits here. The blindfold protects law from irrelevant or even dangerous aspects of the story, or assures that law will make justice only in view of “permissible information” (Curtis&Resnik, 1987:1760). The blindfold prevents law from seeing the pain it causes or the pain in the face of the Other, to which it should respond.

The plasticity of law, necessary for the ex-carnation of justice in a post-modern approach, requires, as a first fundamental step, the rejection of the formalist vision of law and its principles. The critique formulated by a post-modern discourse is however wider than a mere critique against formalism since the modernist view brings with it a range of problematic issues for the plasticity of law, of any grand theory or meta-narrative.

“[As] Roberto Unger observes, ‘those who dismiss formalism as a naive illusion ... do not know what they are in for; ... they fail to understand what the classic liberal thinkers saw earlier: the destruction of formalism brings in its wake the ruin of all other liberal doctrines of adjudication.’ (...) Formalism, as Unger correctly sees, is not merely a linguistic doctrine, but a doctrine that implies, in addition to a theory of language, a theory of self, of community, of rationality, of practice, of politics” (In Fish, 1989:5-6). Formalism is the logics of separation and is one of the hurdles for the achievement of justice in proceedings of law.

No law beyond law is a tenet of a sort of modernism defended by Ronald Dworkin which results in the thesis that law offers always the right answer. A post-modern view of the tension between law and justice recognises the prison created by such ideas and the uselessness of them in a world dominated by a myriad of human problems and a diversity of peoples. Grand theory and meta-narrative are the theoretical

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<sup>23</sup> See Conley and O’Barr (1990) on relationships and rules as two different ways to tell stories in courtrooms.

background of modernist approaches in law and a post-modern stance works consciously to avoid it and to provoke local disturbances. Thus, this section tries to formulate the post-modern perspective as parallel as possible to the modernist theory in crisis, in order to avoid grand-theorisation. Beyond any modernist reaction to positivism, like “Dworkin’s well-respected hermeneutical theory”, the post-modern formulation of the justice-law difficult couple remembers that “law is force” (Douzinas&Warrington, 1994a:5-6); that “law without violence (...) [is] simply inconceivable” (Sarat, 1992:255). The parallel between a modern and a post-modern view of the problem of law and justice emerges in Juarrero-Roqué’s legal reading of Holling’s *Resilience and Stability of Ecosystems*. She identifies a dispute between two different models of justice: one called “fail-safe” and its adversary “safe-fail”. She highlights a dispute between certainty and resilience, rule of law versus context-sensitiveness respectively (1991:1745-6).

The stability and certainty that characterises any legal system, when submitted to a discussion of its moral crisis, faces the challenge to equalise resilience, which is expressed by the “ability of the system to mutate and evolve when disturbed by the environment” (Ibid., 1748). The modernist general characteristic of viewing justice as threshold, tributary of the Platonic idealistic rationality, which is also Cartesian, evolving through the market rationality, finds itself in a position of extreme mutation. Thus, resilience is the new characteristic of a possible model of justice able to respond to the needs of the arguments engendered by that market. “Modernity’s insistence on deduction as the only legitimizing process finds its counterpart in law in the traditional objectivist or formalist approach, according to which law is constituted by a set of ideals and principles that are applied to specific cases in the process of adjudication. Legal formalism is the consequence of admitting into the realm of reason only phenomena devoid of particularity, local diversity, and other indicia of complicated human experience” (Ibid., 1757-8).

The modernist theory of law represented, for instance, by Hart seems somewhat unable to respond to the challenges of plasticity and resilience insofar as his positivism defends justice as a horizon concretised, essentially, by the respect of the principle of treating like cases alike. In addition, the ideal of formal justice in Hart’s positivism is also a function of the following rules and relies upon the principle of impartiality especially for adjudicative activity (In Kramer, 1999:48-49).

The natural law theory’s approach to the drama of justice and law, as another modernist approach to the issue, will not offer either, any hope for plasticity and resilience as desirable features for law. The separation thesis is asserted as a feature of law by almost all the branches of legal positivism, from the traditional one, of Austin and Bentham, through Kelsen and Hart alike. The consequence is that justice is not a legal

responsibility; it is irrational or a horizon unreachable. Justice has to happen in the framework of legality, in order to have expression and be a function of the fair application of law, treating like cases alike. At this point, the discussion between positivism and the natural law theory gains force only to show that the separation thesis, denied by this theory, indeed rests untouchable in its consequences for the life of law, because justice goes on as a horizon that now, under legal naturalism, law must express or must incarnate. The crisis of law remains unresolved to the extent that, as explicated previously, this crisis is not a product of the loss of faith in universals rather of the loss of the Other, a consequence of the separation syndrome from which suffer law and morals, law and justice and bearer's of rights alike. The problem seems inherent in the state of consciousness produced by modernism, which a post-modern criticism tries to overcome. The insertion of the Other in the life of the self promises a resolution for the separation syndrome in law, pushing law beyond law, in order to render possible the settlement of disputes in an institutional way but without the constraints of legality, urging the legal system to be endowed with plasticity and resilience.

When stepping out of modernist projects for law and justice resolution, justice needs to be apprehended beyond the limits of the idea of fairness, as a material criterion or a procedural one that determines or informs the materiality of the outcome, and a revised contractualism of pre-modern western societies. In this sense, justice, as the fair application of what law says, is, on the one hand, a blind sight informed by pervasive bias, which dominates the atmosphere of courtrooms and leads justice to failure. On the other hand, it is a drastic reduction of the aspirational character of justice.

There is a normal way of thinking about justice, says Shklar (Ibid., 17), and it seems that the normal model could be identified with the current positive reasoning applied by legal justice in courts, administrative agencies and the scientific-academic environment. It excludes any moral discussion, silences any ethical calls and settles justice in a technical positive process of applying the rule of law. This paradigm not only prevents justice but above all deceives. In order to apply the rule of law, aiming the achievement of justice, no other knowledge is required but the one of law itself. To rely upon rules is, especially for judges, the best way to avoid facing the ignorance of the Other and of oneself. This attitude informs the unproblematic and arrogant pervasiveness of law, supported by the modernist approach expressed by the understanding that there is no law beyond law.

Justice fails insofar as it remains domesticated and tamed by the criteria of law and its rationality. Law as father has the specific aim of protecting us “against our own irrationality”<sup>24</sup> (Rawls, 1972:250), which, instead of being suppressed may be the

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<sup>24</sup> That expression of Rawls is used in order to demonstrate how the liberal-positivistic account of law cannot think of law beyond the strict contours and limits of scientific rationality. In this sense, law does not happen in the realm of “irrationality” and since the feminine quality bears the irrational as one of its

appropriate site for justice to be recovered. That irrationality is actually an alternate rationality whose silence is connected with the domestication of justice.

The concert between law and justice cannot happen only through the effectiveness of rights with the necessary generality and universality that law presupposes since law, in practice, is likely to be called justice and therefore it brings about the individual and particular. The effectiveness of justice happens in the practice of law and requires the encounter of individuals as the site where a conception and a practice of justice can be engendered. Law, by and because of its pretension to universality, encumbers justice, transforming it into a horizon that informs law (natural law theory) or a horizon which happens contingently or only if absolutely in accordance with law (legal positivism).

Levinas' affirmation that "justice is indeterminacy *par excellence*" (In Diamantides, 1995:209) does not help much in the task of understanding justice achieved beyond law, or even against law. This post-modern understanding, whilst denying the submission of justice to law, does liberate justice from the power, force and violence of law but fails when it reaffirms justice as horizon. Hence it leaves justice prey to the domination of law which works also to transform justice into "an ideal value of highest rank" (Shklar, 1990:12), very abstract, and therefore incapable of being an object of practical deliberation, thereby confirming the antinomies between law as regularity, generality, public and scientific discourse, and justice as abnormality, singularity/particularity, private and religious discourse. It does not prevent the annulment of the antinomies by the process of colonisation and subordination of justice by and under the regularity of the rule of law, i.e., by the process of technicalisation of justice to fit in the contours of law and its rules. So, more than post-modernism is needed.

Behind law, which pretends to contain justice or be the universal expression of justice, one finds a given rationality which supports it. The rationality of the patriarch prints itself on the layers of the ego creating the superego which, following the way of law, "issues a command and does not ask whether it is possible for people to obey it" (Barron, 1993:89). This is the way law controls the selves without knowing them. The Other and the relationship that can be established represent the only chance for the imaginary to reveal, to project the real and to unveil the illusion, the deceptions and the

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features, law obeys the male pattern and refuses the female. Law is the way through which we are protected against our own irrationality. This thesis has to do with the irrational quality that the typical feminine bears in the western culture. In this sense, "our own irrationality", in Rawls' words, could mean "our feminine rationality". The father, the patriarch, has, in western culture, the social role of rescuing the son from the domination of the mother. In the social realm, the male rationality excludes everything that sounds different and calls it "irrational". Thus, it could be clearer to talk about another rationality, which is quite different from the current one – the one of applying rules and principles to settle disputes. The alternative rationality, whose effect on law this thesis seeks to elucidate, will be identified with the quality of the feminine, and ethical while concerned with relationships with the Other.



falsehood of the isolated and unencumbered self who proclaims “I have the right to that”. The ethical resolution of the moral crisis of law silences that sentence and affirms the priority of the relationship where the Other has to be recognised and considered.

### **II.1.1- A Post-Modern Entrenchment Can Reconcile Law and Justice?**

Resisting the modernist legal theory, a certain post-modern one intends to “reinstate ethical concern at the core of its jurisprudence” and calls into question the relations between law and ethics or law and morals (Veitch, 1999:189) .

The post-modernist discourse that fits this thesis is the one that refuses the identification of law with justice and proposes a desidentification through the deconstruction of law, possible through the undeconstructibility of justice.

“[D]econstruction is necessarily ‘on strike’ against established legal norms as part of its refusal to positively describe justice as a set of established moral principles [or rules of any kind]. (...) [I]t is only once we accept the uncrossable divide between law and justice that deconstruction both exposes and protects *in the very deconstruction of the identification of law as justice* that we can apprehend the full *practical* significance of Derrida’s statement that ‘deconstruction is justice’ ” (Cornell, 1992:144-145/154/157).

Post-modernity is preoccupied with “processes of exclusion and marginalization, which produce truth, unanimity, rationality, sameness” (Barron, 1990:141). The marginalisation of justice grants truth to law as much as the social, political and cultural suppression of the feminine grants sameness of the masculine against which women is conformed, judged and condemned. Deconstruction denounces those processes of violence usually unacknowledged as such. They are rather masquerading or dressed up as rule of law or legitimate application of well-accepted principles as the principle of equality, refused by the feminist thought as a valid expression of justice since equality “does not allow for a consideration of differences” (Pierce, 1991:66). Deconstruction is justice itself and fights its identification with law as justice; “ ‘deconstruction’ *as* the force of justice against law” (Cornell, 1992:158). This fight is against the conservation “of law as a self-legitimizing machine [and] the perpetuation of the ‘current’ legal system” (Ibid., 159). It is the resistance against the “keeping coming” of law in the process of taming justice and against the force or potency of law, in Fish’s formulation, as a mark of the maleness of law. Deconstruction as justice resists as female

“[P]ostmodern jurisprudence insists that morality and justice are not identical with legality nor can they be simply reduced to the following of legal principle and procedures” (Douzinas&Warrington, 1994:160). Nevertheless, the post-modernist divide between law and morality and especially between law and justice is of a totally

different nature from the positivist separation thesis. The post-modernist divide has a moral quality which law misses; it is a diagnosis not a horizon of perfection to which law has no compromise. In reality, the post-modernist divide is the truth of the positivist separation thesis, thereby pushing law to respond to the call of justice.

The suitable postmodernism searches for “a more pluralistic, contextual, and nonessential explanation of law and legal decisionmaking developed for a multicultural society” (Minda, 1995:2)<sup>25</sup>. It works without any theory, rule or fixed pattern, intends to be outwith the system of the rule of law, which determines one fixed pattern of a generalised theory of law. It intends also to provoke local disturbance through local narratives, marked by diversity and fragmentation, instead of offering a Grand Theory.

Post-modernism aspires to equalise law and justice through the call of the Other, which is a call for and of justice and refuses to rethink the relations of law and justice along conventional modernist lines. This thesis does not intend to develop any theory about the relationship between law and justice but to propose a gendered way to understand and ease it through a practice of justice as care. Justice needs to speak in its own voice, the voice of the Other, the voice of care and responsibility in relationships.

The immorality of modernism lies in the abandonment of ethics in law and supports the reduction of justice to a horizon, the identification of justice with legality, inner morality of law, right answer, treating like cases alike and so on. Justice as a feminine virtue, when tamed by law, becomes male, violent, uncaring and appropriately wears the blindfold and wields the sword, since it holds potency, force, power and violence.

The ex-carnation of justice from the bowels of law is founded on the non-reducibility of the former to any pre-given norms even of a well-established legal system. Law and its institutional apparatus face the paradoxical demands of personal and social justice and are unable to respond equally. The collapse of justice into law is reductive and draws lines which call for verdicts and exclusion.

Cornell expresses perfectly the suitable methodology to offer a very localised re-definition of justice. “I want to suggest that the ‘postmodern’ should be understood as an allegory and that, as such, it represents an ethical insistence on the limit to ‘positive’ descriptions of the principles of modernity long-elaborated as the ‘last word’ on ‘truth’, ‘justice’, ‘rightness’, etc” (1992:11). The post-modern as allegory works against “the search for new theories and metanarratives to solve law’s problems [and against] (...) the attempt to create large-scale, totalizing theories to explain social phenomena ” (Minda, 1995:9/224).

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<sup>25</sup> Between two different streams of post-modernism, neo-pragmatism and ironist. The former is not suitable, at that point of this discussion, especially in its understanding of theory as “a tool to get the job done”. The ironist view is better mainly for they “understand legal theory as a type of theatre” (Minda, 1995:237).

This thesis presupposes a new rationality; it has to come from a totally new experience and most probably from a non-scientific<sup>26</sup> discourse, since the particular is the source of the unique, the abnormal, the unpredictable and is characterised by arbitrariness, in the sense that it does not follow a rule. Science is about normality, normalisation and normatisation; so is law. Justice is never “normal” since it has to be personal. The rationality currently in force entails competition, the enforcement of rights and the exercise of justice through the application of law and according to the adversarial system of the adjudication services. Heller reminds us that deconstruction is not destruction (1992). However, “(...) [it] is an enigmatic approach that glories in its own slipperiness for its intellectual cogency and appeal. (...) [I]t is not a philosophy, but a theoretical strategy for displacing traditional philosophy: a deconstructionist ‘is a bad son demolishing beyond hope of repair the machine of western metaphysics’ ” (Hutchinson, 1988: 35). Furthermore, it is useless to destroy theories if one leaves intact the rationality which informs them. It is necessary to debunk the rationality that informs the suffering and sacrifice of justice and the feminine. Therefore, deconstruction is inspiring since it intends to “strike at the deep roots of consciousness that condition and shape the psychic, theoretical and practical possibilities and parameters of (...)” human conviviality (Ibid., 50).

Post-modernity and its deconstructivism as a response to Enlightenment try to bridge the gap and reinsert the individual and its particularity. “Post-modernity definitely presents itself as Antimodernity”<sup>27</sup> (In Habermas, 1993:98). Justice and law (*droit*) is, in Derrida’s account, a couple to be divorced or deconstructed through the deconstructibility of law and he clearly states that he tries “consistently (...) to distinguish [law] from justice” (1992:15). In this enterprise, he is also aware of the suffering that can accompany it since one does not have either rules or any clear or “definitive criteria” to promote the ex-carnation of justice from law.

At that point, where the separation between law and justice is established, a possibility exists for law to overcome its moral crisis because there is “‘something rotten in law’ (*etwas Morsches im Recht*)” (In Ibid., 39). Is exactly what Derrida seems

<sup>26</sup> See footnote no. 3.

<sup>27</sup> Habermas understands modernity as a rebellious movement against normativity. A movement of contestation of tradition and of separation from morality (1993:100). “The (...) requirements of justice given by (...) Kant (...) consummates the separation between law and justice (...)” (Kamenka, 1979:21). For Kant, *Aufklärung* means autonomy, isolation, separation. Separation comes from the modernist project of autonomy, which frees the reason to shape reality. The subject shapes reality because he can shape the rules, discovering or producing them. The Enlightenment project and the Kantian separation are well appropriated in the wording of the “*Discours Preliminaire sur le Projet de Code Civil*”: “*Un homme qui traite avec un autre homme, doit être attentif et sage: il doit veiller à son intérêt, prendre les informations convenables, et ne pas négliger ce qui est utile. L’office de la loi est de nous protéger contre la fraude d’autrui, mais non pas de nous dispenser de faire usage de notre propre raison*” (In Lewis, 1992:146). In this resides this thesis’ arguments against modernity as a movement of separation and for the rescue of justice in a project of connection, of re-connection, of remembrance of the original form of justice freed from the constraints of law and compromised to a project of human conviviality.

to suggest when he identifies the “problematization of law and justice” as a couple with the “problematization of the foundation of law, morality and politics” (Ibid., 8). The indecency identified in the moral crisis of law is characterised by Benjamin as violence present in every contract and inherent in legalistic reasoning. “(...) A total nonviolent resolution of conflicts can never lead to a legal contract. When the consciousness of the latent presence of violence in a legal institution disappears, the institution falls into decay” (Benjamin, 1989:288).

The violence that characterises law lives in adjudication processes where lawyers, judges and any other officials suppress the dispute from the interested parties and they, before such power, are disempowered and become unable to think and act autonomously (Cover, 1986:1615), which is ironically the core of modernity. The language of law silences the parties, perverts their sense of justice, violates unempathically the stories behind the legal facts. The parties are pushed to the inevitability of becoming litigants once they are prevented from the personal exercise of resolving their dispute, and thrown into the realm where the adjudicator acts as promoter of justice as law, with its virtue of impersonality, impartiality, rationality, consistency and predictability (Auerbach, 1983:11/12). “Justice is an experience of the impossible. (...) Every time (...) that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgement, *we can be sure that law (...) may find itself accounted for, but certainly not justice. Law (...) is not justice*” (Derrida, 1992:16).

Deconstruction as the non-actualisation of justice needs a remedy. Furthermore, deconstruction offers suspicion and it is a very good start indeed for the criticism of the certainty of modernity. Nonetheless, deconstruction aims also to offer an “utopian possibility”. One needs to jump from surprise into a real possibility of another justice, freed from the constraints of the aporias of deconstruction (Cornell, 1992: 133-134/156).

Derrida asks: “what does it mean to establish the truth of justice?” (Derrida, 1992:12) The answer and the problem are both the Other, the singularity of a unique situation, before the pressure to be reconciled with universal, general, clear and prior rules or principles, which urges justice to be done to its singular condition. “This ‘idea of justice’ seems to be irreducible (...) in its demand of gift without (...) rules, without reason and without rationality. And so we can (...) identify a madness. And perhaps another sort of mystique. And deconstruction is mad about this kind of justice, (...) which isn’t law” (Ibid., 25).

So is this thesis.

The search is both for a paradigmatic shift and for a sort of plasticity that post-modernism aspires to understand and propose. That plasticity is necessary since the

paradigmatic shift will happen as often as the kaleidoscopic condition of the legal subject changes. The paradigmatic shift in legal theory or in law as a fact of life is function not of the man or legal subject constituted by law but by the man who constitutes law for himself and by himself in his peculiar and multifaceted condition. The change needs a fixative to call forth the colours and the shape of the scene. That fixative is the Other.

## **II.2- The Ethics of Alterity: the Other and a Possibility for Bridging Law and Morals**

To consider the “ethics of alterity”, this thesis will not analyse texts by Emmanuel Levinas as its first representative, nor texts mainly devoted to considering his works because the aim here is to use alterity to understand the problems for justice as law vis-à-vis the separation between law and morals. The Other will be presented as an ethical problem to be equated with the demands of justice vis-à-vis the legalist landmarks of the modernist legal theory and its emphasis on the rule of law, justice as law, and law as rules. Derrida (1992), Veitch (1997a&1998), Goodrich (1993) and Douzinas&Warrington (1991, 1994&1994a) will illuminate what follows.

Justice made law, or justice achieved through the application of the rule of law is to be challenged in an attempt at freeing justice entangled in the traps of law, which is seen as both a good and a bad thing for law. One question immediately has to be acknowledged: to what extent can justice be grasped beyond the limits of law, especially when the task is about resolving disputes, a very much legal enterprise? Justice, to be understood beyond the rule of law, requires that one could unveil or re-establish the relationship between law and morality in order to recall an essential ethical question which could shape justice away from the limits of an a-moral law.

Justice, as a post-modern theme, touches the limits of what can be expressed and promises already to be turned into an impossible nevertheless obligatory task, object of a great desire and longing. It revolves around “deferring the undeferrable”, “conceiving a justice that cannot but must be conceived”, “saying what cannot be said” and “listening to what cannot be heard” (Veitch, 1997:97).

The suitable post-modernism would connect justice with the unavoidable encounter between the Other and the self. It advocates the displacement of the autonomous, universal, unencumbered self in favour of a contextual and relational self, and establishes the Other as the moral screen on which justice can be enacted. How to judge particular persons or facts without knowing them, without establishing a relationship with them? The only way available for the formal rationality of law to settle disputes is to apply general, clear and prior rules with the inevitable consequence of the miscarriage of justice, which, as said, can only be revealed in the encounter of

particulars, when they are fully considered as such. Moreover, the legality of such colonised justice is about personal de-responsibilization, or “do not think about it”, whilst one dreams about a world where “justice is not a matter of our seeing that something conforms to a pre-given order, but that it accords with the idea we make of ourselves (...)” (Carty, 1990:28).

Thus, the ethics of alterity is extremely attractive since, behind the criticism against law’s appropriation of justice, resides a necessity to dismantle a rationality discovered and installed by modernity and elaborated essentially by Kant. Besides, Levinas seems inspiring as he is recognised as “the major 20<sup>th</sup> century philosopher who introduces a post-rational ethics as a first philosophy that is not dependent upon cognitive claims and does not lead to totalising systematisation” (Douzinas&Warrington, 1991:118). “Levinas articulates the primacy of the ethical –that is, the primacy of the interhuman relationship, ‘an irreducible structure upon which all the other structures rest.’” (Critchley, 1999:9) Like the ethical response, the justice response “is indeterminate, something to be done rather than something said. (...) In every act of judging there is a moment of saying and a moment of doing and justice cannot be identified exclusively with what is said” (Douzinas&Warrington, 1991:123/135).

To Lévinas the insertion of the Other entails an ethical discourse. “Derrida sees in Levinas a deconstructive attempt to displace ethics and think it anew by locating its condition of possibility in the relation of the Other, the *Autrui*, the singular other” (Critchley, 1999:18). Ethics in Levinas is certainly something different than a set of rules about how to behave or how to resolve a moral dilemma; it is rather a position before the face of the Other. “Moral consciousness is not an experience of values but an access to an exterior being” (Ibid., 255).

The post-modern theme rests in the impossible, and it could be identified as the re-unification of law and morals through and toward a comprehension, beyond rules and law, of what justice is. The separation of law from morality has engendered a split into the understanding of justice in “an institutional-legal and an individual-moral pole” (Douzinas&Warrington, 1994a:406). In this vein, the duty to apply the rule of law in a court of law justifies and explains the assertion that justice “is not used in a general sense as the antonym of ‘injustice’ but in the technical sense of the administration of justice in the course of legal proceedings in courts of law” (Douzinas&Warrington, 1991:147). The clarity of these words would be enough for a well-established understanding that justice cannot be achieved through legal proceedings in a court of law and that justice as a moral virtue is not the aim of the due process of law. Nonetheless, the separation between justice as institutional and as individual leaves a gap which is twofold: first, the moral and political aspiration of law to be the instrument

for realisation of justice in a *Rechtsstaat*; second, the expression in the face of the Other who holds his own unachieved or denied justice and faces (confronts) me, faces (confronts) law and obliges me and law to respond to him, to be responsible, more than merely responsive. The Other, as a concrete entity considered as the object of justice, refuses law as a legitimate way of knowing him and responding to him through the principles of universality, equality and impartiality.

What makes the universalisation of the singular impossible is the Other which is not equal but strange, foreign, different, alien.<sup>28</sup> The self and the Other do not melt into each other and then the conflict is likely to arise. The self to melt into or with the Other has to let go of his own “I”, his individuality, his ideas, himself; he has to be empty. The resolution of the conflict, without listening to the specificity of the Other, cannot perform justice either. Justice is a theme brought about by the Other: its alterity challenges the law that tries to equate the differences by generalising them. The Other stresses the internal fight between law and justice by bringing about an ethical question of responsibility. The theme of separation between morality and law is central for the dislocation of justice from the bowels of law,<sup>29</sup> especially for dispute resolution, insofar as within law the differences are silenced in the name of equality and generality and conflicts misplaced to fit into the definitions of law about the legal. Litigation through law, lawyers and lawyers’ law, deepens the conflict by removing it from the parties involved, by rephrasing its terms and imposing its own logic; therefore, the meaning of justice, infinitely problematised by the Other as an outsider, is lost whilst justice is equated with technical issues in experts’ language.<sup>30</sup> One tends to “forget the violent nature and unjust character of much legal action” (Ibid.,116). Post-modern legal theory, through the ethics of alterity, however, makes the violence of law increasingly clearer and then perceptible.

The Other imposes the different, the unknown, the incommensurable and the unaccountable vis-à-vis the regularity of law, which normalises and normatises. The Other is the impossibility for the rule to be applied because the Other is the uncertainty

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<sup>28</sup> According to Veitch, the insertion of an ethic of alterity in the established judicial adjudication of disputes through proceedings of law, entails three problems: the understanding of justice as dependent on particulars, the decision of how the Other needs the law, or which are the needs of the Other, and thirdly, the information about the Other, that are necessary for judging (1999:190/92/93/95/97).

<sup>29</sup> Will law resist an imaginative exercise deemed to encompass the challenges that the Other seems to impose? Identifying justice with the accomplishment of those challenges, one asks: how can law be understood in order to be reconciled with justice? Perhaps it is not the case at all and then one should ask about the meaning of a post-modern ethics and justice able “to resist the totalising influence of politics and law” (In Veitch, 1997:102). Douzinas&Warrington ask: “[How] can we move from this ethic of responsibility to the law?” (1994a:146)

<sup>30</sup> Veitch develops a criticism against the post-modernist justice understood as responsibility for the Other, “momentary, fleeting without any ‘principle, value or code’”. He mentions the danger of having one’s conflict adjudicated by a post-modernist judge judging or listening without criteria which is necessary in order to decide questions of justice (1997:108 & 1998:220).

that cannot be grasped by the rules, which limit and tame justice.<sup>31</sup> “Justice is an experience of the impossible (...) [I]t requires us to calculate with the incalculable” (Derrida, 1992:16)<sup>32</sup>. The Other is the incalculable with which justice has to deal and law cannot do without reducing it to the known and public terms of the rules to be applied in the name of certainty and security.

Veitch asks for criteria in his criticism against Derrida’s formulation on the impossibility of justice in view of the singularity of the Other, as the central concern for the task of grasping what justice, which is not law, is. To displace the singularity which makes justice impossible but yet desirable, Veitch seems to propose “negotiations around the *construction of commonality*”, as an attempt to know the Other and to make justice, which is desirable and irresistible, possible and correct, if one reads Veitch properly (1998:226)<sup>33</sup>. Nonetheless, against Veitch, the correctness of justice without a concept, a criterion and, above all, without law seems to be possible, in order to be, like the post-modern ethics, “left only with responsibility. Indeed with a responsibility for the responsibility created by the suffering face of my neighbour” (Douzinas&Warrington, 1991:124). Furthermore, Veitch’s commonality collapses easily into universality when forced to respond to the safeguards of the liberal principles of the due process of law.

The correctness of justice as the just application of a just rule is an aporia, defends Derrida. The aporia resides not in justice itself but in the rule, in the fact that rules, which have to be universal, clear, and laid down previously, must be applied. This is law, which is not justice, and then what is justice? “If I were content to apply a just rule, without a spirit of justice and without in some way *inventing the rule and the example for each case*, I might be protected by law, my action corresponding to objective law, but I would not be just. I would act, Kant would say, *in conformity with Duty*, but not *through duty or out of respect* for the law. (...) How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups

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<sup>31</sup>Through establishing the requirement of criteria for justice to be concretised, Veitch contests the quality of justice as impossibility and stresses that justice and the question of information are not equivalent, in the sense that justice cannot be suspended, or given up due to the ignorance of the adjudicator who cannot grasp the singularity and subsume it into the legal terms (1998:220). It is true and it justifies the understanding of justice as conquest to happen out-of-court in opposition to a delivered justice, dispensed in courts of law or even alternative dispute resolution schemes which impose a decision, binding or not. Moreover, *institutional will* would avoid the shame of delivered justice, which is not justice but proceedings of law in courts of law.

<sup>32</sup>The impossibility of justice only makes sense vis-à-vis, on the one hand, the necessity of criteria for the fulfilment of the rule of law and the Other and his demands for justice, on the other hand. The Other’s particularity imposes and requires a singular, personal and contextual justice. The philosophical impossibility of justice so posited is just a reflection of the uncontested legal background. The challenge is to go beyond the sterile philosophical questioning, which in truth conceals a positivist conception of justice in the limits of law, to embrace a liberating practice for legal justice to happen beyond law.

<sup>33</sup>Despite the uneasiness between justice and law, it is necessary to endure and work for “a post-modern ethics (...) not condemned to cynicism or passivity” (Douzinas&Warrington, 1991:117).



and lives, the other and myself as other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case? (...) For a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, re-justify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle” (In *ibid.*, 138/144). Derrida’s words, whilst offering a way to reconcile law and justice, put an enormous challenge for the *logos* of law, since its scientificism autonomously seeks and imposes security and certainty.

The question that returns unanswered is about the relationship between law and justice whereas the place of ethics, not any ethics, but the ethics of the particular, the strange, the unique, in law remains undecidable. The place for a male morality in law seems nevertheless resolved. Any doubt about that place dissipates after hearing courts’ paraphrases and epithets like these: “self-made moral dilemmas are deserving of no sympathy”. Ethics is secondary, its demands are valid only if formally legislated and it is for the court and not the individual to resolve according to the law any conflict between legality and morality. Courts’ pronouncements or sentences establish ethical standards by declaring the law applicable to the case. What remains is the pain of the cut performed (the separation, *Urteil* = sentence) by judicial sentences or verdicts, the cut in the life, the destruction of relationships or possible prospective ones, the pain on the face of the Other, unseen, not legally comprehended. The outsider remains and reminds us that justice stayed outside. The outsider, holding his own unachieved and yet desired justice, challenges law and the closure of the legal system.

The ethics of alterity Is important for this discussion because it unveils the traps of law where justice is made hostage. The Other and his singularity, to which justice intends to respond, denounce law, unveil the fact that law is not justice. The face of the Other is an important threshold that law, by managing to keep itself apart, refuses to look at since it will show the real moral, ethical compromise behind the legal promise of resolving disputes. More generally, the ethics of alterity challenges the ontological and epistemological assumptions of traditional philosophy and their application in morals and jurisprudence. The whole modernist language of law is inappropriate to respond to the claims of the ethics of alterity.

The ethics of alterity debunks the traditional modernist way of questioning and makes its theories inadequate. The question of “who?”, that the principle of treating like cases alike imposes in order to identify who are alike or different, becomes nonsense before the demands of the Other and his ethics of alterity since the Other asks: “Where”, “Where are you now?”, “Where do you stand?” (Douzinas&Warrington, 1994:164). The ethics of alterity is essentially situational and demands a relational answer to its

dilemmas. These questions require a fine perception of what is around one and consequently need an acknowledgement of the relations one establishes with his surroundings. The Other demands that I accept my responsibility without any mediating concept or respect to law or to any transcendental and external principle. The call of the Other on me places my responsibility within the context that the encounter with the Other installs.

“Kantian formalism (...) ends up in the blatant assertion that formal legality equals justice and identifies justice with the administration of justice. We need to reintroduce ethics in law but traditional moral philosophy has proved insufficient. At this turning-point, the ethics of Levinas can provide the initial inspiration for imagining an Other Justice” (Ibid., 167).

The requirements of the Other and his ethics of alterity appear to demand a number of shifts in various levels of legal theory but the separation thesis in its three forms seems to be the greatest target of the Other’s campaign/reclamation project.

Most probably, law, left alone with law and its “all-encompassing edifice”, would not make the justice of the particular its own justice. The limitations and difficulties for law are remarkable and it should be better explained through the analysis of the problems law faces in dealing with mercy and love, two concepts that, before the challenges of the ethics of alterity, could offer a possibility for law to make the justice of the particular its own justice.

### **III-Feelings and Emotions as Exigencies of the Ethics of Alterity: a Threshold for Law? Mercy and Love as Legal Impossibilities**

The discussion focuses now on mercy and love in legal reasoning for two aims. Firstly, to add two important themes to the ethics of alterity for the reconciliation of law and morality, insofar as love and mercy can entail ethical questions which cannot be overcome within the limits of legal proceedings. Secondly, because both are important test-cases that highlight the incompatibility between modernist legal theories and the aim to free justice from the traps of law, thereby showing more clearly the necessity of a third term for a post-modern thought to overcome the modernist transcendental understanding of justice.

The autonomy of morality established by the enlightened reason and its emergent rationality was necessary for the separation of law from morals. Moreover, this separation was necessary to de-ideologise and de-emotionalise the legal discourse removing emotion and feelings from the purposive discourse of law (Shklar, 1986:26). Furthermore, it will lead to the understanding that the moral crisis of law is indeed profoundly ethical and connected not to the loss of faith in universals but to the loss of the Other as one of the most important manifestations of the separation syndrome.

### III.1- Mercy and Legal Justice

Mercy is a moral theme that, especially in the contours of legal discussions, produces contradictions and paradoxes. Mercy as a moral virtue presents difficulties to a Kantian morality of duty and rules and to a legalistic conception of justice alike.<sup>34</sup> Those problems in both legal and moral realms are due to the fact that mercy is a moral virtue, which requires a mediative consideration of particulars. Mercy addresses a particular situation that asks for an exception from the general rule in the name of love, compassion or justice.

Mercy will not be a problem or engender any paradox or contradiction if one understands justice as a moral virtue to be grasped beyond the limits of law and legality.<sup>35</sup> Justice that is connected with the consideration of the particularities under conflict invites mercy. It is in the realm of legal proceedings and law, concerned with universals, where both mercy and justice encounter contravention. Then, the question for us is about equating mercy with law or legal justice and not mercy with justice, which is not law.

The traditional understanding of mercy, following the characterisation offered by Murphy (1990), refers to it as an autonomous moral virtue, which cannot be reduced to another moral virtue like justice; it has the power of tempering justice, maybe even melting with it but not being reduced to it; it transcends any moral or legal obligation, being understood as a free gift, a manifestation of grace, love or compassion, and it is not a response to any claim of right, duty or obligation; it is due to a sort of nobility from the one who alleviates other's burden (166).

The traditional view of mercy leads to a paradox when one tries to meet the requirements of a morality of duties and rules or legal standards. Mercy seems capable of only acting as a temper for justice and, at the same time, imposing a departure from justice. It is even possible that mercy leads to injustice, exercised out of mere sentimentality, which is likely to be dangerous for morality and law alike. Centring this discussion on law, mercy, as a free gift that comes from a special manifestation of nobility intending to light the burden of the offender, who before the legality of law should suffer the retribution (punishment) of his own deeds, is not a virtue but a vice. The difficulty grows unbearable if one thinks that mercy, as a free gift, could not be an act of discretion of a judge who does not have any relationship with the victim, neither

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<sup>34</sup>The paradoxes of mercy in legal discourse comes from the separation expressed by the following division of labour and power: "(...) [S]ince Chief Justice Coke's great confrontation with James I, common lawyers have held that while the king may be the fountainhead of justice, he is not, as king, the best dispenser of it. The king's personal prerogative is mercy; justice is a matter of being learned in the law, not as an esoteric secret science (...)" (Tay, 1979:82-3).

<sup>35</sup> See Teitel on transitional justice (2000:217).

with the offender and has not suffered with the wrong the latter perpetrated. Thus, mercy in the legalistic justice, as a free gift of legal proceedings, requires that it comes from the victim if one wants to minimalise the level of appropriation of the conflict.

In a context where one assumes that justice is a moral virtue related to particularities and also a practice that aims to respond to the needs of the Other while settling a dispute, the questions like the one put by Murphy and others rest meaningless.

The question “how can God be both just and merciful?” loses its meaning or does not lead to any paradox if one thinks of justice away from a morality of duties and rules and from legal proceedings in courts of law. If God does justice for the moment as when he gives water to the thirsty Ishmael, who was dying in the desert, whom He knows will, in the future, kill innocent people and make Israel suffer, then this justice is the one that responds to the needs of the Other in a given situation (Douzinas&Warrington, 1991:117-8/145). Nonetheless, one could say that God’s justice in this case reveals a problem of the male rationality, which is the incapacity of contextualising dilemmas and decisions. He was merciful in His justice and what brings this sort of justice into problems is not the injustice that comes from saving the life of a person who will kill many innocent ones and make an entire people suffer. The point that makes mercy sound unjust in that Biblical passage is that the merciful solution proved itself at odds with a rule or principle of justice such as desert, entitlement, equality and impartiality (treating like case alike). The merciful act of giving water to a prospective enemy betrays an abstract rule that says that one should not save the life of someone who is going to kill innocent people.

If one looks at the problem from a different perspective or through a different rationality, one may say that, even when a merciful solution follows a rule, which is about doing justice for the moment in that Biblical story, it fails in responding to the whole context of the problem and a second gap in the merciful act of God, as in any legal judgement, is that the giver does not establish any relationship with the receiver. In the case of legal judgement, this relationship is impossible since the judge “sits as representative of the rule of law, not as representative of his own feelings” (Murphy&Hampton, 1990:174).

Mercy is totally different from justice and can lead to injustice, exactly because mercy requires or permits that justice be set aside, says Murphy. One can observe here again that the justice mentioned is the legal one, which leads to the paradox expressed in the fact that mercy is either itself justice or it is a vice. Mercy leads to injustice when one refers to justice as the enforceability of rules. Mercy as free gift fits entirely into justice without reason, rules, fixed criteria, but compromised with the needs of the parties involved in the dispute and not of the isolated Other.

In fact, Murphy struggles with a conception of justice without being able to see justice as a moral virtue beyond the limits of law. Nonetheless, he identifies justice as a capacity of seeing the particularity of each individual and situation when he says that judges who cannot give the right importance to “individual response are not lacking in mercy; they lack a sense of justice” (Ibid., 172). The myopia of his vision becomes apparent when he tries to respond to the criticism that challenges the importance of particularity as a demand for justice before the understanding of justice as blind. His response returns to the legalist position when he says that the blindness of justice should be limited to the points which had no relevance to the dispute to be settled. Thus, the logic or rationality of the legal proceedings is recalled and from its pseudo-sophistication, he calls “overrestricted and simplistic conception of justice”, the one that cannot appreciate all the problems involved in “retributive justice and the role of the judiciary in implementing” it (Ibidem). Once one is able to recognise that justice is not law and to re-install justice in an ethical environment, all sophistication becomes unnecessary.

Thus far, mercy and legal justice were considered in the realm of criminal law. In private law, says Murphy, mercy paradoxes do not occur since there is possibility of agreement between the parties and mercy can be shown without tension or contradiction. However, this argument seems flawed because mercy is likely to entail problems irrespective of the nature of the legal proceedings, and the possibility of an agreement between the parties. The agreement can be made against the law, for instance, and, in that case, the court, called to ratify the agreement, will reject it on legalistic grounds. Then the mercy that expresses an unlawful private agreement is certainly in tension or contradiction with law. The second point of tension is the same that is perceived for criminal law, insofar as the judge, applying the law, will have to do it in the limits of the *res deducta*, and has also to respect the rule of law.

One example is the private agreement involving consumer rights before the criminal prosecutor in charge of consumer protection, which is a pure private matter in accordance with Brazilian law. The law prohibits that those agreements contain any sort of renunciation of any consumer rights. That prohibition prevents any agreement to happen. In the great majority of the situations, the consumers are prepared to renounce part of their rights to secure any sort of compensation. Mercy in this case is prohibited, despite the willingness of the parties. A solution obviously lies away from law or even against law.

The chivalry example given by Murphy as a case of mercy in private law is clearly mistaken since the rules of chivalry do not rely on any adjudicatory enforcement. Mercy, in the chivalric code, is justice to be shown at the discretion of the knight before whom mercy is claimed. Private law disputes, as objects of adjudication, do not belong

any longer to the parties; justice is reduced to what law says and mercy is surely in tension with this sort of justice and with law. In this sense, Murphy is wrong saying that in criminal law, the judge cannot show mercy on the grounds of his personal feelings but in private law, it is not at all problematic. It is clear that it is a problem in any branch of law where the rule of law has to be observed by officials, especially adjudicators (Ibid., 179). Mercy in private law used by the parties through agreement, in order to avoid adjudication, is, on the one hand, desirable and welcome, says Murphy (Ibid., 176-177). On the other, nonetheless, it prevents law from being clarified. Anyhow, who cares about that? Boys do; it is definitely a boys' game. Girls are interested in something else.

Another example which corroborates that mercy is a virtue at odds with any kind of law refers to the impossibility of showing mercy under the principle of equality. It is, according to Murphy, the second paradox of mercy. The principle of equality is a legal exigency for justice in the limits of law. In order for mercy to be elevated to a legal category in harmony with legal justice it needs to adhere to the principle of equality which requires that mercy is to be shown to all persons in similar conditions, or always when a given reason "C" is present. Notwithstanding, it is clear that the principle of equality is against the very nature of mercy as a free gift shown without any claim of right or desert to it. Furthermore, mercy operates against the criteria of universality.

Mercy as a moral virtue of legal systems or states sounds impossible, because both are supposed to follow the rule of law and to be rational in doing legal justice. Mercy as a free gift, or an act of compassion and love supported by personal feelings about particulars, leads to injustice trying to perform or temper justice (=law). The paradoxes of mercy exist only when mercy is forced to conform to a morality of rules and duties or the logic of the modern juridical thinking or legal order. The common understanding of "mercy as a quality the exercise of which is peculiar to a *judge*, one who has authority to punish" is likely to be rejected since therein lies the source of the paradoxes. They disappear when mercy does not collapse into legal justice but is understood as a free gift at hand only for the parties directly involved in a dispute (Twambley, 1975:84 & Smart, 1969). The paradox of mercy, formulated in terms under which mercy collapsing into justice (legal justice), performs injustice reveals the dramatic reality of law contradicting justice.

The resolution of the paradox seems to be in the following words: "Mercy, properly understood, has no essential connection with punishment. It is not the prerogative of a judge: on the contrary, a judge has no right to be merciful. In accepting his office a judge places himself under an obligation to impose just sentences and to treat like cases alike" (Twambley:1975, 85). Judges must apply the law following criteria, principles and rules, which make the office transparent and accessible for

democratic control and critique. The quality of mercy as free gift installs a paradox, when placed in the wrong hands: in the judge's legal hands, or when submitted under the control of the language of rights.

The paradoxes of mercy come from placing a category that belongs to the ethics of love and charity into the ethics of rights or legal justice (Card, 1972:182). The resolution of the paradoxes of mercy demands only the recognition that mercy is a free gift. Mercy as a legal principle or rule would require another name, since it would have another nature. A judge could use it, then it would not be mercy any longer, but just a mechanic tool of law as "made justice" dispenser or conventional justice.

In a different vein, Simmonds relates mercy to judgement and tries to show how it does not transcend the abstract and formal claims of law, but is totally compatible with law, legality and judgement. Simmonds is against the solution offered by Murphy, which is about detaching mercy from the realm of judgements or legal proceedings, in order to resolve the paradoxes. Rather, his arguments are built against what he calls juridical idealism, which has been destructive to legal theory and its development. He insists that mercy is not at odds with judgement and juridical thinking. Judgement, in a Kantian tradition, involves subsuming a particular case under general rules and presents mercy as an antinomian category for law and legalistic justice, since the former is related to particularity and the latter to universals. Simmonds interprets the idea of particularity as wholly abstract and idealistic to be rejected by the juridical thinking, which must express "the necessary rootedness of juridical institutions in the practices, judgements and prejudices of daily life, and we must shift juridical categories of thought from the centre of our moral reflections to a more subordinate position" (1993:59).

Following his own advice, Simmonds rejects the possibility of particulars that could not be apprehended by the categories of human thought. The particularity void should be avoided as an expression of human intelligence, which should subordinate all that is around it to what human thought can classify. Thus, his conclusion appears to be that since it is possible to subsume anything under categories of human thought, any particular will fit into general rules and universals of juridical thinking.

In order to make mercy compatible with legal or juridical thinking, one has to subordinate the particulars to universal categories. Veitch, in his claim for criteria in making justice from particulars, takes Simmonds' argument against idealistic particulars and builds an argument about "the construction of [the existence of particulars] as a matter of relations between relative abstracts. (...) [A]ny particular can exist only within a context of relative abstracts, and it is particular only for a specified context rather than particular in itself" (1998:227). Thus, by manipulating the context, in the sense of attributing meaning to particulars in a given context, particulars cannot be unknowable

before the law. Law delimits the context and the description as well. Particulars then are accessible, knowable and deemed to be subsumed under general categories. The outcome is the removal of the ignorance and creation of a secure set of information, which includes also criteria, values, rules and standards, according to what justice is dispensed (Ibid., 228). The argument seems to turn back to legalistic justice through which particulars, as mysteries, are standardised by rules, standards and criteria in the name of justice.

Veitch uses two examples to defend a conception to enclose and overcome the idea of particularity. He aims to conceive something wider, as required by the juridical thinking. He talks then about “commonality”. He sees “commonality” as the motto or guidance principle in the examples of Pierre before Davoût, in *War and Peace* and George Orwell before a Fascist, whom he had to shoot but could not do so due to the shocking picture of this man “holding up his trousers with both hands”. Davoût had the legal obligation to shoot Pierre (suspected of being a Russian spy) but could not do so because he realised that “they were both children of humanity”. Orwell’s story is about another encounter in war times between the author, a sniper in the Spanish Civil War, and a man, “an opposing soldier running along, trying to hold his trousers up with both hands. Orwell’s description follows: ‘I did not shoot because of that detail about the trousers. I had come here to shoot at ‘Fascists’; but a man holding up his trousers isn’t a ‘Fascist’; he is visibly a fellow-creature, similar to yourself, and you don’t feel like shooting him’ (...). (...) [We] seem to be confronted not with an appeal to the particular, but to the level of generality: ‘a fellow creature, *similar* to yourself’; a commonality, in other words, not a singularity. (...) [The] other is unknown as the other, yet is perceived as the same and his life is saved” (Ibid., 230).

One cannot deny the strength of the argument around the conception of commonality applied to these two examples. Nevertheless, how will law take into account “commonality” as a legal category, authorised to determine acts of legal justice, or mercy as legalistic justice? How can it be possible for a judge who has to judge in accordance with the rule of law, keeping at home, or outside the court, his personal feelings or his own humanity, which would be able to make him feel sympathy to the commonality brought before him? Which criteria would this judge apply to adjudicate from his perception of commonality? In which sense, “commonality” has advantages to legal thinking over “particularity”? These questions seem to unveil the incompatibility between modern legal discourse of criteria and principles and post-modern demands of particulars for justice. In addition, the category of commonality, if not embedded in a contextual consideration, is turned into universality, thereby betraying the project of justice for particulars.



Christodoulidis offers another attempt to tackle the relationship between mercy and legal justice. His effort is based upon the uneven co-existence between mercy and legal justice which is due to the problem of particularity. The same assumption of justice as law's justice is present again. Simmonds' rejection of the particularity as much too abstract is considered "wonderfully instructive" however it is contested. Christodoulidis refuses the particularity void by claiming that it should be perceived as a "*complexity deficit*; (...) the deficit, that is, between the (infinite) possible understandings of a particular and its legal determination" (1998:8).

The argumentation developed by Christodoulidis supports this discussion when he refuses Simmonds's "reliance on juridical reason as central to (ethical) judgement" thereby pointing out the violence that such a position does to the particularity by constraining it within the categories of modern human thought or juridical thinking.

His refutation rests on the fact that the criteria which informs a legal approach to commonality would be given only *a posteriori*, contrary to the well-known requirement of legal validity, which establishes that norms and criteria should "*pre-exist their application*" (Ibid., 9). Thus, the commonality cannot avoid merciful judgements being issued at the expense of law. Since law is what law is (reductive), particulars are "reduced to roles and rules" as a function of what an exclusionary language of law does to its subjects and objects, which in the realm of law need to be subsumed under general and pre-existent norms, roles and rules. Having refused the possibility of particulars to be apprehended by the exclusionary language of law, which facilitates the accommodation of expectations towards stability and predictability of legal systems through giving solution for disputes, while ends the debate entrenching the reason for action or judgement, against which any argumentation is forbidden, Christodoulidis suggests that "respect for the particular and the exercise of mercy can only meaningfully find a home in the reflexive, in the realm of a radically antinomian critique of law's justice" (Ibid., 10).

The objection against commonality in Christodoulidis' terms could be summarised, as the suppression of commonality itself by the generalisation process of legal thinking, which entails abstract categories. The appropriateness of judgement and action in law must yield security for the system and requires that reductions to role and rule be performed by an exclusionary language of law. Certainty and security in legal action and judgement aim to regulate " 'encounters' between strangers", providing "actualisation/suppression" of particulars when subsumed under general categories (Ibid., 15/16). Christodoulidis concludes that "[i]nstitutionalisation thus abstracts into an impersonal context that allows specifically legal attributions of expectations, ones that are normatively co-expected. (...) And it is precisely here that the particularity of the affective encounter is suppressed, why it is that upon entering the realm of law the

lawyer finds nothing there to call by name. (...) Finally, the law is there to give us a certain stability of expectations. (...) [It] reduces uncertainties by furnishing certain expectations with ‘normativity’ (Ibid., 17).

Thus, the paradox of mercy is re-installed by delineating clearly the view that mercy cannot be shown in the realm of justice as law without performing a vice, an act of injustice. Mercy requires the access to particulars in their own terms, but law as a normative institutional order cannot address particularities. It works by reducing facts as particulars to roles and rules. Then mercy is to be shown in the realm of ethics where exclusionary reasons do not work and reflexivity can be performed. Law and ethics or morals are to be kept in different and well-delimited spaces. Mercy as part of legal thought and the subordinate place of juridical thinking in “our ethical reflections”, alluded by Simmonds, are unwarranted assumptions, says Christodoulidis (In Ibid., 20).

Moreover, mercy seems not to be the virtue which can make law realise away from ideologies and abstractions that “the human person is precious and unique” (In Ibid., 21). The ethics of alterity and its capacity to contextualise the subject through the call of the Other inspire a “reclamation project” for the uniqueness and preciousness of the human person. Notwithstanding, law, in the modern rationality, due to the reductive character of its needs for criteria, seems to require further improvement to be a useful tool for Others’ searching of justice.

Let us try then another virtue called love to see how far law can cope with it in a legal project of concretising justice for the particular, the singular, the Other in his own terms. Can law engender a legal practice capable of reflecting the needs of the Other as a genuine demand of justice?

### III.2 – Love and Legal Justice

Whereas the discussion about mercy could be restricted in its semantic environment since it could be defined, a definition of love has baffled poets and psychiatrists alike. The term “mercy” refers to a well-accepted definition despite the suggestion to use a different name when mercy is taken as a rule, principle or legal term. Thus, the discussion around mercy assumes its nature and examines the conditions which make mercy at one with legal justice. Love, however, is polemic *par excellence*. Everybody talks about love but nobody has been able, so far, to reduce all that love encompasses in a single definition. Love expresses itself through many intimate and social forms; it is not characterised by one unique attitude or posture. Love can be identified with many and also contradictory attitudes, therefore its definition amounts to impossibility. Yet, this definition is highly desirable and intuitively anticipated for even a very immature child, able to express love and hate, antipathy and sympathy.

Whilst mercy seems to be amenable enough to be grasped in one precise behaviour, love entails innumerable possibilities through which it can be expressed. This state of affairs has made love one of the most explored themes in western culture, especially in the Christian one. Whereas mercy expresses itself mainly in the moral realm of human conviviality, love enters many realms of human life and then expands the moral or ethical environment of its expression. Mercy can be seen as a manifestation of love but love cannot be fully contained in an act of mercy. While mercy is about giving and forgiving, love is also about receiving. Whereas mercy is about setting free or lightening the load, love can establish strong connections and compromises between people, entailing burdens not easily resolved or dissolved.

What is love? Many pages and a great part of human history revolve around the word and, as much as justice or truth, love is highly desired but indefinable. Nobody is able to define love in order to end the discussion but everybody is able to claim the tortures and pleasures of it. While mercy can be a concession, which does not require any relational consequence, love is commonly seen as relational, and involving emotions, which one could oppose to reason. Thus, love as relational and emotional seems to be beyond the influence of reason or even in a quite strong fight with the rational way of apprehending life. That fight is everywhere; love lacks definition but rationality cannot surrender and leave love for love only. Love is to be understood under rational categories. Consequently, love is everywhere, escaping, being caught, and suddenly running away again. Everywhere is a place for emotions; they cannot be kept for special moments of privacy. Emotions are everywhere and reason watches and wonders: are they love?

Emotionality and rationality, law and morals: couples to be disconnected. This is the task of modernity.

Post-modernity calls attention to the gap where most of the modernist and romantic deeds were and are performed. From this gap arises the tension that keeps the modernist consciousness running. The post-modernist radical refutation or deconstruction negates the gap by recalling emotionality in the rationality and claiming the re-ethicisation of law, through facing the suffering on the face of the Other. Law can no longer claim to regulate our lives by reducing it to facts. Law must prepare itself to welcome emotions and their unpredictability: a post-modernist challenge.

Love for the romantics is approached in the gap between rationality and emotionality, and always in tension. Although love permeates our society and our lives, it is unapproachable despite much rational effort, since the screen where it can be seen

is the face of the Other, whose particularity frightens.<sup>36</sup> Nevertheless, love promises to re-unite what modernity separated: emotionality and rationality, law and morals.

What is love? “[O]ne cannot ‘know what love ‘is’ unless one understands the ‘practice of loving’ within western culture and perhaps one cannot know what love ‘is’ until one loves and is loved. [It] presents itself (...) as an emotion that cannot be uttered or expressed by words” (Raes, 1998:27). Emotions are everywhere and love is more than romantic love between human adults of different or same sex. And the mistaken movement toward the romantic love is to refuse it as emotion, trying to qualify it as rational in order to possess love, and avoid its incommensurable quality. To refuse love as emotion and qualify it as just, calling it “just love”, (as does Paul Tillich (1954)), or to refuse love as romantic, qualifying it reasonable love, as do the feminists (as Petersen contends (1998:23)), seem errors too grave to countenance. These formulations of love are not acceptable here because both, love as emotion and the romantic love, happen in the modernist gap. In order to save love from the resolution in this gap, the suggestion is that love may be seen as will<sup>37</sup> not as feeling or emotion. This proposal will place love in the realm of human abilities or skills, which are object of conscious and purposive development. The engagement in a project of learning how to love, in the same way one trains oneself to drive, to become a Doctor, to speak a foreign language, will dissolve the gap aforementioned. Moreover, that gap must be dissolved in order to relax the tension that sustains the continuity of rational illusions, which encloses heteronomous law, insulated from ethics and from relationships because it regulates conflicts from without, and, because of this, it seriously disregards human life. Then love is not a question of sympathy or antipathy but a question of effort, of human purposive will. Love is approached as an object of human will and not of feelings and emotion, enabling us to consider love as institutional will. Love will not be connected with passion but rather with *interesse*.<sup>38</sup>

Love does not allow general and finished definitions since it appeals to the fragmentary nature of singular and unpredictable relationships. Law is about general and clearly defined rules. How would love be, if at all, at one and at ease with law and legalistic justice? The antinomian situation between law and love is even more profound when one thinks about romantic love which is “radically personal and particularistic; (...) an intimate bond between significant others”, intrinsically

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<sup>36</sup> It frightens so much that one needs to “upgrade” particularity to commonality: a more apposite category for legal thinking.

<sup>37</sup> *Institutional will* is another element of this thesis and the framework it intends to develop. Chapter VII will discuss it in more detail.

<sup>38</sup> The term in German is used in order to particularise its meaning here which is grasped by the two following quotations: “Scheneller als erwartet fand ich die Zeit und das *Interesse*, die beiden mir gesandten Manuskripte zu lesen” (Letter written by Gadamer, in Bernstein, 1983:261). “Wirkliche Selbsterkenntnis wird dem Menschen nur zuteil, wenn er liebevolles *Interesse* entwickelt für die andere” (Rudolf Steiner in *Trilogos D*, no. 3).

spontaneous and emotional; it “implies involvement, (...) partiality”, uncertainty, unreasonability and unpredictability (Raes, 1998:29). Law, by its turn, is impartial, requires detachment, separation, is rational, calculative and cool, and pretends to regulate and facilitate conviviality and interaction among strangers. “Love is unconventional, unjust, and challenges all of morality. (...) [L]ove relationships are irresponsible and hot. Love is described as a mental illness (‘une folie à deux’), aroused by a poison and enslaving the subject. Love is unlawfulness” (Ibidem).

Thus, romantic love has no place in a legal project of turning love into a possibility for juridical thought, and also defies any attempt of the will to discover what love is. For this present project of exploring the compatibility between law and love, love is the capacity to perceive the Other (any Other) and to respond to his needs in his own terms. It means that the I, who loves and is then able to look at the Other’s face and to perceive him in his particularities, has to empty himself, has to surrender all his concepts, rules, understandings and morality. The approach of the Other cannot happen from the I’s warmth, anxiety, or desire to understand the Other; it requires, in truth, an ability that depends on a certain sort of objective enthusiasm acquired after much training and human effort. This interpretation of love emerges from the eastern lesson that is here defended as a means of rescuing love from the modernist gap and tension between emotion and reason. “What enables us to hold both [autonomous and heteronomous life] together? My suggestion is love. For love demands (...) that you respond to the other in a way that is not dependent on your (...) [desire] but on what the other wants and needs” (Bankowski, 1996b:32).

Gilligan’s exposition of Kohlberg’s reversibility principle is helpful to illuminate this present understanding of love corroborated by the words above quoted. She reminds us that in trying to put oneself in Other’s position, to understand Other’s circumstances and reasons, one has to put off one’s shoes, not to hurt the Other. It means that trying to grasp what the Other feels and needs, one must put aside one’s own conceptions and understandings. Lessons from the East tell us that the mind, trained in judging, will not love. The mind, which mixes up things, is influenced by its own desires and needs, will call love sex, charity, friendship, mercy, and a mistaken compassion based on its own ideas and conceptions about the Other’s needs. In order to love one needs meditation, the art of non-judgement, the art of emptying oneself. This is the eastern lesson of an Indian man, named “Master” by his disciples: “To me love is a by-product of a meditative mind. Meditation (...) is not a simply technique. You cannot learn it. (...) It is a growth. It is a growth into silence, into emptiness, into the art of being a witness, of living without judgement. (...) Meditation is the art of becoming a hollow bamboo. (...) What I mean by meditation is a state of being where a person is sufficient unto himself. (...) Love flows through (...) [him]. (...) [He] (...) does not

love, (...) because [he] (...) is himself love. (...) [H]e is a hollow bamboo through which love flows” (Rajneesh, 1986: 12/156-160).

Love could be the space for reason and desire to be in peace, beyond the gap where reason and desire (emotion) fight, where *eros* and *agapè* cannot find a resolution in earthly terms. Love is about dissolving this tension since love does not belong to any of them (reason or desire, *eros* or *agapè*). Love requires to be re-installed in its right place. The eastern recipe requires as ingredients silence, emptiness, non-judging before the Other.

Can love find a place within law? “Modern love [or romantic love] (...) is in itself already a bundle of tensions and contradictions. Confronted with law they result in contradictory forms of life. Love melts together, law divides. Love is ‘the art of fusion’, law is ‘the art of separation” (Raes, 1998:32/38). Accepting love as a principle of reunion and fusion, how could one think about love as a bridge (or a melting force) able to overcome the separation of law and morals? Thus, one must try with a cool experience of love.

Love, as an ability to embrace the Other in his authenticity, needs and aspirations, is profoundly ethical and exercises an ethics of alterity with its preoccupation with the particularity of the Other. In this sense, the difficulties explored in the insertion of an ethics of alterity in law would appear in the same discussion about love. Thus, one needs a more comprehensive category able to encompass the achievements of love through an ethics of alterity. Could the incompatibility between law and love be overcome in the equation between love and justice, the one that is not law? Romantic love must be disregarded by this discussion. Another conception of love has to emerge for a more encompassing view of the exigencies of an ethics of alterity and the unavoidable re-ethicisation of law.

After overcoming romantic love, how does one go beyond law to find justice as a feminine category more able to encompass love?

“Law cannot ‘express’ love, but law needs not do that. (...) However, (...) love and law need one important corrective; in both (...), interhuman *respect* is a basic value. Legal respect is impersonal (...)” (Ibid., 48/49). One can read “love” for “respect” and the challenge of the Other goes on untouchable. Within legality uniqueness, context, idiosyncrasies and particulars represent the ontological impossibility for law to give full account of the Other and respond, beyond its legal principles, to the demands of a justice of the singular. What is the value of impersonal respect? To be effective, respect must acknowledge specific methods of demonstration. Impersonal respect cannot do so.

While love is about responding or taking responsibility, law is about evading responsibility through “not thinking about this”, “I did not know” or “It is nothing to do with me”. Law is rules and these rules appropriate mystery and facilitate evasion of

responsibility. Before law, the Other becomes invisible and what is under judgement is a case, with facts and principles of law, rules, under which the case should be subsumed. Law silences the Other who says: “I’m here. I’m important” (Bankowski, 1996f:6-7).

“Once in the system of law, I apply rules. Love and need stand outside” (Ibid., 10). The love, which considers the Other in his own terms, will need a totally different relationship with rules and the possibility of creative application which could allow them to be bent or breached or even avoided in dispute resolution. Love which considers each particularity as one and unique will be unpredictable at a point that it will challenge the predictability of law and rules which “takes away the magic of the world (...) the mysterious force of love” (Ibid., 11).

“[Detmold] says that it is only particulars of the particular case that give us reasons for actions. Not the universal rules that we derive from them” (Ibid., 17). Thus, one has to listen to the Other to arrive to the solution that meets his necessities. How to listen to the Other, how to understand the Other’s needs, how to know what to do? Bankowski gives us a possible answer in a very inspired way through the analysis of the Biblical passage of the Good Samaritan in Matthew 25:34-35: “The Samaritan sees not just the beggar, but in that beggar he sees the Divine. *And it is because of that he knows what to do.*” (Ibidem). (My emphasis) Nonetheless, the Divine does not allow room to be associated with the general rule but with the truth of that particular. When love reveals the Other to the I, the I knows what to do. How far is law prepared to embrace a very unpredictable system of discovery to settle disputes? How flexible or plastic is law in allowing the application of rules to happen in an uncertain environment, in accordance with the quality or amount of love each one is able to perform? How patient is law to allow room for thinking things through and through? The attempt undertaken by Bankowski to conciliating rules and love remains problematic since love, as Christodoulidis says, does not reduce particulars to rules and roles; it does not facilitate the decision by operating through “‘stilling’ factors”. In love, “[t]here [is] (...) no avoiding the particular encounter; no avoiding reflexive risk”, by “thinking things through” (Christodoulidis, 1998:17-18).

Christodoulidis (as with mercy) tries to re-instate a separation between love and law by stressing that the love/law distinction resembles the difference between reductiveness and reflexivity. Whereas love operates within the reflexive horizon, law acts within the reductive one. Law reduces and love thinks things through. Christodoulidis characterises the reflexivity of love by saying that: “if [love] ceases to question itself it will stagnate and cancel itself out” (1998b:1). This enterprise is welcome but with caution since his characterisation of love sounds very romantic. He maintains that love is reflexive because love thinks things through, which sounds

appropriate for this thesis' own understanding of love as a capacity to see and embrace the Other in his own terms. Love entails a reflexive attitude which would be about thinking things through. Only the reflexive love offers the possibility of seeing the Divine in the Other.

The romantic contamination, difficult to be avoided in western culture, emerges when he says: "Love exists only in the 'not yet', ('Die Liebe existiert nur im noch nicht'), one can never have loved enough. Love lies in that promise of future fulfilment, its actual fulfilment signals its end. (...) [L]ove thrives on *change*, its existence overtime is dynamic, it requires 'die Formen zu wechseln und immer etwas Neues zu verzehren' " (Ibid., 4). This romantic contamination means that love entails uncertainty, many shifts and the horizon of reflexiveness makes community life unbearably insecure, thereby turning it into an anxious place, he says. Reflexiveness can make life in community impossible to be categorised into general and clear rules, since "what comes next", after seeing the beggar and identifying the Divine in him, is absolutely unpredictable. This scenario belongs to the realm of love where the Other dictates what comes next, and through love, the I happily surrenders. However, in order to see the Divine, the I has to think about it, or better, has to care about it. The anxiety is easily overcome in the process of seeing, listening, understanding and responding to the Other, to the Divine, through love. Nevertheless, if one lacks the courage or skills for that, the reduction and the security of law should be kept.

The reunion that love can promote has to happen within the justice, which is not law and can require for its realisation that one steps away from law, in order to care for and properly respond to the Other in his needs. Whereas law reduces through separation, love, aiming to re-connect, to re-conciliate, illuminates the promising tension between law and ethics, particular and universal, autonomy and heteronomy. That tension seeks resolution which requires one to overcome the romantic gap, mercy paradoxes and the separation between love and rules. Legal theory must acknowledge that its categories and structure can no longer give full account of what law has to respond to in order to be rescued from its moral crisis. Separation requires rules and separateness cannot be the measure of justice but of rules and law, which entraps justice and renders impossible for it to consider the uniqueness of Other's needs and truth. Togetherness requires understanding, willingness to see, to hear and care for the Other in his terms; it requires love. Thus, let us end with separation and let us be allowed to explore the path of togetherness, responsibility and care in relationships. "To be just means to recognize the other *as other* (...). Justice says: That is another person, who is other than I (...). Justice, therefore, 'consists in living one with another'; the just man has to deal with the other" (Pieper, 1942:28/30).



#### **IV-Is There Anything Beyond Law? The Feminist Effort in the Path of Care Toward Justice**

Law is not about particularities, the here-now, but about a pre-given system, about the past. Law does not look at individuals, or hears what they say, but answers their request according to the pre-established legal system and sends them away. Justice as a principle, which permeates individualities and their encounters, is not an object of cognition and therefore is likely to be called irrational (Cahn, 1949:11). Law is about principles and therefore it cannot address individual, concrete human beings. Justice shaped by law is blind, is impartial, impersonal and the justice, which can see, has been relegated to the confines of human intuition and dreams. Law imposes its own rationality which perverts particularities and their justice.

Law and justice is then a couple in a joyless marriage. Justice as a moral virtue cannot be achieved or even exercised within the limits of law. The fundamental reason for this state of affairs lies in the separation of law from morals which became clear through modernist rationality thereby intending to establish conditions for the organisation of social and political life and endowing the nation-state with legitimacy, necessary for the regulation of public and private life. The conditions for a legitimate legality were established by the separation between law and morals, which at the end of the day represents “the pre-eminence of ‘security’ over ‘justice’ ” (Gurvitch, 1973:239). This immense movement of humanity towards complex forms of living together recognises a crucial moment in this separation which is ethical, legal, human, ontological and epistemological. This movement is recognised as a revolution. After the second separation, the discussion analyses the third separation thesis in order to give contours to the question from which this section starts: “Is there anything beyond law?”

This section will discuss separation as a human phenomenon and its effects on law and justice problem in three subsections. The first will situate the suffering of the feminine in patriarchal culture as the suffering of justice in legal orders, by exposing briefly the ideas of Arrigo’s imaginative discourse. The second one discusses the feminist reading of the third separation thesis and its consequences in the context of legal theory, drawing from the work of West. The third will introduce a feminine project to respond to the challenge to legal theory offered by the imagined or imaginary space beyond law from where comes the call of the Other, by following the path of an ethic of care.

#### IV.1- The Feminine Problem as the “Sacrifice” of Justice<sup>39</sup>

One of the current formulations of a feminist account of law considers that law is male in the sense that it oppresses women and expresses only male interests and the male way of shaping life. Another feature of that understanding is that any attempt to overcome the chauvinist law has to happen through a well-founded claim on rights. If the positive law does not offer that possibility, politics is the alternative in order to secure an amendment of the law and thereby make it just in order to include women’s rights. This approach is called “publicist” for it sees women and their rationality only within social systems, where they try to conquer space in male culture through law and rights, i.e., with male tools. This is publicist since women have to go outside (away from herself) and alienate herself from her very nature, which, anyway, is hidden, unknown, unspeakable, prohibited and dangerous, in order to canvass for some attention and space to express their truth.

Notwithstanding, the feminist account of the feminine has discovered a private way to talk about differences, about new-old ways of seeing reality, of understanding moral issues and finally of resolving problems. That discourse could become very attractive for the whole realm of law, politics, science, education, church and so on, since they are all about resolving disputes. However, this approach becomes problematic since in reality, the male rationality is not honestly involved in resolving problems but in discovering them and dealing with them in order to justify positions and privileges. In this respect, Mackinnon’s words reverberate: “male academics have been able to afford to talk in ways that mean nothing, so also women (...)” (Mackinnon, 1987:2-3).

Another problem with a discourse that proclaims a new approach concerning moral issues is the pretension of moral unity that underpins the positive order of law, institutional life and their male nature. The unitary view of morality will show that the search for the feminine cannot fruitfully happen within a male framework. Furthermore, one has to bear in mind that empirical data would be rare since the feminine quality

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<sup>39</sup>Irigaray uses the term “sacrifice” in a very inspired way when she says that the founding sacrifice, which is in the grounds of the Judeo-Christian culture, is the sacrifice of the mother, a basic archetype of the suffering of the feminine, of women, and of justice to this thesis. The inspiration of Irigaray certainly recalls the Christian charge on Eve as the one responsible for the human expulsion from the Paradise. The Christian portrait of Virgin Mary, who gives birth to Jesus without a human normal sexual intercourse, shows the sacrifice of the feminine. Whitford sheds light on the consequences of this state of affairs. She points out that the feminine is not recognised in the cultural imaginary and it implies a serious lack of creative intercourse at the level of the cultural imaginary and the cultural symbolic. Moreover, its consequences can reach levels of unconsciousness of difficult control or patrol. It means that no matter how innovative or emancipatory a theory could be, it would be likely to repeat and perpetuate “the founding obliteration (...) [and] the gesture of silencing and repression” (In Schwab, 1998:168). Whitford also points out that Irigaray sees that the female has the especial function in the symbolic of representing that which is outside the discourse (Ibidem).

does not have any concrete manifestation in social life. Therefore, the so-called feminine quality, intuition and non-strictly-scientific recourses would be used in order to corroborate a possible project of a new rationality. Life would be re-interpreted by what Arrigo calls “experiential feminism”.

The feminism of difference aims at a sort of reconstitution of the issue of woman to respond to the ontological questions such as: “what is a woman?” “what is the feminine?”<sup>40</sup> Differences, multiples and particulars do not have a comfortable place in traditional legal synthaxis, neither in its principles of generality and universality nor in its practice of equating justice with the rule of law. Moreover, a full acknowledgement of the female voice would transform the practice of life and law in a phallogocentric culture. This transformation presents a perceptible danger on many levels. To whom could it be of any interest at all? The disconnection of men from women and of women from themselves, as psychological phenomena, have profound social and institutional effects. To facilitate a re-connection and a re-association would provoke a drastic revolution in the established way of thinking, of valuing facts, of weighting circumstances, of applying rules (whether it would be the case at all) for resolving problems and settling disputes. “The different voice is (...) a relational voice: a voice that insists on staying in connection and most centrally in connection with women, so that psychological separations which have long been justified in the name of autonomy, selfhood, and freedom no longer appear as the *sine qua non* of human development but as a human problem” (Gilligan, 1996:xii).

Separation is the problem and connection is the feminine response to moral issues. The feminine framework for moral questions and application of law in concrete cases brings different ways for us to live peacefully together. The female voice articulates a new paradigm to settle disputes and ease access to justice. In this respect, the female would look for keeping relationships and considering particularities within conflict situations, by engaging with care and responsibility rather than searching for a general rule to be applied in order to achieve objectivity and detachment.

The invisibility of the feminine in social, political and legal environments requires a search for it. Moreover, it is the search for justice as a feminine quality and it is an imaginative endeavour to imagine, to discover and ultimately to create another

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<sup>40</sup> The basic inquiry is about the possibility of an imagined institutionalised feminine justice since the current understanding is that law institutionalises things through universality not particularity, which excludes women since the feminine is more easily identified with the particular. In this sense, Irigaray had already diagnosed the exclusion of women from western philosophy, thought and society exactly under the argument that women do not follow the male rationality of universals. “When women attempt to speak in their own name, to speak as *women*, to speak their truth, as one might say, this is rejected in the name of truth; truth it is said, has a universal character, and women cannot speak for the universal” (Whitford, M., 1991:102). First of all, the immediate response is that everything in this project is meant to be, in principle, institutionalised insofar as law and its practice will be the way through which justice can be achieved, despite the modernist separation between law and justice.

way of life, of human conviviality, of justice, of dispute resolution that would promote connection instead of Urteil or Teilung, division, separation. The inspirations of the imaginative discourse and the experiential feminism formulated by Arrigo are tools to be analysed.<sup>41</sup>

#### IV.1.1- Arrigo's Imaginative Discourse and Experiential Feminism

Firstly, Arrigo's target is the patriarchal code of justice as law based on rights and informed by procedure. She appeals to "an uncultivated feminine discourse [based upon] experience, gatherings, consciousness-raising and interpersonal truth". She argues that in constituting "an unadulterated code of feminine justice (...) [one needs] a return to imaginative discourse" (Arrigo, 1992:13).

She proposes also a language, grammar or system of signs to inform the uncultivated feminine discourse and calls that "experiential feminism". This language warns women and justice about the traps of male and legal culture. This grammar also offers tools to overcome the deep cultural habits that drive us to resist the truth of findings such as those of the relational contract theory and Gilligan's work. Arrigo aims at a radical re-elaboration of justice and law, through de-bunking the patriarchal language of law. She claims that the face of the Other "holds salient meanings for the re-formulation of justice (...). (...) [T]he project of experiential feminism, in its re-conceptualization of juridical truth, entails a dismantling of prevailing phallogocentric symbols: the courtroom, the legal method, the reasonable man standard, burdens of proof, a demand for factual evidence, case precedent and so on" (Ibid., 23/25).

Arrigo denounces the invisibility of the feminine. "[T]he intrapsychic and intersubjective dimensions of feminine desire are denied affirmative codification in the domain of legal 'male speak'. (...) Put another way, the postmodern (...) feminist point of view is typically relegated to the realm of linguistic banality and, when applied to legal dogmatics or jurisprudence, intellectual absurdity. (...) [E]xperiential feminism identifies the imagination as the locus of establishing an *écriture féminine* (...) (an uncultivated discourse for and about women) (...)[; it] seeks to displace the metaphors of 'rules', 'facts', 'proofs', 'burdens', 'evidences', etc., as constituents of juridical (patriarchal) truth. (...) The work of experiential feminism in its rendering of a feminist jurisprudence is to de-center law and reconceptualize justice. This language working must be grounded in reflexive, concerned, imaginative discourse so that the feminine in

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<sup>41</sup> See Edward Murray (1986), as a source of inspiration for Arrigo and as a discourse on the power of imagination in moral reasoning. Murray opposes the imaginative thinking to the logical one, which does not supply the requirements of human condition, and identifies the former as the process "of individuation, of personal becoming", as the Einbildungskraft, or "the unity-building power within the person" (26/62).

consciousness can announce the unadulterated experiences of women” (Arrigo, 1995a:23/28/31-32). Experiential feminism, through imaginative discourse, finds the culture where the feminine quality could be imagined, made up, tried out and translated into reality. The object of a “relinguaging” is the rediscovering of myth, metaphor, symbol and their significance as elements of storytelling. Justice can be recovered exactly where the feminine is hidden.

The basic tenet of imaginative discourse in the realm of a male language is that culture grows out of the way in which people imagine their life and therefore life is lived in the way it has been already imagined. Thus, insofar as the male culture is the way for male life to be created and lived, a supposed female culture can explore the same process which consists of getting distance from the current imagination, by starting to challenge it, even repudiate it. Feminine discourse yet must create another imagined life. In this respect, the imaginative discourse could be understood as an ontological hermeneutics which consists of a method for “recounting the experience [as] an authentic movement toward ‘transcending what has been given to us’ (...)” as product of imagination, in order to imagine and construct something not only better than what has been given to us but something essentially different. The imaginative discourse, in that sense, entails necessarily a creative process to the extent that something existential can be created, on the one hand. On the other, it brings about metaphors, myths, symbols which “resituate our experiences in ambiguity, multiplicity, uncertainty, and contradiction. As Murray concludes, ‘[it is] a lie that tells the truth, a confusion that clarifies, a detour that puts one directly on the road, a blindness that enables one to see all the better’ ” (In Arrigo, 1995a:100)<sup>42</sup>.

A classical example of how a lie can reveal the truth, in the story of Little Red Riding Hood, which is about a girl who decides to visit her grandmother and gets entrapped by the bad wolf. He swallows the girl in her grandmother’s house where he had swallowed the old woman before.

Many symbols in this story unveil the concealed trappings of the phallogocentric reality. Firstly, the red cap symbolises menstruation and indicates that the isolation, the silence and the trap of the feminine occur by the time they are bound to acquire sexual maturity.<sup>43</sup> The girl who visits the grandmother, the old woman; it shows the way knowledge is transferred: from the old to the new, especially among women. That visit exemplifies what happens to girls and their femininity when they have to cross the forest, to grow and to become women. The walk through a forest symbolises, as well,

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<sup>42</sup> There are plenty of images in fairy-tales about silenced women: Penelope, Philomena (Rowe, 1986:57) and Antigone to mention the Greek ones. The *Spinnerinnen* in the German tradition (Bottigheimer, 1986:118). And a collection in the Grimm’s fairy-tales like, to quote one, the Sleeping Beauty.

<sup>43</sup> One could say that the trap occurs when a girl becomes a woman and can exercise her three traditional knowledges: of sexual passion, of healing, and of the wisdom to spin tales (Rowe, 1986:59).

the process of growing which ends in the belly of the bad wolf where the old granny is already and toward where Little Red Cap has driven herself. The process of walking through the forest means the process of growing through inner and imaginative realities. Traditionally, the forest in fairy tales represents the psyche. Male society is represented by the wolf who meaningfully does not kill the grandmother nor the girl but only swallows them; the feminine entrapped by the male rationality is not dead, but painfully hidden and colonised. In this sense, the feminine can be recovered and it will be by a chaser, who knows the grandmother, the forest and the bad wolf. Looking at the wolf sleeping, the chaser guesses what had happened to the old woman and he opens the wolf's belly to find the granny and her granddaughter. The feminine is not in the forest nor in her own house but in the belly of the wolf which means that the feminine is not in the social concrete life nor even at home, but has been swallowed by the masculine in the culture. The recovery of the feminine has to be done nonetheless by somebody who knows the culture, the feminine, the masculine and above all the home of the feminine. Besides, he is the one who chases, enquires, wonders and imagines activities very much connected with the female quality.

Another interesting story that shows the use of similar images is Antigone and her fight with Creon, understood as a fight between male and female legal and moral reasonings, a fight between law and justice. It is suffice to recall that Creon exercises legal justice on Antigone's brother (an enemy of the polis) and prohibits his burial. Antigone disobeys his command, thereby answering the higher call to justice, and buries her bother. Creon threatens her with entombing her alive. It is similar to the image of the grandmother and the granddaughter alive in the belly of the wolf. They are not dead but if the chaser takes too long to rescue them, they will not survive. The same situation exists concerning justice in the belly of law. The male culture entombed the feminine quality in the kitchen, where it is alive but without expression. When it has to say something, it does so through the code of the living room where the patriarch rules. Justice, in the same way, is alive between the lines of law, suffocated, silent, without any expression but the one law permits.

This story is an example of an imaginative representation of the situation of the feminine vis-à-vis the male culture and, above all, the possibility of the feminine being rescued. Besides, telling a tale about women or for women can be a valuable way to break imposed silences (Rowe, 1986:53). It can be a way of delineating the nature of the feminine and a model for justice, which is also in the belly of the bad wolf, to be concretised. This model of justice, as living experience and the product of the experimental feminism, "applauds personal diversity, esteems cultural heterogeneity, experiences situations contextually, acknowledges individual/collective competency and fallibility, encourages communal participation, and invites imaginative discourse. In

short, the juridical transformation constituted by experiential feminism is a spiritual revalidation of one's freedom to imagine the world in all its possibilities –an invitation to touch the transcendent [and the very core of human quality] in all of us” (Ibid. 107). The feminine method as the method of justice requires imagination, an imaginative practical reasoning in the endeavours of weaving, spinning and fantasising a different way of peace making, “of stretching (...) imagination to identify and understand the perspectives of others” (Bartlett, 1990:390). The feminine quality is the perfect conditions to allow this kind of justice to be potentialised, experienced, transformed, constructed, pursued, created and recreated.

Imaginative discourse furnishes empathic legal attitudes, while offering a language of metaphor, symbol and myth, through which spoken narratives are transformed into lived action (Arrigo, 1992:26). “Experiential feminism is the process whereby one authors one's life. (...) [It] is an invitation to us all to unpack the meanings of our community's metaphors, symbols, and myths. Moreover, it is the project of reconstituting, through our imagination, those enchanting images that more intimately reveal the feminine in consciousness, and to incorporate these significations into the culture of one's community through storytelling and ritual. This process leads to a reconceptualized and more authentic understanding of justice (...). [It] readies the way for styles of existence that are as different from one another as possible. These styles, through imagination, bring with them multiple meanings (...) and a variety of other experiences that defy the singularity of law's normalizing claim to truth” (Ibid., 103-104). Experiential feminism is the process whereby one can visualise imaginatively the suffering of the Other in the making or promotion of justice. One can imagine that law could “moderate, among all men and women, links of association (...) organized around more or less physical, affective or spiritual feelings ... A structure, or structures of identification, of spiritualization, of links of relationships and communication between living persons” (Irigaray in Schwab, 1996:175).

This discussion demands a closer look at the feminist endeavour to overcome separation as an ethical obligation in order to restore morals and justice as legal possibilities. Moreover, separation is another name for the silence of the feminine and of justice imposed by their entombment, by the enclosure in the woods, in a high tower, in a glass coffin or in the belly of the bad wolf.

#### **IV.2- The Third Separation Thesis and its Meaning for Legal Theory: A Feminist Path**

West (1988) identifies the separation thesis as the source of liberal political thought, which organises the great majority of western societies. The separation thesis to which West refers is formulated as the realisation of a single human being that is

alone, different and separated from other human beings. She believes that this separation is the source of all the splits with which we try to deal in life and in theory. The history of separation between self and Other is very similar to the history of “modernity’s (de)linking of legality and morality” (Douzinas&Warrington, 1994a:137), and to the exclusion of the feminine from the phallogocentric culture. The history of the withdrawal of the feminine from the social scene explains the separation thesis as a masculine strategy of the culture which informs the dominant male pattern of social, legal and moral organisation in western societies.

West connects the social realisation of the separation thesis with the liberal project through which law guarantees freedom. Human organisation, as separation is installed, cannot dispense with law, rules, and principles. Separation denies and silences women’s experiences whereas coherence of law confirms male dominance (Roach, 1992). Separation promises freedom, but entails vulnerability in a feminine perspective. However, from a male perspective isolation is condition of security, argues Gilligan. Moreover, it demands rules, law and the rule of law. And law as separated reflects the fundamental separation between self and Other and cannot reconcile them. On the contrary, it deepens the gap in the name of autonomy, purity of morality, individuation, privacy, etc. Law saves the self from the dangers of the encounter, of the Other, of the encounter with the Other. Law regulates the separation by imposing itself as a set of rules necessary for the re-connection, always desired but never achieved.

Feminist theories characterise the feminine way as the way toward connection, intimacy and relationship when working on the separation thesis. This diagnosis is celebrated as a positive feature of the feminine quality by the so-called cultural feminist whereas the radical feminists see in this characterisation the source of women’s subjugation and powerlessness. Cultural feminism is the branch chosen by this thesis to bridge the modernist divides and separation. Its criticism against the male regime of the Rule of Law establishes a way toward a different conceptualisation of law and justice.

West takes both branches of feminist legal theory and formulates what she calls “reconstructive jurisprudence” which is about unveiling “how women –that is, people who value intimacy, fear separation, dread invasion, and crave individuation- have fared under a legal system which fails to value intimacy, fails to protect against separation, refuses to define invasion as a harm, and refuses to acknowledge the aspirations of women for individuation and physical privacy” (West, 1988:61). Feminist legal thought has the challenge of debunking a legal system which destroys intimacy for fear of it, promotes separation as the condition for the stability of the system, silences the feminine voice, the voice of justice, the call of the Other.

Reconstructive jurisprudence shows “what it means for the Rule of Law to exclude women and women’s values” (Ibid., 64). Moreover, the incompatibility



between women's values and the Rule of Law situates exactly around the separation thesis because the defence of legal values by the male modernist legal regime occurs against intimacy and connectedness which entail the dislocation of the autonomous subject in favour of a more relational and contextual approach especially in dispute resolution. Security and certainty as values of the Rule of Law will not facilitate a possible harmonisation with women's values as intimacy, connectedness, love and care for the Other.

The goal of reconstructive feminist jurisprudence, says West, "is to render feminist reform rational. We must change the fact that, from a mainstream point of view, arguments for feminist legal reform efforts are (or appear to be) invariably irrational. The moral questions feminist reforms pose are always incommensurable with dominant moral and legal categories. Let me put it this way: given present moral categories, women's issues are crazy issues" (Ibid., 68-69). However, the feminist effort should be, especially in legal theory, exactly because of its craziness, which is named irrational. This irrationality is a feature of the feminine discomfort before the phallogocentric rationality in force.

In the feminine path toward rescuing justice, the variety of craziness amounts to a great diversity, among which one could mention the effort to reach a more "individualised justice" through the practice of legal storytelling. "[T]elling stories can move us to care", which approximates legal practice within a feminine morality of care and consequently to a morality which could make law a more appropriate tool for justice (Massaro, 1989:2105).

Moreover, this movement represents a genuine feminist craziness or "irrationality", expressed as a rebellion against rules, universal categories, abstraction and in favour of a more contextual, caring and empathic approach toward the legal-human. Fundamental to any feminist theory seems to be the development of something which reflects, respects, reproduces the feminine experience and is based upon it. Moreover, the craziness for the Other, for relationships, for justice, which is not law, is connected to the feminine and its craziness.

"Empathy", in Henderson's words, entails: "1. capacity to perceive others as having one's own goals, interests and affects; 2. imaginative experience of the situation of another; and 3. the distress response that accompanies this experiencing –which may (but not must) lead to action to ease the pain of another" (In *ibid.*, 2101). "[T]he debt to the other cannot be answered by a rational law, by a ruler's decree" (Hirvoneen, 1997:243). Empathy asks for craziness, disruptions, emotions, irrationality, illogicality, ethical sensibility, the darkness of the culture or of the polis, which is the feminine itself and also the place where the feminine was entombed, confined, tamed, repressed, made unable and anaemic (Ibid., 244).

West recalls the feminine ethical sensibility, which she nominates “intersubjective sensitivity to the needs of others” (In Minda, 1995:133). That sensitivity is ethical and based upon feminine experiences with nurturance.<sup>44</sup>

Notwithstanding, the path of the feminist craziness in law has its problems. “Law (...) cannot empathize with everyone equally” (Ibid., 109), since law is about exclusion, rules, and above all separation. This craziness of feminine togetherness is irrational for human beings educated in separation. Law as a human institution could not be different, and it would be deemed “unempathetic” since separation and exclusion are its main features. Empathy and legal storytelling, as feminist craziness, find themselves in a very difficult situation before the modernist organisation of legal institutions based upon classical principles of equality, impartiality and universality. The aporias that inform the substance of justice in Derrida’s analysis are consequences of the contested modernist understanding of justice as proceedings of law well perceived by Derrida but badly equated in the characterisation of justice. Therefore, despite the points of similarity between post-modernism and feminist craziness, especially the fight against universality, grand-theory, and the abstract idea of justice, this thesis pushes feminism further to overcome conformity to a certain post-modernism expressed by the ideas of Levinas and Derrida and, above all, to recover an erased form of thought and practice of life (Minda, 1995:248). Moreover, this recovery demands a radical change in lawyers’ law, profoundly marked by the modernist male way of thinking and problem-resolution especially moral ones. This change is ancillary to the reality that lawyers’ law is more than technicality; it expresses indeed a way of thinking, of resolving problems of life, a quality of soul.<sup>45</sup>

The ethics of alterity, through the eyes of a feminist jurisprudence, paints law’s impossibilities and limitations, named complexity deficit, with even darker colours. The discussions on mercy and love in law are very instructive to corroborate the understanding that law does not offer conditions for justice to happen in terms of merciful or loving judgements, and to indicate the path through which justice, which is not law, can be achieved in dispute resolution.

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<sup>44</sup> “Feminists assert that ‘women’ know that there is a nonlingual domestic world of human needs that compel fulfillment –‘a world of bodies, of babies, of babies sucking milk, of babies’ shit, of babies’ sleeplessness, of children, of children’s needs, of children’s appetite- lurking beneath’ the objective world of men” (Minda, 1995:133). The quotation sounds very round and fulfilling. However, one anxiety persists: whether and to where this understanding can lead law? The craziness in feminism is hence a function of its defence of ahistorical functionalist categories as reproduction, mothering and nurturance as model or inspiration for theoretical criticism and social practices as well. The craziness becomes acute when confronted with male modernist theories and practices which “exclude from citizenship persons identified with the body and feeling rather than with rationality” (Smiley, 1991:1580/85). In the same vein, the craziness dares to imagine a non-contractual society guided by the paradigm of mother and children (Held, 1987:114). The morality claimed by the feminist craziness is the one for “people in love”.

<sup>45</sup> “[L]earning to think like a lawyer can affect one’s soul” (Powers Jr., 1991:993).

That path cannot be forged in the limits of a legal theory that is based upon the separation from the Other, the separation of law from morality, of law from justice and that privileges security at the expense of justice. Quite the contrary, that path will require a turn in the considerations of morality, especially the ones about moral development.

Thus, what follows intends to introduce the theme of the next chapter, with a view to consolidate the understanding of separation as problem, while indicating the path of care as the path of the excarnation of justice from law.

### **IV.3- The Path of Care: Healing Separation Toward Justice**

Gilligan's findings articulate a female moral reasoning, differently from the male one defined by Kohlberg's moral theory. Her work identifies a counter-ethic called the feminine morality, which offers an alternative for legal dispute resolution to the reductive approach of law and its individualist and separatist mode of reasoning. "At first glance the usefulness of the concept of altruism in describing the legal system is highly problematic. A very common view alike in the lay world and within the legal profession is that law is unequivocally the domain of individualism (...). Private legal justice supposedly consists in the respect for rights, never in the performance of altruistic duty. The state acts through private law only to protect rights, not to enforce morality" (Kennedy, 1976:1718-19). Relational contract law claims that rights and legalistic arguments are not moral; not decent. The morality of law is law and another morality, a feminine one, expressed by care for Others and responsibility in relationship, may indicate how it could make sense in law. Can law impose altruism, care, love, mercy or justice in the terms of the Other, since law is about applying rules and not morality? To what extent is this question a real one? Can law offer an opportunity for real justice to be achieved, justice for the Other in his own terms, a sort of justice informed by a feminine ethics, the ethics of care? Or, all that is resolved by the unwarranted assumption of being love an unenforceable claim?

The path of excarnation requires a morality that challenges any morality of principles, rules and norms, which informs law, and also seems to require a model able to dismantle the adversarial background of adjudication. It turns toward a conception of justice as a construction, a conquest in order to overcome "a marked orientation toward the past" in the adjudicative practices and to insert the search for justice in the here-now of given particularities (In Cotterrell, 1992:211). Above all, the morality required must establish conditions to overcome the unenforceability of love as the only moral value able to respond to the Other, as holder of particularities, in his own terms.

Adjudication as a path to achieve justice will not do because the judicial environment of rules or standards application will reduce substantive issues in order to equate them with finished-stories, thereby violating particularities. These stories are to be told and understood with legal universal pre-established concepts, ideas and paradigms. It means that no substantive justice can disregard the form, no matter legally or personally established, in an adjudicative model of dispensing justice. In this sense, legal discussions around formal and substantive justice as a framework to equate law and justice do not help much. A single example can explain how substantive justice relies upon the anchorage of formal parameters in order to be adjudicated.

Based on the assumption that tenants are the weakest parties in rent contracts, Brazilian law adopted rules to regulate these contractual relationships to protect tenants. Substantive justice was then achieved by looking at the particularity of the parties involved in contractual relationships at the expense of a more formalistic principle of equality. The law established privileges in favour of one of the sides of contractual relationships. Nevertheless, the substantive justice needed the rule to establish what kind of protection would be appropriate. In the Brazilian example, tenants were deemed to be weaker than landlords and the law determined the privileges they are entitled to in order to balance the substantive difference vis-à-vis the position of a landlord. However, the economic reality of the country with high interests and great opportunities for very attractive profitable financial “investments”, caused various families, especially rich people, to sell their homes to invest the money in financial markets and to rent new places to live. Thus, in settling disputes, judges, following substantive justice to protect the weaker party in relationships of rent, have to follow rules that determined which of the parties was the weakest one. If the judge dared to look at the face of the parties to discover their truth, thereby leaving the rules aside, she would find herself in a most strange state of despondency, enforcing substantive principles and getting it wrong by protecting those who do not need it at expense of those who do. By applying the substantive rule, the protection was deferred to rich and powerful tenants, rich people with lots of money invested in financial markets at the expense of landlords, in this case, people that were renting out their only property, going to live in simpler spaces, in order to make some extra money to afford their basic living. Then, the substantive justice, anchored to formal rules or principles, can be flawed, ineffective and simply unjust.

Therefore, substantive and formal justice cannot be understood, in the limits of this thesis, as two opposite sorts of justices, but two different laws, two different modes of adjudication. The practice of adjudication, which is based upon the adversarial mode of finding truth to apply rules and/or standards, has to deal with challenges like the antithetical character of procedures and routines to truth. Truth, thus, is antithetical to

peace, and law, by its turn, antithetical to life, particulars, encounters, and relationships. If one has lawyers, judges, rules, and law in between parties, how can one express his own truth and justice? The path of incarnation of justice by care and responsibility in relationship will be another way to engender justice, most probably by suspending rules, legalistic arguments and lawyer's law and enlarge law to embrace love as enforceable. The willingness to listen and talk toward an understanding which can encompass or take into account everyone's needs may emerge.

Since community links are progressively removed from today's technological market society, to awaken a different morality able to strengthen human relationships, even the ones the market can provide become urgent. Furthermore, at the end of the day, the market and its individualism it engenders are not points on which one has to concentrate one's attack in order to overcome the moral crisis of law. Rather, through market's aspirations, one can transform its practices and forge a different morality, a different way to equate diversity, a different possibility for dispute resolution in a more nourishing human environment. Care, in a market environment, works not for individual rights but for individuation of particular situations and subjects, not for bearers of rights but for Other's opportunity to express his own justice.

In "Caring for Justice" (1997), West argues for the centrality of the notion of care for legal justice. Like Minow, she intends to improve judicial adjudication and argues for the integration of care in judicial practice of justice dispensation. She builds her arguments on the path breaking work of Carol Gilligan but does not acknowledge the aporias of legal justice as a manifestation of male morality. She aims at a synthesis of care and rights but her argument loses force because it does not dissect the suffering of justice in the framework of the morality of rights. West works broadly to synthesise both perspectives without success and loses sight of the difficulties of care as a female value silenced in male politics of equality, impartiality, coherence, security, certainty and rule of law.<sup>46</sup>

The path of care is not itself a synthesis that equates legality, or a morality of rights and rules, with the ethics of alterity, but is an alternative to the male rationality that pervades law. A different voice can voice the Other in his own terms and makes love perfectly enforceable. The conciliation or synthesis between law and justice does not happen in a compromise arranged in the modernist gap, where emotion and reason fight without resolution. The path of care should avoid the gap not by calling reason that which is emotion but by acknowledging the emotion as a valid way to be in life, tackle problems, and resolve disputes in a different way, through a different voice.

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<sup>46</sup> West's inspiration about the separation thesis does not lead to a very emancipatory formulation in her "Caring for Justice" (1997). In this sense, it appears that she fails to respond to Mary Frug's criterion which demands that a feminist analysis must change one's consciousness (1992:53).

The ethics of care has a special aim to simplify the sophistication of male rationality especially around law or in legal theory because it understands that the more sophisticated the juridical thinking the more serious becomes the problem of access to justice, since justice is bound to collapse into a discussion about legal proceedings and legal adjudication (Auerbach, 1983:140). The secular indeterminacy of justice is not a challenge for judges, lawyers and litigants to undertake a shared understanding of justice in courtrooms, where the rule of law, understood as justice, reduces everything to roles and rules, silences the Other's justice, isolates disputants and destroys relationships. Legal theory cannot resolve that in its own premises and procedures. The path of care and responsibility in relationships promises a resolution that preserves relationships; it promises a moment of moral sanity in disputes resolution by challenging the individualist mode of moral and legal reasoning, undertaken by isolated adjudicators and disputants and autonomous bearers of rights, who represent the status quo.

Through the path of care in dispute resolution, one would be able to perceive that, in the end, justice is a task that belongs to each one particularly, singularly and personally. "Arendt put it in the following way: 'in the last analysis...our decisions about right and wrong depend upon our choice of company, with whom we wish to spend our lives.' (...) In sum, it is not a set of universal rules that makes justice possible, but a way of life that makes it possible for us to want to be just. It is for this reason that I stress personal justice" (Jackson, 1986:24). The path of care is about personal justice; is about weaving a net of ethical standpoints in favour of the Other in relationships.

The task of rescuing justice from the traps of law is of paramount importance and beyond the possibilities of legal theory alone. In addition, the debate in the arena of moral development theory sounds interesting and especially the feminist branch of that debate needs to be explored and articulated within a discussion about legal justice criticised for its faith in "ideals of neutrality and objectivity unacceptably indifferent to the concrete specifics of lived reality" (In Christodoulidis, 1995:186).

Axel Honneth (1995) helpfully unveils the radical challenge offered to moral theories elaborated in the modernist and Kantian tradition, such as Habermas' discourse ethics<sup>47</sup> or also Kohlberg's moral development theory, posed by "the asymmetrical experience of obligation, rooted in a phenomenology of care" (Critchley, 1999: 267).

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<sup>47</sup> The author is well aware of Habermas' efforts to overcome Kant's individualist moral theory, by trying to elaborate the social aspects of morals as shared forms of life. The author argues that Habermas endeavours to revise Kant and bases his conception of justice upon a premise which includes equality, reciprocity and symmetry as principles that inform "a procedure for moral argumentation (...) to resolve conflicts between rival moral claims." Honneth argues further that the framework of discourse ethics needs to be complemented by the ethics of care (Critchley, 1999: 295).

This supports this thesis about the important consequences of the path of care to the modernist ways of law.

Honneth shows how asymmetry, particularity and concrete, non-totalisable relation to the Other, as post-modernist values inscribed in Levinas' ethical conception and in Derrida's recent works, fit well into the ethics of care. This thesis argues is that relationship, as the basic conception of Gilligan's ethics of care, is needed in Levinas' ethics especially regarding practices of law.

The important point in the ethics of care is the asymmetrical character of the moral standpoint of any relationship with the Other, while challenging, in a radical way, the principles of equality and universality common to all theories bred in the Kantian tradition.

Gilligan's ethics of care is very much against the universalism of modernist and Kantian frameworks and it has surely credentials to embrace the post-modernist ethical turn through using moral theory as a medium of post-modern criticism (Honneth, 1995:289). It argues for the centrality of the unforgettable particularity of concrete persons for the making of justice, thereby challenging equality as a valid principle for the achievement of justice, or justice as care, and proposing that moral responsibility for the concrete Other is essentially asymmetrical. Derrida draws a line between justice as "the infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotropic (...) [and] justice as law or right, legitimacy or legality, stabilizable and statutory, calculable, a system of regulated and coded prescriptions" (Derrida, 1992:310). Care, as an everlasting moral obligation, refuses justice as law in order to make a claim for justice as asymmetry. Care challenges legal theories to respond to the call of the Other, to look at the suffering in the face of the Other, if law is to overcome its moral decay. Again it is appropriate to posit that the master's tool is not of use here and one must to look beyond the limits of legal theory for help.

The path of care will respond to the concrete Other, left outside of the legal discourse, of legal proceedings, isolated and unconsidered in his aspiration of achieving justice in his own terms.

## **Conclusion**

This chapter challenged the modernist rationality, which has colonised justice in the realm of law, based on the morality and politics of separation. In that sense, this thesis disrespects the division of labour which establishes that lawyers are supposed only to discuss the rule of law and law as a pre-given set of rules used in courts and/or administrative agencies. The enigmas of justice are left for other fields of knowledge. In the legal profession one talks about law, and when justice is the subject, one refers to it

as what law says, or the ability of following rules or applying them impartially and equally. Justice in the kingdom of law, in legal sites/syntaxes, is law itself. However, this chapter has also looked through the veils of law, lifted them up to see what else one can do with law and still beyond it toward the human condition and human conviviality, and has found the very feminine quality of justice.

Can law have a feminine face and be the organising principle of our everyday life? If so, which face would it be?

The moral crisis of law, as a product of the positivist separation thesis, demands a return to morality and a practice of “re-imagining moral theory and making justice the proper and main concern of legal action” (Douzinas&Warrington, 1994a:3-5). Law, as exclusively understood as rules, is ethically impoverished and the moral crisis of law demands the re-inscription of morality in law. Which morality? Which ethic? The second chapter answers these questions, thereby suggesting a feminine framework for them.



## CHAPTER II

### Gilligan's Paradigmatic Revolution-An Inspiration for the Life of Law

The present chapter analyses Gilligan's findings as one way toward reconciliation between law and justice after having established separation as the source of the moral crisis of law which was defined as the conflict between law and justice. It aims to unveil a new paradigm to compound the praxis of justice as a feminine virtue<sup>48</sup>.

The main hypothesis is: the moral crisis of law is the consequence of the pervasive male pattern of rationality and social organisation based on separation. The separation of law from justice and law from morals, while reflecting a kind of structural issue, has a special effect on the relationship between law and justice in the practice of law.<sup>49</sup> The culture of separation provokes suppression, domination, and the silencing of a voice that speaks differently.

This chapter might face some terminology problems when discussing Gilligan's ideas. She claims a radical difference between "the ethics of justice" or "morality of rights" and "the ethics of care". This thesis will try to identify justice, which has to be freed from the traps of law, with Gilligan's ethics of care. The ethics of justice, described by Gilligan, is characterised as the foundation of the normal practices of law and as a morality of rights and rules. This terminology unveils the modernist non-problematic relationship between justice and law. Since it seems unwise to change Gilligan's categories, it is better to use "morality of rights" in opposition to "morality of care". "Justice" will designate the synthesis between the two moralities expressed in a

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<sup>48</sup> Gilligan's work on women's moral theory has had immense influence and repercussions, in both academic and lay environments. She was named Ms. Magazine's "Woman of the Year" in 1984 and over 1100 citations of her work were marked in the *Social Citation Index and Science Citation Index* from 1986 until early in 1991 (Tronto, 1993:77). Currently, however, the academic value of the work seems to be diminishing. For instance, Gilligan's most important work, *In a Different Voice: Psychological Theory and Women's Development* is classified in Thin's Bookshop as "Popular Psychology". Concerning the moral discussion, her work, some critics say, does not belong to the centrality of the issue, they regard her discussion as being placed in the fringes of the official conversation on the matter. Notwithstanding, one must acknowledge that revolution is a movement promoted by the margins toward disrupting the centre. Moreover, Hooks claims that the marginality of the feminine furnishes women with an opportunity to develop a very peculiar way of seeing reality and also of acting on it through its sense of wholeness of the privilege sight from the outside inwards (In Michelman, 1988:1529).

<sup>49</sup> See Kristeva's words about the separation of the sexes and its Christian cultural background and legal structure (1986:141).

feminine practice of law able to guarantee effective access to a dispute settlement scheme based on care.

The aim of this second chapter is to forge a solution for the problem of separation diagnosed previously. The paradigmatic shift that Gilligan's findings entail remedies the limitations of the ethics of alterity and offers a necessary articulation to create an institutional practice of justice as care.

At present, the feminine quality has no concrete social representation. It is placed firmly as a lesser form of male. Benhabib says: "Woman is simply what men are not (...). She is simply what he happens not to be. Her identity is defined by a lack – the lack of autonomy, the lack of independence, the lack of the phallus. (...) It is the very constitution of the sphere of the discourse which bans the female from history to the realm of nature, from light of the public to the interior of the household, from the civilizing effect of culture to the repetitious burden of nurture and reproduction" (1994:85-86).

MacKinnon's words are magisterial: "Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines the family, their inability to get along with each other –their wars and their rulership - define history, their image defines god, and their genitals define sex" (1987:36).

Women's reclamation project reclaims not only rights for women as an excluded social category, but also feminine or womanly virtues in order to blur the contours, to stress the tension between male and female, private and public, morals and law, justice and law and to propose a much needed reconciliation.

Gilligan's findings illuminate the following question: which is the female power? What is a feminine quality? What is the different rationality, which is behind justice which is not law? How would a feminine quality exercise power?

## **I- Gilligan: a Response to Lawrence Kohlberg**

Gilligan elaborated her theory when working with Kohlberg upon moral development, which developed further Piaget's theory of cognitive moral development<sup>50</sup>.

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<sup>50</sup> See Jackson (1995) for details on Piaget's theory.

## **I.1- Kohlberg's Stages of "Normal" Moral Development**

Kohlberg identified six stages of moral development divided in three levels which correspond in broad terms to Piaget's stages. Each level is divided by two stages. The first level is called pre-conventional, the second conventional and the third post-conventional. In the pre-conventional level, the rules are external to the subject and the behaviour is commanded by rules and by means of reward or punishment. The second level is characterised by socially shared rules, which are applied by an authority. In the post-conventional level, the social rules are different from personal standards of moral behaviour. The acceptance of social rules emerges from an understanding of general principles and universal ethics which support rules and are respected by rules, not from a blind obedience to authority nor any application of the reward/punish principle.

Each of the three levels is sub-divided into two stages, hierarchically organised. In the first stage of the first level, the egocentrism, as the site of moral behaviour, determines that rules are to be obeyed because of the consequences for the self, without considering Others. In the second stage, the self acknowledges Others in terms of personal and concrete individualistic reciprocity; rules are observed only when the immediate interest of the self is involved.

The first stage of the conventional level is characterised by the Golden Rule which prescribes that one should treat Others as one would like to be treated. The moral behaviour is then shaped by Others' appreciation. In the second stage, the moral behaviour is seen in a wider perspective through which the self relates his behaviour with the maintenance of the whole social system within which he lives. Rules are observed not because of fear, neither because of respect to authority, nor by appreciation of Others, but in name of the maintenance of the whole system which benefits the self. Therefore, a notion of duty is predominant.

The contractual legalistic orientation colours the first stage of the post-conventional level; rights of individuals and not duties owed to society are the focus of the moral development. The important point in that stage is that the rights of individuals are abstractly considered. They are autonomous and thus independent of any previous social rule or agreement. Their concretisation in social relationship requires rational effort from subjects interested in formulating specific rules and agreement about those abstract rights. The last stage is based upon a universal-ethical principle orientation. In the sixth stage, the moral agent is absolutely autonomous and he rules his moral action by a set of ethical principles self-chosen and in accordance with his own particular consciousness which is not to be shaped by any social rule or contingent circumstance. It results in a very abstract conception of morality. The moral self then has evolved from

acting out of fear of punishment to the final stage where he acts from an abstract set of moral principles.

Kohlberg's most important study for this thesis is about a sample of 84 boys aged 10,13 and 16. He studied them in six different times over a period of 20 years. Girls were not included in the study in order to avoid a variable which would require "doubling sample" (Kohlberg, 1981:294-295). The boys were asked to resolve moral dilemmas such as the one of Heinz, whose wife is dying. A druggist has the drug, which could save her life. However, the drug was too expensive and Heinz could not afford it. The dilemma is whether Heinz should steal the drug. Boys' answers were classified in order to identify the moral development stage to which the answer belonged and to confirm the sequence of development. The most advanced stage in the moral development would be characterised by that life takes precedence over property, concluding that Heinz should steal the drug to save a human life.

Gilligan reacts to Kohlberg's research on moral development theory which considered only boys. She formulates her own women's moral development theory as a response to an entire tradition of chauvinism in psychology, starting with Freud, and in moral philosophy alike, where women are understood as morally deficient and philosophically disabled.

In Kohlberg's moral scale, only a few achieve full development: a great majority seem to stop in the conventional stage. Women barely reach stage three, which is about "maintaining bonds of trust with others". Level four is reached by women who manage to have experience with power and responsibility in secondary social institutions. Conformists reside in stage three, and stage four is the place for contractualists (Kerber, 1986:311). On that point, Gilligan pins her women's moral development theory, thereby acknowledging "a dissonance between psychological theory and women's experience" (Ibid., 325). Nevertheless, Gilligan's main purpose is not to show a gender difference in Kohlberg's moral theory or even in general but to articulate two different moral voices which eventually can be gendered. She concludes that "the study of women's moral thinking changes the definition of the moral domain" (Ibid., 328) and requires "a different strategy of research" (Gilligan, 1983:40).

Gilligan emerges from an impartialist tradition in moral philosophy, which informs Kohlberg's theory of "rational principles, impartiality, universality and generality on rules and codes of ethics" (Blum, 1994:3). Her reaction, following the inspiration of Noddings and Murdoch, points to another moral language, which evokes conceptions related to the female agency of "care, empathy, compassion, emotional understanding, responsiveness to needs (...) [and] loving attention to particular individuals" (Ibid., 5/13).

## I.2- Gilligan's Stages of a Different Moral Development

Following Kohlberg's stages, she also establishes three levels of development, calling them pre-conventional, conventional and post-conventional, and dividing each of them into two stages.

In the pre-conventional level, stage one is characterised by self-survival. In the transitional stage two, the self-survival is understood as selfish and it represents a step toward the construction of responsibility. The conventional level is the realm of the Other, the goodness and responsibility. In stage three, the central concern is to please and care for Others and equate it with self-sacrifice. Stage four represents a transitional period where selflessness is confronted with a necessity for truth in relationships. The post-conventional level represents the morality of non-violence and the achievement of truth. In the initial stage, the relationships bring about the real opportunity for the subject to equate care for Others and for self, in order to dissipate the tension generated in the earlier stage. The last stage is characterised by care as the self-chosen principle heading to the condemnation of hurting Others (Kittay&Meyers, 1987:7/8).

Gilligan and Murphy articulate another stage in the postconventional level of moral reasoning called postconventional contextual (PCC) which corresponds to Kohlberg's postconventional formal stage (PCF). Whereas the latter is reached by bright subjects in Kohlberg's theory, the former is a sign of female moral maturity, while in Kohlberg's scale it is interpreted as regression. The PCC level is characterised by "it depends" whereby one seeks to include as many variables as possible in one reasoning, adapting it to the peculiarities of the concrete situation.

Gilligan, working basically with women, elaborates two different moralities, one of rights, based on rules, fairness, equality, and reciprocity and a second one of care, based on the concern not to hurt, on responsibility and relationships. The former is considered as male and the latter female.

Kohlberg replies by placing Gilligan's findings in the margins of the moral theory field. He argues that his theory defends a moral standpoint which involves features such as impartiality, universality, reversibility and prescriptively and moral judgement as "metaethical assumptions of universalism (against relativism), cognitivism (against emotivism), and prescriptivism (against naturalistic descriptivism)" (Kohlberg, 1982:524/527).

Gilligan, however, understands the moral subject as profoundly particularised and situated in concrete relationships where the self takes into account Others' needs and his own, and is informed by care, love, compassion and responsibility. Kohlberg's moral self is autonomous in a Kantian sense and legislates rationally, in loneliness, his own principles and abstract rules which he obeys from a inner feeling of the

righteousness of such an action, responding in his agency directly to the principle or rule, which should be universally applied to anyone in the same situation.

## II-Gilligan by Herself

What follows is the feminism of difference<sup>51</sup> represented by Luce Irigaray among the French and Gilligan in the Anglo-American context. Irigaray unveils the phallic theme of positive masculine language, through centring her discourse in language mechanism and establishing a psycholinguistic treatment of female discourse. By contrast, Gilligan develops a pragmatic moral account of the feminine.

In a paper published in 1994, Gilligan situates the suffering or sacrifice of the feminine in its process of “getting civilized”. Gilligan inspects and dissects the psychological dissociation that supports a human disconnection, experienced, by men, as separation from women and, by women, as separation from themselves. In general terms, she identifies separation, dissociation and disconnection, at the heart of patriarchal culture, as a male requirement and the psychological price for women entering patriarchy and civilisation (18).

Gilligan criticises male rationality and the culture of separation, which ironically intends to take male morality “as the basis for theories of (...) ‘social perspective-taking’, [and which] refers to the ability to take the point of view of other people” (19). The ethics of alterity is a good example of how male rationality, whilst identifying the problems of separation, cannot heal the pain of the isolated and untouchable Other. Thus, male rationality is the framework within which the ethics of alterity identifies the Other as impossibility. Therefore, the inspiration of the ethics of alterity is valuable but its benefits are very limited because of the dynamic of separation thereby one must learn “how to achieve and maintain a separate self”, as a condition of freedom and respect (21). The feminine remedy is reconnection or re-insertion of the Other through an ethic of care.

Gilligan started to hear a “different voice” and concluded that the feminine remedies or reasons “experience the other interpersonally”, and “respond to the feelings of others with feelings of their own” (Gilligan, 1996:97)<sup>52</sup>.

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<sup>51</sup> The strategy of the difference, radical or publicist approach in feminist thought challenges the sameness, cultural and privatist approach.

<sup>52</sup> The feminine does not respond to Others with its own feelings but with the feelings of the Others. This is the formula of the feminine reversibility principle.

## II.1- *In a Different Voice* and Related Studies

*In a Different Voice* was first published in 1982. It responds to the conclusions of the psychological theory of moral development, under the aegis of Kohlberg.

The book aforementioned outlines what people think about morality and about themselves. Through listening to people, women and men, girls and boys, the author started to hear two different ways of seeing moral problems and of resolving them. The book explores the interplay between experience, or real life, and thought as an abstract way of elaborating and understanding life and its dilemmas. It inquires about the way one listens to oneself and to Others and about the stories “we tell about ourselves” (Gilligan, 1996:2). Two different perspectives and “different notions of what is of value in life” arise, and she associates one with men and another one with women (Ibid., 5). Nevertheless, the book clearly describes a different voice not in terms of gender specificity or difference but in terms of theme.

The book consists of analyses of three different sets of empirical data: the *college study*, the *abortion study*, and the *rights and responsibility study*. The first one looks into identity and moral development in early adult years. The second study explores the interplay between real conflicts in life and abstract ways of thinking about problems and the choices available for their resolution. The third study reconsiders the hypotheses “(...) concerning different modes of thinking about morality and their relation to different views of self (...)” (Ibid., 3), defined by criteria such as age, social class, occupation and level of formal education, by taking male and female samples in different moments of the life cycle.

She starts from Freud’s chauvinist account of differences between men and women, which considers that the latter “show less sense of justice” than the former mainly because women are unable to resolve the Oedipus complex (In Ibid., 7).

Gilligan refuses to stop where Freud did and follows Chodorow’s work about mothering in order to understand separation in the process of differentiation from the mother, which has to happen more abruptly for boys than it usually happens for girls. Separation from the mother is the condition for boys to construct masculinity. Girls, however, can maintain connection with their mothers without normally compromising their sexuality. In Freudian terms or in a male standardised science and society, a failure to separate is understood as a failure to develop. What Gilligan inherits from Chodorow is the positive construction of what was, until then, understood as a failure. To bolster the argument, the author takes the findings from Jean Piaget and Georg Herbert Mead about children’s games in middle childhood.

In a paper of 1979, Gilligan uses the data and conclusions of J. Lever which explain better Piaget’s and Head’s findings. Lever observed children’s play and

concluded, as Piaget did, that boys' games last longer than girls' because when disputes arise boys seem to enjoy resolving them as much as they enjoy the game itself. Boys tend to spend a lot of time discussing, setting up and applying rules. Girls' inability to deal with rules appears as the reason for the comparative brevity of their games. Gilligan explains that, for Piaget, "(...) boys [become] increasingly fascinated with the legal elaboration of rules and the development of fair procedures for adjudicating conflicts (...). However, presumably as a result, he concluded that the legal sense which he considered essential to moral development 'is far less developed in little girls than in boys' (...)" (Gilligan, 1996:10).

The psychic-social analysis of the differences in boys and girls' play reflects the differences in their upbringing, and reveals that: 1-Masculinity is defined through separation from the mother and that femininity does not require the same sort of process. "[M]ale gender identity is threatened by intimacy while female (...) by separation. Thus, males tend to have difficulties with relationships, while female (...) with individuation." (Ibid., 8) 2- Boys play competitive games more often and their games last longer than girls' do. 3- Boys play toward an establishment of sets of rules and procedures to adjudicate conflicts while girls play in a more pragmatic way toward the continuation of the relationships, sacrificing the game if necessary. 4- Boys tend to prefer more public and larger spaces and groups to play in, while girls usually play in private spaces and in smaller groups.

Gilligan asks 11 year-olds to resolve "the dilemma of Heinz" to give bones to the different voice she is searching for.

*Heinz'* wife is dying from cancer. In his town, a pharmacist had discovered a drug that could save his wife's life. However, Heinz cannot afford to pay it. He tries without success to borrow what he needs to buy the drug. Therefore, Heinz considers whether he should steal the drug. From the answers of boys and girls to the question "should Heinz steal the drug?", Gilligan hears two different voices being voiced by boys and girls.

Jake responded that Heinz should steal the drug and Amy said he should not do so.

Gilligan analyses these two answers and their reasoning and notices that whereas the boy, Jake, thinks in a very formal and logical way and constructs the dilemma as a math equation, Amy, the girl, "failing to see the dilemma as a self-contained problem in moral logic" (Ibid, 29), considers the solution in a context of communication, relationship and avoiding violent conflict resolution. The author sees "two very different moral problems -Jake [sees] a conflict between life and property that can be resolved by logical deduction, Amy a fracture of human relationship that must be



mended with its own thread” (Ibid., 31). Jake focuses on conflict of rights and Amy on failure of response.

*Jake and Amy* represent two different strategies for resolving a dilemma associated respectively with ladder and web. “Jake’s world is governed by rules, principles, hierarchy, and the logic of justification. (...) His method of resolving the conflict is to look for abstract rules that determine which interest is more important. (...) Jake’s response (...) sees people as isolated individuals competing with each other. (...) Amy’s world is one of relationship, interdependence, cooperation, and the ethic of care. For her the moral crux in the Heinz’s hypothetical is the druggist detachment from Heinz’s wife’s needs. (...) Unlike Jake, who sees responsibility as negative (refraining from injuring others), Amy sees responsibility as positive (responding to the needs of others)” (Spiegelman: 1988:247-8).

In dealing with “*issues of exclusion and priority created by choice*”, Gilligan concludes that while the boy “thinks about what goes first, (...) [the girl] focuses on who is left out” (Gilligan, 1996:33).

According to Gilligan’s assessment of “*self-description*” boys tend to describe themselves in relation to a world that is outside them and that “defines his character, his position, and the quality of his life” (Ibid., 35). Girls tend to define themselves with reference to a sense of connection with this world, as well as with Others and herself.

Through analysing *stories produced by men and women*, Gilligan concludes that men perceive danger in connection, and women in separation. Gilligan uses a picture of two acrobats on the trapeze performing high in the air without a safety net. 22% percent of the women under observation added the net while only 6% of men did so (Gilligan&Polak, 1982:166). The conclusion which came about was: “While women (...) try to change rules in order to preserve relationships, men, in abiding by these rules, depict relationships as easily replaced” (Ibid., 44).

In the *college study*, Gilligan queries women and men concerning their concept of morality and self, by putting the following question: “If you had to say what morality meant to you, how would you sum it up?” (Ibid., 64) The common thread of her findings is that women tend to understand the preoccupation with not hurting anyone as moral duty.

The college study demonstrates a great difference between women and men’s answers, as women’s solutions were founded, most of the time, on feelings of empathy and compassion. Whereas women attempt to transform the dilemma in real-life situations, men tend to abstract them in order to find in them a principle or rule which could be relied on to produce a solution not only in the present, but in the future as well.

In the *college study*, Gilligan discovered two moralities, one she called the female morality of responsibility. The other she termed morality of rights which

identifies morality with a prescription to achieve fairness in one's relationships with Others: respecting the right of Others, one also protects oneself from interference; if one respects Others, then one must be entitled to be respected. She identifies the reciprocity principle guiding the moral resolution of problems in relationship with Others and the contractual way of regulating those matters as well. The female approach, by contrast, identifies moral behaviour with taking care of what the Other thinks and considering it important.

The *abortion study* offered Gilligan the parameters for her scale of women's moral development. The first conclusion is about the evolution of moral resolution from a morality of self-sacrifice toward a morality of responsibility for choice. As previously noted, Gilligan classifies that evolution as a sign of maturity in women's moral development. Whereas, in the first stage, self-sacrifice was the way for women in the abortion conflict-choice situation to remain "moral", in the following stage the women strive for responsibility toward Others involved in the conflict and toward themselves as well.

The second point revealed through the abortion study is that many women discover that life is not only "black and white", and that in situations like abortion and euthanasia, for instance, people are indeed confronted with grays with which they have to deal. "Criticizing those who emphasize 'individual rights' over 'issues of responsibility', one woman defines the dilemma of abortion as entailing feelings and thus resisting the imposition of 'a stated hierarchy of beliefs': 'Sometimes those hierarchies are good, as long as you look at them by themselves, but they fall apart when you try to impose them on your decisions. They are not organized somehow to deal with real life decisions, and it doesn't allow much room for responsibility'" (Ibid., 126).

The resolutions were built in the path of non-violence and of care for self and Others alike. "Care then becomes a universal injunction, a self-chosen ethic which, freed from its conventional interpretation, leads to a recasting of the dilemma in a way that allows the assumption of responsibility for choice" (Ibid., 90). Gilligan calls that solution morality of responsibility. The abortion study also makes clear a conflict between femininity and adulthood to the extent that if one responds positively to the patterns of adulthood and its exigencies one has to forget what femininity means. To become adult in a world of men entails, for many women, loss of access to compassion, love, care for Others, and for self and sensitivity. Soon, women realise that power and care do not seem to go together. It is the phenomenon of "getting civilized".

Gilligan quotes the example of a *female lawyer* who faced a dilemma in her work having found a document that could help her adversary. The dilemma is clear between the real truth and the formal truth. The former will benefit the adversary and

concretise a care and love approach. On the other hand, the latter will make her loyal to her contractual duties of defending her client. She decided “to adhere to the system” (Ibid., 135) at the cost of her own integrity as a moral person, understood in the terms of a female morality of care and love.

The morality of rights, when equated with an ethic of care and love, makes moral solutions extremely hard in cases apparently very simple and entails opposition to the characteristically zero-sum game of procedural legal justice, that leaves no room for love, dialogue and web. Thus, there is a moment in the women’s moral development when the morality of right imposes itself, for social life is structured upon it. Moreover, the psychological environment where girls are colonised, or made softer, or brought up, is pervasively male, leaving no room, at first glance, for reconciliation and/or dialogue.

Gilligan begins to recognise a voice that acknowledges the separation, the conflict which arises from the impossibility of assimilating an ethic of rights to one of responsibility, by the time women reach early adulthood and the challenge of facing professional life and individual life as a socially responsible person. As a consequence of the tension between them, Gilligan diagnoses that the impossibility of reconciliation yields a sort of passivity and the self-image of being “as ‘a little round jelly bean, sort of wandering around, picking up snow here and there, never really sinking with the weight of the snow’ ” (Ibid., 143).

Care is the practice that informs women’s reasoning and allows them to escape the “jelly or belly (of the bad wolf) condition” or the straightjacket of passivity. When morality is identified as a question of care, it gains an ethical weight and relevance for many aspect of human life. ““The moral way to make decisions is by considering as much as you possibly can, as much as you know’ (...)” as one of the women of the college study sums up one of the aspects of the “method of inclusion” (Ibid., 147). Furthermore, the choice will nevertheless always imply responsibility. “When the concern with care extends from an injunction not to hurt others to an ideal of responsibility in social relationships, women begin to see their understanding of relationships as a source of moral strength” (Ibid., 149).

Gilligan considers the issues of identity connected with moral standpoints, in the *rights and responsibility study*, by asking: “How would you describe yourself to yourself?” She stresses that the women observed were highly successful. Despite that, Gilligan concludes that they describe themselves as the relationships they were in. Self-description appears as relationship description. In general, they did not mention their careers as the most important feature of themselves. These women described their identities “(...) in the connection of future mother, present wife, adopted child or past lover”. That fact is emphasised by Gilligan as very symmetrically paralleling women’s moral reasoning as related to caring, as “(...) giving to, helping out, being kind, not

hurting (...)” (Ibid., 159). Moreover, the role of relationship in the experience of men and women differs fundamentally. For men, relationships are placed in a frame of individuation and separation as a way to empower the self and to safeguard one’s space for self-expression. Women, by contrast, understand relationships within attachment and connection where one defines oneself and elaborates one’s moral standpoint. These two different ways of resolving conflicts between intimacy and identity demonstrate two different moralities. Separation is justified by an ethic of rights through fairness and equality which entail a balanced consideration of self and Other. Alternatively, attachment is based on a morality of care and responsibility which relies upon the understanding of equity, the careful consideration of every single circumstance of a given situation, which recognises that needs might differ as people do. Furthermore, relationships, as much as care, are constitutive of the relational self or subject in Gilligan’s moral theory.

Gilligan reconsiders the example of the lawyer to point up that in adulthood, where the pervasive male morality or the unavoidable Law of Father reigns, women are often troubled. Care and abnegation, the agape, have to be rethought in the context of including the self where one takes the risk of being selfish when one decides for oneself in a conflict between love and work and love and duty. Women resolve the conflict between a morality of rights and a morality of care in adulthood when they renounce the selfless posture to consider their own needs vis-à-vis Others. For men, the possible reconciliation entails an understanding of the differences between self and Other which gives to the principle of equality a more legalistic interpretation. Nonetheless, a man has said in *the college study*: “People have real emotional needs to be attached to something and equality doesn’t give you attachment. Equality fractures society and places on every person the burden of standing on his own two feet” (Ibid., 167).

An apposite example on the relational self, which will be repeated in other contexts, is about two four-year-olds, a boy and a girl, who wanted to play different games. He wanted to play pirates and she wanted to play next-door neighbours. The solution for the impasse was given by the girl, who said: “Okay, (...) then you can be the pirate that lives next door”.

Giligan’s analysis of that example is so illuminating that it is worth quoting at length. “By comparing the inclusive solution of combining the games with the fair solution of taking turns and playing each game for an equal period, one can see not only how the two approaches yield different ways of solving a problem in relationships but also how each solution affects both the identity of the game and the experience of the relationship. The fair solution, taking turns, leaves the identity of each game intact. It provides an opportunity for each child to experience the Other’s imaginative world and regulates the exchanges by imposing a rule based on the premise of equal respect. The

inclusive solution, in contrast, transforms both games: the neighbour game is changed by the presence of the pirate living next door; the pirate game is changed by bringing the pirate into neighbourhood. *Each child not only enters the other's imaginative world but also transforms that world by his or her presence.* (...) Whereas the fair solution protects identity and ensures equality within the context of a relationship, the inclusive solution transforms identity through the experience of a relationship. *Thus, different strategies for resolving conflicts convey different ways of imagining the self, and these different forms of self-definition suggest different ways of perceiving connection with others*" (Gilligan, 1988:9) (My emphasis).

In the *Emma Willard School's study*, of 1980, Gilligan, through interviewing girls, discovers "listening" as a recurrent matter addressed by them. They showed a keen ability to perceive situations where someone was not able to listen to. Silence and voice appear as paths where relationships can be checked and the reality of one's self vis-à-vis the Other is affirmed. Refusal to listen is, indeed, a dehumanising behaviour that shows an inability for caring. Dialogue, whilst risking disagreement, is essential to adolescent, moral development and self-construction and promotes the possibility of reweaving connections and, above all, of recognising true and false relationships.

The aforementioned study points up the peculiar association between fairness and listening. It is peculiar because fairness is commonly understood in relation to normal legal and moral reasoning and carries a strong sense of pertaining to the public realm of rules and rights. Listening, in its turn, is a conception which evokes a sense of close, interpersonal and private relationship, and, in this sense, it is connected with needs. Fairness for the girls is the opportunity to listen or to be listened to. Doing so, the girls convert listening into a profoundly moral issue and fairness into an interpersonal phenomenon. "[T]he imperative to hear or respond comes to form the core of the girls' concepts of fairness, (...)" (Bernstein&Gilligan, 1990:147) .

Such alchemy is, however, problematic as girls explicitly state that a fair solution is often complicated by the demands of listening. To be sensitive to everyone involved in a conflict situation will increase the level of uncertainty of deciding upon a fair solution. Once the imperative to listen is the cornerstone of the girls' struggle to achieve fairness, the moral dilemma turns into a psychological problem where the clue for minimising the uncertainty pointed out is to focus the process of decision in a wide process of listening where the self and Other are acknowledged and considered as such.

The girls' fight is for being connected in relationship, which is understood as a "channel to discovery, an avenue to knowledge" (Ibid., 28). The separation and loneliness that the male culture attributes to the destiny of being human do not serve women, but rather condemn them to silence, anger, madness, selflessness and serfdom. The poor resolution of the fight in girls' and women's life is the transformation of real

relationships, which could feed them in their hunger for discovery, knowledge and growth, into ideal ones, which keep them in the passivity reserved for good women to perform in private and public realms alike. At that point, the loss of a voice is consummated; the voice is buried deep inside the girls' souls while they grow to maturity, meeting the grandmother in the belly of the bad wolf.

## II.2- Two Moral Orientations

A better systematisation of the two moralities articulated by Gilligan is available in a paper she wrote with Attanucci entitled “*Two Moral Orientations: Gender Differences and Similarities*” (1988a). The parallel between the two moralities was so constructed: “A justice [or rights] perspective draws attention to problems of inequality and oppression and holds up an ideal of reciprocal rights and equal respect for individuals. A care perspective draws attention to problems of detachment or abandonment and holds up an ideal of attention and response to need” (1988a:224-225). A concern not to treat Others unfairly would fit in the rights category, whereas a preoccupation with not turning away from Others in need would characterise the care one. In the care conception, “the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract. This conception of morality as concerned with the activity of care centers moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules” (Gilligan, 1996:19).

Whereas the morality of rights emphasises the isolation or autonomy of the self and gives rise to an ethic of rules and principles, the morality of care is founded on the primacy of relationships, attachment and response to needs in a particular situation. Methodologically speaking, a morality of rights requires an analytic logic and finds its standpoints through analysing hypothetical dilemmas and constructing rules, whereas an ethic of responsibility is sustained by a contextual understanding of relationships where the drama of the conflict arises and finds its resolution as a fact of real life.

A tension between the two moralities is diagnosed concerning the moral position itself and the understanding of the self vis-à-vis relationships. Separation and detachment as conditions to construct any principle of equality within the morality of rights are themselves moral problems in the care perspective. Similarly, the particular consideration of one’s needs, as prerequisite in a responsive morality, is forbidden in the morality of rights. Furthermore, in the care orientation, attachment is not viewed as a residue of early childhood, but defines the human condition and establishes that equality

is not always the sufficient condition to overcome inequality (Gilligan&Wiggins, 1988:119-120).

Gilligan and Attanucci explore the possibility of a “bi-focal” category expressed by a Care-Justice (or Care-Rights) perspective which is identified as a tendency observed in both men and women using simultaneously the two different moralities (1988a:233). They developed further this idea in another paper entitled *Reply to Vasudev*, and explained that just as the sexes are not opposite, rights and care are also in a different relationship with each other. In this sense, one could talk about caring rights and inappropriate or wrong care, what suggests that a possible interplay between them is likely to be verified.

They focus on a third category called “Care-Justice”, which has a complementary function regarding the two fundamental categories of Care and Justice. The third category maintains that both perspectives are to be found in the repertoire of human social and moral organisation. The Care-Rights category appears as a response to Kohlberg’s marginalisation of the morality of care to regulate personal conflicts. Care holds a privatistic aspect while the rights approach serves the public domain of the social, political and legal organisation or institutional life. Nonetheless, the formulation of the two moralities offers the opportunity of enlarging the possibilities for moral reasoning, creating two interchangeable systems on being moral and conducting institutional and legal life.

### **III- Gilligan’s Paradigmatic Shift**

Gilligan has been declared the radical “deconstructor” of moral philosophy and moral development theory, more particularly, because she challenges in a very essential way the normality of the equation between the human, the male and the female. Gilligan calls into question the age-old foundations of Christian-western society that live on in post-modern times. The implications for law may be inspiring insofar as she suggests that a language of rights and duties can be challenged by a language of human needs and moral responsibility as caring for Others. Gilligan’s work suggests a new framework for moral philosophy, legal theory, theory of the moral and knowing subject<sup>53</sup>, methodology, epistemology and for the wholeness of social sciences. Moreover, her exposure of the absence of women from moral theory offers an “alternative conception of scientific analysis” (Hekman, 1995:3/5). So, what follows is a presentation of the paradigmatic shift Gilligan’s work entails.

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<sup>53</sup> It refers to one who knows, the subject of knowledge or the epistemic subject in Benhabib’s formulation (1990:206-208).

### **III.1- The Relational Self**

The fundamental point in Gilligan's theory on women's moral development theory is the creation of a duality which intends to challenge the traditional, unitary, Kantian and universalistic moral. The subject of the moral action is multi-faceted and contextually determined, profoundly different from the autonomous Kantian moral subject who searches for ultimate and absolute truths to be intersubjectively verified. The moral Kantian subject is also an epistemic one, who knows from the same autonomous position. Gilligan's moral subject is, as well, an epistemic one, contextually determined and preoccupied with particularities inserted in relationships.

The relational subject of science will methodologically treat its source, matters and especially findings in an interpretative way in order to make science a body of knowledge able to influence human life. In Gilligan's work it is "(...) impossible to separate questions of substance from questions of method (...)" (Ibid., 8). She prescribes human connection instead of formal agreement as the language that responds to the challenges of human survival in an aggressive market society. Her morality of care and its relational self indicate a breach of the justice/autonomous self conception as the principle under which all morality, legal reasoning and science should be developed. The relational self is the one who listens first, and argues in the endeavour to understand, to transform, and eventually to advance and equate dissonant positions or ideas. The process of listening and responding is opposed to the application of rules and principles which "function to separate us from each other" (Noddings, 1986:5).

#### **III.1.1- Affective Imagination as an Epistemological Tool of the Relational Self**

The relational self never speaks from the veil of ignorance, since under its conditions the Other disappears (Benhabib, 1994:90). The veil of ignorance is characterised by mutual disinterest, whilst the moral and political actions and decisions of the relational self derive from a profound attachment and bonding with Others and their circumstances. The reversibility principle that Gilligan hears in the female voice cannot function under a veil of ignorance. Women's reversibility principle consists of the ability to put oneself into Other's situation, and assume Other's way of understanding that specific situation. Gilligan calls it "affective imagination": "the ability to enter into and understand through taking on and experiencing the feelings of Others" in their own terms (Gilligan&Wiggins, 1988:120). Affective imagination as a moral ability is also a tool for knowledge.

The affective imagination, by using the reversibility principle, requires more than the ability for empathy. In truth, this principle, in the female voice, as showed by



Gilligan, requires a capacity of self suppression, i.e., the capacity to see the Other without one's pre-conceptions, prejudices, without personal feelings. This is required for one to be able to receive the Other, hear and respond to him in his own terms.

“I need to apprehend the Other's reality not as I would feel it in their shoes but as they feel it (...). This is close to what María Lugones calls 'playful world travel', through which one can learn to love cross-culturally and cross-racially. It involves being able to go into the world of another quite different from our own without trying to conquer or destroy it (men's idea of play) (...)" (Hoagland, 1992:249).

### **III.2- The Methodological Advancement**

The paradigmatic shift is based upon the creation and empowerment of a moral self that is relational and equates morality with particulars, in opposition to an autonomous self.

The paradigmatic shift that Gilligan seems to suggest happens also in the way she methodologically constructs her theory. Gilligan says: “There is no data independent of theory, no observations not made from a perspective. Data alone do not tell us anything; they do not speak, but are interpreted by people” (1986:328). Furthermore, she says, when defending herself about making assumptions not confirmed by her data: “The (...) question is what constitutes data and what data are sufficient to support the claims I have made. To claim that there is a voice different from those which psychologists have represented, *I need only one example* –one voice whose coherence is not recognized within existing interpretive schemes” (Kerber, 1986:328) (My emphasis).

Gilligan participates in a changing paradigm of sciences, where “all scientific knowledge (...) [aims] at becoming common sense. Common sense is characterized by collapsing cause and intention, (...) is practical and pragmatic, it is self-evident and transparent, as well as superficial, but for this reason also capable of capturing complexity (...), and (...) it is rhetorical and metaphorical ‘it does not teach, it persuades’ ” (Petersen, 1994: 28/9).

Hekman delineates Gilligan's method as follows: first, the central position of narratives at the costs of empirical and objective data. Second, the impartiality and distance of the researcher is abandoned in favour of a relational method which approximates researcher and object. Third, the relational method is hermeneutical in the sense that the results are interpretative and are marked by the researcher's own experience and truth. Fourth, the new method is political and engaged. The methodological paradigmatic shift consists of “a move from an objectivist method to a

relational one, from the search for factual data to the collection of stories, from a detached, 'scientific' approach to a committed (...) one" (Hekman, 1995:21).

Furthermore, Gilligan's paradigmatic proposes a re-enchantment of life in its social aspect. When Gilligan clearly challenges the autonomous self, disenchanting by the new conceptions established by modernity, she somehow elicits a return to a conception of an enchanted human life, no longer dominated by nature, (as were the Greeks), but by a relational self able to displace a conception of justice limited by law, rules, rights, principles of equality and impartiality and egotistic understandings of reciprocity and reversibility. The relational self sees beyond the veil of ignorance through the enchanted power of relationships and their constraints of caring, nurturing and responsibility in a context of almost pure particularity.

### **III.3- Challenging the Public/Private Dichotomy**

Gilligan is also a catalyst in another revolution in culture about the discussion of what the public has to do with the private and the personal in as much as the personal and private have become objects of public and impersonal regulation and production (Nicholson, 1983:526). Gilligan turns away from a publicist discussion of women's issues and places the private along with the public, thereby reinforcing the conviction that the classical opposition between public and private is in decline. It is a revolution in the understanding of what is of value in life.

Gilligan introduces the private feminine thought into a very much public discussion of moral standpoints or moral development, moving toward an imaginative practice, which could provoke the debunking of the patriarchy through "undoing men's disconnection from women and women's dissociation from themselves" (1994:31). She provokes a revolution just introducing women in their own terms into an exclusively male realm.

The paradigmatic shift proposed by Gilligan offers the challenge and the possibility of the mutual conviviality between the two selves –the autonomous and the relational-, insofar as the male and the female, the public and the private also need to come to terms. The re-enchantment of the world happens by the re-insertion of the private, the domestic, the personal, the particular, and their implications of care in the public realm of social human life, from where they are absent as standards of goodness.

The re-insertion that Gilligan suggests has the power to blur the limits that oppositions, such as public/private, draw in human consciousness. "When incorporated into legal discourse they induce beliefs that existing social arrangements are just, natural, inevitable, legitimate, thereby denying our capacity of conceiving of new forms of human relations and to challenge existing forms of domination. (...) The solution is

to transcend the public/private divide, transforming both family and market, and simultaneously transcending the male/female dichotomy (...)” (Rose, 1990:63/4).

For Derrida, in Seidman’s and Scott’s words, the binary oppositions that underpin western thought, in an effort “to establish foundations”, must be deconstructed since they are “arbitrary, unstable, (...) reversible [and] conceal a will to power” (1995:4/8-9 & 1995:286).

A paradigmatic shift is indicated insofar as the relational self acts in and upon the public with the tools he collects privately. The relational self walks against the stream by transforming the public into private when the movement is about the publicisation of the private. He speaks the language of the particular, of the private in a contextual framework and stresses its form and its content. Once one accepts the relational self as a valid paradigm, the political, moral, legal and epistemic conditions are established for many different voices to come together in a conversation about anything. The autonomous subject no longer holds the privileged place of ruling the public life, especially in a historical moment when the public invaded the private and reached a point where the counter movement of the private that regulates the public is unavoidable.

The public invasion into the private brought to the latter the language of rights especially in the public way of being feminist. The claim for rights is the avenue through which women’s liberation has grown. That movement promoted the language of rights in relationships. This thesis urges the opposite: the realisation that persons are much more than their rights and that one should try to forget about rights in solving disputes in a public realm of impersonal relationships.

#### **III.4- Caring is a Relational Moral Value – The Relational Self is Feminine**

Gilligan’s theory re-installs a very special moral quality to the conception of care. Care for Others in relationships as morally relevant creates an alternative for understanding moral attitudes, and affects law in a very interesting way. Re-connection, in order to overcome the problems of separation, entails a caring approach and makes the whole enterprise moral. The caring approach requires contextual knowledge and an attitude of comprehension of the Other and his needs at odds with a language of rights and rules. Moreover, it entails the insertion of the Other in a relationship which gives to him the condition of being considered, heard and cared in his own terms. Care eases the erasure of the Other made by a morality of rights and makes possible the total conveyance of self and Other, impossible in the ethics of alterity.

Gilligan enlarged the conception of moral theory, by adding anew trend/different voice to it and thus she made woman present in ethics with a model of an

alternative moral epistemology which can be articulated as “a very different way of identifying and appreciating the forms of intelligence which define responsible moral consideration; (...) deployed in shared processes of discovery, expression, interpretation, and adjustment between persons (...). (...) [It means] attention to the particular; a way of constructing morally relevant understandings which is ‘contextual and narrative’; a picture of deliberation as a site of expression and communication” (Walker, 1992:166). That alternative moral knowledge is an understanding which can be characterised as “a collection of perceptive, imaginative, appreciative, and expressive skills and capacities which put and keep us in unimpeded contact with the realities of ourselves and specific others” (Ibid., 170). Therefore, morality is no longer understood only within the kingdom of the self. It entails an inquiry about self and Other in relationships.

By enlarging moral theory, Gilligan also demonstrated the resilience of moral systems when it follows a feminine inspiration. Female resilience, when faced with the loss of relationships, in trying to save and keep them as a moral duty, enables the system to perform a fail-safe mechanism. Again, one sees the great intimacy between content and method, substance and form. The moral substance of female morality is also its moral form or the way it performs its own reality.

In sum, Gilligan succeeded in offering women, in the words of Virginia Woolf, a way of “finding new words and creating new methods” for their liberation, for the sake of the whole humanity and their own (Kerber at alli, 1986:509). Gilligan described “care and justice as two moral perspectives that organize both thinking and feelings and empower the self to take different kinds of action in public as well as private life” (Ibid., 527). Gilligan had the courage to call into question the publicization of the private and to stress the value of the private, claiming that the public needs now to suffer a deep privatization through a feminine voice in the name of “the future of life on this planet” (Ibid., 532).

#### **IV- Problems in What Gilligan Suggests**

Gilligan’s book *In a Different Voice* provoked discussion and controversy. Nonetheless, in Benhabib words, the controversy was non-acrimonious, due to the intrinsic elegance of Gilligan’s style and conclusions. Once more, content and methodology were deeply interwoven (Benhabib, 1992:178).

Gilligan’s findings stimulated a vast response, however one could systematise all the criticism under two general headings related to the feminist discussion and the moral theory respectively: essentialism and moral relativism. In addition to those two main themes, one could still consider criticism against Gilligan’s methods of surveying her

data and interpreting it: an epistemic one about the rigid dualism in which Gilligan's findings are presented, which caused problems of practical translation of her conclusions; and a political one regarding the liberal features of her theory, which is built upon a self who cares, a somewhat choosing self. Nevertheless, Gilligan's ethic of care does not occupy itself with the construction of a self. It rather deconstructs the modernist self who is unable to respond to the Other. Her morality of care is not a morality of the self but a morality of the Other. Finally, one must address a general criticism against the wideness of the ethics of care especially regarding its apparently inapplicability to strangers. This is, nevertheless, a false limitation and Gilligan's "method of inclusion" is powerful enough to allow her findings to be extended in order to include strangers in the web of care. Gilligan theorises for the public that highlights the virtue of the private.

#### **IV.1-Gilligan as an Essentialist**

It has been said that Gilligan's thesis undermines women's agency despite her intention to give colours of dignity to a supposed female essential characteristic of nurturing, when putting a feminine tendency to care at the top of a hierarchy of moral values (Hoagland, 1992:246). That criticism comes from the understanding that the exclusion of women from political and social expression, or the female absence and silence in the public realm, is represented by the domestic feminine site where women are treated as property.

Gilligan's findings about a different voice, as a female voice of nurturing and caring for others different from the one marked by competition and isolation, characteristic of male discourse, has been critically associated with the famous Sears case,<sup>54</sup> as the inspiration that justified a judgement against women. In this case, "judges used feminist theorists' [-historians Alice Kessler-Harris and Rosalind Rosenberg-] expert testimony [-on opposites sides] about gender differences and their 'separate spheres' ideology to justify sex-based disparity that kept women in lower paying, non-commission sales jobs" (Bender, 1990:5). The Sears lawyers used the testimony of Rosalind Rosenberg to corroborate their thesis that women are different from men. The former are more nurturing and disinterested in competitive jobs like the best-paid commission sales jobs. The judge accepted this argument and declared legally acceptable Sears' practice of keeping women in non-commission sales jobs. The criticism, nevertheless, loses sight of the real problem that the Sears case exemplifies. The problem seems to be in the way the judicial practice of law or justice hears or does

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<sup>54</sup> It refers to Equal Employment Opportunity Commission (EEOC) v. Sears, 839 F.2d 302 (7<sup>th</sup> Cir. 1988). Chapter I discusses this case. The best article about this case was written by Ruth Milkman: "Women's history and the Sears case", *Feminist Studies* 12 (Summer 1986).

not hear, ignores and considers arguments and stories. Scott considers: “In cross-examination, Kessler-Harris’ multiple interpretations were found to be contradictory and confusing, although the judge praised Rosenberg for her coherence and lucidity” (1995:291). The unitary voice and linear reasoning is privileged in the dispensing of justice that is profoundly male and attentive only to the coherence of the arguments used. Rosenberg used this linear reasoning in her testimony, made in favour of Sears which is praised by judges, and supported by the judicial style of reading realities.

Consequently, the criticism that says that the cultural feminism of difference (like Gilligan’s) is not emancipatory and leads to essentialism has to acknowledge that the theory demands a previous reformulation of the rationality in force. The appropriation of feminine truths by male rationality betrays the sincerity of the insertion of the feminine into social life. The use of Gilligan’s findings by Sears defence and its acceptance by the court, which accrues to the defeat of many women interested in a commission sale’s job, shows how morally sick the rationality against which Gilligan speaks is. The cultural feminism of difference and especially Gilligan’s version imposes a reformulation of western rationality which informs the re-definition of justice.

It has been said that the essentialism of the ethics of care “ignores the significance of political obligation” (Bartlett, 1992:85) or appears to “perpetuate (...) the status quo, affirms the established division of labour, and forecloses on the possibility of a radical transformation” (Houston&Diller, 1993:374). The care tendency is inherent to the private and the domestic, and, when used in any level of any relationship, it leads women to a position of inferiority and submission, by making them incapable of fighting for their rights and for political and social survival and expression. Furthermore, Gilligan’s different voice is not liberating; it legitimises and perpetuates women’s inferiority, says Tronto (In Hekman, 1995:23).

Tronto’s criticism does not acknowledge that Gilligan’s argument speaks about a “different voice” not about the voice of all women. Tronto also does not perceive how the private, domestic, quality of the ethics of care can work in public realms, as a way to support women’s rights.

Gilligan’s feminism belongs to the privatistic branch of feminist theory as a reaction to the inability of publicist women’s liberation to inquire upon the nature of the feminine. Gilligan’s findings, concerning a different moral voice based in a specific way of being feminine, offer a new avenue through which women’s liberation reconciles public and private conquests. The reinsertion of a privatistic image of women with dignity in the public realm permeates and transforms it into an order where care can be another valid way to inform relationships between strangers. Moreover, essentialism is another way for women to survive and put forth the search for the feminine.

“[T]here is always the danger in any struggle for liberation that the oppressed class will accept too much of the dominant picture and thereby forfeit its soul and lose the real depth of the contribution it could make to a new society” (Hardwig, 1984:449). Gilligan calls attention to this danger in the path of the public branch of feminist movements and proposes another framework for impersonal and/or public relationships. The semantics of care, whilst recalling the familial environment, aspires to public encounters among strangers and aims at establishing a discourse of friendship which could enable attention and responsibility for the Other in his own terms. Can everyone be my friend? Can I care for the Other whom I have never met before? Negative answers justify the establishment of a discourse of rights and rules to perform justice. The morality of care offers positive answers to those questions as a moral duty in an ethic of responsibility in relationships, based on the practice of affective imagination. There is no stranger that cannot be a friend through such practice<sup>55</sup>. The morality of care through the practice of affective imagination can expand Gilligan’s “method of inclusion”, as an approach of solving problems when valuing relationships, and demanding *institutional will* to publicise the private aspects of the ethics of care (Houston, 1993:113) and to perform a post-modernist “idea and practice of justice that is not linked to that of consensus”, equality or impartiality (Lyotard, 1995:37).

Besides, the criticism of essentialism comes from the post-modernist reading of feminist questions. The association between feminism and post-modernism is considered a *liaison dangereuse*, says Hutchinson. “ (...) [S]ome maintain that feminists ‘cannot afford not to be essentialist’” because they say that a non-essentialist position will weaken the political position of feminism in academic and legal milieus where the dominant patriarchy dictates the articulation of forces. Gilligan’s awareness of that danger results in her elaboration of a theory that responds to Kohlberg’s essentialist male biased moral theory. The refusal of the postmodernist inspiration can incorrectly make Gilligan’s theory an “exemplar of modernist feminist inquiry and critique”. Gilligan is rather a strong voice against the separation project sustained by an isolated self that characterises modernity. Gilligan does not produce a metanarrative; instead, she presents a compelling argument against the male “archimedian or ahistorical standpoint from which (...) [one] understands the human mind, knowledge, society and history” (Seidman, 1995:5).

Gilligan’s position obviously presents difficulties for a postmodernist approach, despite their common adversary, namely the abstract, universal, male and modernist rationality. The resolution of those impasses is offered by the enormous amount of “localised disturbance” that Gilligan’s different voice can provoke when inserted in a project that should be qualified as “deconstructivist”. The potential for opposition of her

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<sup>55</sup> See footnote 1 of Chapter VIII.

theory in western traditional philosophy does not allow space for an essential, universal, ahistoric, transcendental, impersonal, abstract or disembodied self. Her theory offers a real possibility for the Other to decentre/deconstruct the self. Her theory has the aim of deconstructing the male rationality for the acknowledgement of the Other in general and not only the Otherness of women.

#### **IV.2- Gilligan and Moral Relativism**

The philosophical criticism sees in Gilligan's moral theory a serious threat to morals as such since she sails very close to moral relativism. The proximity to relativism comes from Gilligan's coherentist conception of truth and method, expressed in her understanding and practice of constructing her theory on women's moral development, which considers that theories constitute the evidence they examine. The resolution of that sort of coherentist approach employs a very different methodology. That methodology was born of the criticism and refutation of the classical empiricism applied in behaviourist psychology. Moreover, that alternative methodology can be identified as contextual relativism.

Gilligan develops a morality of virtues which cannot be accommodated with any attempt of universalisation. The decision in abstract upon what is good and bad cannot be possible in a morality of care, insofar as autonomous thinking is not a possible female way of moral reasoning.<sup>56</sup> The apparent relativism is not about the same values in a given dilemma, but the way to discover in that situation what is of value.

Gilligan consciously avoids any kind of Aristotelian or communitarian ethics. She represents a very powerful voice defending a new moral language altogether and its harmonisation with the language of rights. To achieve this, Gilligan argues for an asymmetrical moral theory based upon an intrinsic articulation between the languages present in the earlier years of childhood where separation and connection define the social-sexual role for a person.

Gilligan's paradigmatic revolution comes from the fringes, the margins of moral theory. It challenges the normal science of universalism and autonomy and unveils an alternative in the feminine, in the private, in the personal, without rejecting the tension between the different and the old.

Gilligan challenges the western male desire for a unitary conception of truth and morals, and suggests a dualism or pluralistic model, (not a relativist one) wherein the articulation between the moralities offers conditions for a new practice. That resolution seems not to fit in a purely theoretical approach, since it requires a competent

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<sup>56</sup> Ironically, says Baier (1987:50), Gilligan in a way proves Kant right about it not being possible for women to think autonomously.



articulation of different practices, in as many fields of social-human life as possible. In fact, Gilligan does not appear to succeed in her attempts to establish a theoretical basis to harmonise two apparently incompatible moral voices. Therefore, the problem of dualism remains unresolved and its resolution demands more than a mere moral hermeneutics towards a practice of reflexiveness and rematerialization. The practice of achieving legal justice demands a methodological approach (reflexive and procedural) in order to overcome an unwelcome moral relativism and to insert effectively the feminine into the masculine, the private into the public. Let us explore Gilligan's potential contribution to law.

## **V- Gilligan and the Law**

Law is not to be applicable in all human relationships. Quite the contrary, law selects very specific sorts of relationships that are of legal interest: law defines law. Furthermore, the publicisation of life means exactly that law is widening its field of application and simultaneously shaping morality when law becomes the language of personal relationships, thereby suggesting urgently that the language of the personal should urgently shape the public. Then, let care encompass law and claim for a critical consideration of the transformation of the limits and functions of the private vis-à-vis the public. Moreover, such encompassing process entails a task hitherto neglected by legal theory.

Humanity is left in the crossroad of life where moral and law have a long conversation to try to fix boundaries between them, where justice and law are not the same. How can Gilligan's morality of responsibility encompass law and transform it for the challenges of that sort of justice in concrete life? "Gilligan's work offers valuable tools to use in rebuilding the house of law –altering its structure, content, and practice. In using these tools, we must not forget –in fact we ought to celebrate- their basis in gender differences and women's gender culture" (Bender, 1990:36).

Separation is placed in the development of the modernist conceptions of reason, state, civil society, division of power, and science. Law was required to leave the realm of morality and gain wider grounds to legitimate the social organisation of the modern state and the division between the private and the public spheres of life. The emergence of the state could not be accommodated within the limits of a so-called historical conception of justice, which was in the foundations of a legal thought solely applied to private transactions.

Law separates from morality in order to perform its regulatory function and modern law had to acknowledge two different realms of social life, the private and the public. This thesis re-thinks law in order to elect the ideal conditions for access to

justice, in which justice is to be achieved beyond the reductive effects of law and tries to re-define the tense co-existence between public and private social human and legal life. It proposes the re-emergence of the private when one deals with public issues in the same way women talk in the kitchen, in the private way, as a possibility to respond to the Other in his own terms, since the findings of the ethics of alterity regarding the Other are awaiting a legal response through the path of care.

### **V.1- The Challenge of the Other – A Possibility for Law Through Care**

The morality of care brings to law a possibility to realise justice in the Other's terms by understanding the role of care and responsibility in relationships, through affective imagination and the method of inclusion, which can make the Other accessible.

The morality of care elaborates a conception of justice that challenges the traditional idea of justice as an ideal aim of fairness and righteousness, expressed in bringing the scales into balance again. Furthermore, justice becomes a poor virtue if the aim is to right the wrong because, in many situations in life and law, the wrong is unexpungible, ineradicable. Justice, in those cases, would have a very different quality and demand a particular approach. The path of care dislocates justice from the constraints of legal rules and contracts and understand justice as the capacity of equating the various needs and aspirations in a relationship which faces conflict; justice is identified with the solution of a dilemma that considers all the particularities in a relationship regardless what rules, rights or legalistic arguments say. Justice is not only personal, but it has a public connotation in Gilligan's theory when she discovers the "web" as a female way to articulate solutions for conflicts. The web requires that the terms of a solution enclose as much as possible, pouring out from the limits of the personal basic relationship, to create many more other connections. This web consists of persons, relationships and arguments. In this way, justice gains a warmth not present in rules, rights or law and becomes inclusive, comprehensive, and not reductive like law. Justice does not isolate, but rather involves everybody in a unified effort to understand and overcome differences.

Law makes the Other just a bearer of rights and can not build and maintain relationships because they are not legal preoccupations in themselves and do not reduce behaviours to roles and rules.

The relevant loss for the moral crisis of law is the loss of the Other as such which is expressed by the imposition upon him of legal sameness. Sameness was the abstract response to handle the challenge of the Other. To keep the Other as Other in his particularity requires a plasticity beyond law.

A feminist moral theory, which stresses a different feminine voice, must acknowledge the difficulties of such a voice when finding a comfortable place in legal syntaxes. Gilligan's theory, then, comes to law with the bias that was the first motivation for her own work, a bias that has coloured all the history of philosophy and moral theory alike. "Jean Piaget wrote: 'The most superficial observation is sufficient to show that (...) the legal sense is far less developed in little girls than in boys'" (Kerber et al., 1986:310).

After having overcome equality subtle difficulties persist because fairness remains as another legal principle. Fairness is not care, because fairness requires a level of abstraction that prevents care. The relational self as the subject of a contextual understanding of the conflict will be in a position of hearing the Other and responding to him in his own terms. Contextuality, within which responsibility to Others and self brings about morality and justice and inserts them into the realm of law, tames law and dyes justice with the colours of life.

The individualist self in the path of care is not opposed to the altruist one, but to the relational one, which is not accepted in law and its legal proceedings, as Conley and O'Barr report. They mention the example of Mrs. Rawls whom "the judge described (...) as a *crazy old lady whom the law could not help*. Her difficulties with the court had to do with the fact that she was unable to structure her problems according to the template of law. Her logic was not that of law. She could not separate the hedge, the property line, and the concept of ownership from the complexities of social relations, unneighbourly neighbours, and twenty years of bad feelings" (1998:76).

To take a relational litigant into full account, the authors suggest, would demand that the judge would be prepared *to listen* and ask for all the details of the relationship, trying not to apply law in case of violation of rights or breaching of rules, but to acknowledge the here-now to consider the past and to look to the future in order to mend the web, the net and relationships. The judge would have to be a relational self trained in Gilligan's "method of inclusion" and affective imagination. This kind of justice is justice as care according to Gilligan and her appreciation of female ways of resolving disputes.

Can law be contextual and caring for the particular? Can law be caring without taking rights in its stilling and reductive effects? Is law able to consider relationships? If so, then the autonomy may be displaced in the name of justice as care: friendship over certainty, love over security, solidarity over the rule of law, singular feelings and emotions over generality, decency over legality. This displacement is similar to the one made by the businessman when refused law and legalistic arguments in order to preserve a relationship that was of value for him.

The ethics of alterity unveils the tension and changes the equation between self and the Other. Once the self looks at the eyes of the Other he is caught up by the Other, he is made responsible for the Other. This look reveals the Otherness and it obligates more than any law. In fact, the law reduces responsibilities and obligations, stills expectations and defeats the Other and the relationship through connecting responsibilities with elements outside the relationship

Finally, morality of care offers to law, as rational, objective and principled, the challenge to become irrational, subjective and particular, which is, doubtless, a problem beyond any legal or moral theory. The resolution of the apparent incompatibility is left for the realm of practice, which is understood as access to justice or the life of law. Difficulties in equating law and the morality of care seem to explain the separation between law and justice as a moral virtue whose resolution requires a practical stance.

## **V.2- Responsibility as the Demand of the Other**

Derrida argues that justice exists beyond law, as something wider, bigger than law. He considers justice not deconstructible in itself whereas the deconstruction of law is possible through justice. “He concludes that even though deconstruction [of law through justice] may seem like a move to irresponsibility, it actually entails an increase in responsibility” (In Hekman, 1995:140-141). Responsibility is another challenge Gilligan puts to legal discussion. The concept of responsibility developed by female morality is fundamental if law is to encompass a morality of care, thereby deconstructing a morality of rights through justice, as a practice. Moreover, the legal understanding of responsibility needs further improvement along with Gilligan’s findings.

Responsibility, for Gilligan, is the essence of moral decision and can hold two different meanings depending on the sort of morality one is inserted into and the self-image one has of oneself. Thus, responsibility can be either “commitment to obligations”, in a morality of rights or “responsiveness in relationships” in the ethics of care. Responsibility in a care approach is at odds with legal concepts which entail always an “ascription” or “imputation” on a detached and isolated self. It is also contrary to responsibility in the morality of rights, which entails contractual reciprocity, clearly at odds with any understanding of love and care.

### **V.2.1- Responsibility Without Relationship**

Ricoeur, when analysing the contemporary concept of responsibility, registers that it carries an idea of obligation to compensate or to suffer a punishment.

Nevertheless, this concept has suffered a profound enlargement following the complexity of the technological society. The legal rules of contract or statutes are now replaced for an objective concept of responsibility, i.e., responsibility without causation, without agent, without guilt. Responsibility exists only because damage has been provoked. This enlargement of the concept of responsibility has been so meaningful that Ricoeur identifies in it a quality of principle, already elaborated as so by Levinas and Hans Jonas (2000:11). The reality of acting under the protection of insurance is the new face of responsibility: it is the responsibility without self neither Other, just an insurance policy that covers a number of pre-determined events. Despite the infinite possibilities of events to be covered by an insurance policy, it will not however cover cases which fall outside its provisions. Thus, the satisfaction of one's needs which emerge from an ascribed or imputable event is still conditioned by contractual rules, privately (contract) or publicly established. The necessity to respond to needs, whether directed provoked or not, has, paradoxically, created new strategies to avoid responsibility or duty to respond. The contemporary understanding of responsibility has been developed into a growing sophistication towards impersonal responses. It is one more commodity available in the market. Responsibility in the global market, contrary to what Ricoeur seems to suggest, is still conceived in the realm of ascription and imputability but it happens now in an impersonal way. The transference of responsibility, as a comfortable commodity of the market, does not respond to needs because it does not listen, it does not even ask for them, just objectively checks the facts, the damage and reads policies. Since causality is diffuse, responsibility can no longer be based upon it and insurance policies are suitable for that. It assures certainty, a praised legal value, and limits, re-directs and impersonalises responsibility, sometimes very much broadened by law, in its endeavour to set up the protection of weak parties to a contract. Ricoeur offers a diagnosis on a current demoralisation of imputation and ascription in contemporary legal responsibility. Accordingly, the current movement seems to deepen the moral decay of law. Gilligan offers a view to give legal and moral practice to responsibility as a principle. It is a moral exercise of legal responsibility beyond the letter of rules and contracts in the name of the continuity of relationships and in response to needs of the Other.

### **V.2.2- Responsibility in the Female Path of Moral Development x The Male Legal Version**

Gilligan says: "The essence of moral decision is the exercise of choice and the willingness to accept responsibility for that choice" (Gilligan, 1996:67). Gilligan claims that the path of responsibility and care is the path of moral development and

psychological maturity for women. Women's responsibility is an evolving process that follows a pace of moral development intrinsically connected with self-discovery. The rise of responsibility does not happen in an external relationship despite being caused by one. Responsibility is an inner feeling brought by the sense of Otherness; it is profoundly moral and deeply feminine. To develop a sense or feeling of responsibility is an inner challenge for women in their moral development: to gain the sense of Otherness, capacity of responding, without losing oneself. It is a kind of awareness that is a permanent background to moral, social and legal behaviours, and it is solely due to the epistemic condition of the moral subject who has choice, and knows the terms of choice; who is the decision-maker in a given situation.

Thus, that responsibility, which exists without external cause and requires only the hypothetical possibility of choice, supports a notion of indiscriminate care, or care for all.

The legal conception of responsibility is, by contrast, entirely male, and has a more external quality that is attributable due to disconnected, separated and isolated selves. A contract or an external relationship is required for a background for responsibility to arise. It is connected with liability and the ability to repair a damage caused by a fact ascribed to its subject. Thus, responsibility is the consequence of a causal chain or causal agency where fact and the damage caused can be logically and temporally connected by a causal relation. Concerning objective responsibility, one can surely observe its "ladder effect" associated with the male quality of legal and moral reasoning, in contrast to the female "web" tendency, which reasons in the name of the continuing of relationships. Consequently, it establishes an asymmetrical resolution of obligations and imputability of responsibilities. Then, responsibility for Gilligan refutes the symmetric feature of the principle of justice identified with the principle of equality.<sup>57</sup> Responsibility, in a care perspective, is a inner moral feeling different from the responsibility that comes from a formally conceived, prior system of rules, rights and "(...) 'self-chosen principles', removed from the relational contexts which give them life and meaning" (Gilligan&Wiggins, 1988:134).

The discussion about responsibility in legal dogmatic is pinned upon the necessity of introducing a psychological element into the causal chain constructed by fact and damage. The psychological element is called desire and the discussion is whether its presence is required for the causal ascription of responsibility for injury or damage. In a positivist account, the voluntary element is necessary for the motivation to act, but is not necessarily the desire to provoke damage or injury to justify the ascription of responsibility. In the case where injury is incurred by omission, the discussion

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<sup>57</sup> See Honneth (1995) about the asymmetric character of the ethics of care and the position of Habermas' discourse ethics theory.

becomes acute, since the point in omission is the lack of desire to act. Nonetheless, omission can hide a desire to damage and become the respective behaviour causally ascribable. The point is relevant to the idea of irresponsibility connected to the idea of lack of capacity or opportunity, which occurs when the subject cannot determine his behaviour for lack of information or mental capacity to decide autonomously. This is the case of young people and psychopaths who cannot show voluntariness and intentionality when acting and provoking damage thereafter. In a positivist account, the psychological element is not crucial, it is only important to verify whether the person had the “normal capacities for doing what the law requires and opportunity to exercise them” (Mackie, 1977:185). Hart refuses the psychological element as the determinant aspect for the ascription of responsibility in the sense that it is “only what an agent voluntarily does that can in itself deserve punishment. He sees both legal penalties and the excusing conditions attached to them as parts of a compromise between the protection of society and the freedom of individuals, as element in ‘a method of social control which maximizes individual freedom within coercive framework of law’ ” (In Ibidem). Young children and psychopaths cannot be punished, insofar as they cannot determine their behaviour with a clear comprehension of reality and consequent punishment. In a morality of care and responsibility in relationship, the same hypothesis will have another explanation, as those persons cannot respond to demands of responsibility because they cannot establish relationships. The moral quality in a morality of care is determined by the capacity of being in a relationship with the Other, acknowledging his Otherness. Then, for Gilligan responsibility asks for a moral element, which consists in the relationship with the Other, leaving without justification the question whether the agent had real choice or ability to act differently in order to determine his responsibility for damage caused by his action or omission. Another aspect added by the morality of care for the theme of responsibility is that a caring position for Others dispenses with the causal element or causal chain between the imputable action and damage caused by it. In this resides the asymmetrical responsibility in contrast with the reciprocal or symmetric one.

### **V.2.3- Responsibility in the Moralities of Rights and of Care**

Responsibility, then, in the morality of rights, derives from a set of conditions previous and external to responsibility itself. This set is the condition for the responsibility to become legally enforceable. In a morality of rights, one is moral as long as he responds to his commitments, legal obligations, or is able to respect a universally stated hierarchy of values.

Gilligan says: “considering responsibility to be ‘attached to morality’, [Emily] sees responsibility as setting up ‘a chain of expectations, and if you interrupt that, you interrupt a whole process not only for yourself but for all those around you” (Ibid., 142).

Therefore, the conception of responsibility evolves towards becoming internal vis-à-vis a particular relationship and it has its origin in the epistemic position of a moral subject who knows the choices and makes decisions.

Responsibility in a male conception entails discussion about guilt, conscious or not, vis-à-vis a damage or a commitment which rests without repair or unfulfilled. In the female conception, damage and/or commitment are not necessary to create a moral responsibility, which solely arises from the fact of one being in a position of choice which entails consciousness about the situation, even before any damage or commitment occurs. This conception of responsibility, firstly, leads toward the silence of a conflictual language of individual rights. Secondly, it pushes one to pursue by oneself one’s own measure of justice. Consequently, it is at the core of any pacific dispute resolution which reinforces bonds of care, respect and love for self and Others and strengthens relationships.

Female responsibility requires a moment of individuation without separation. The relational condition of the self is warranted by the “method of inclusion” and affective imagination. The re-ethicisation of law through the concept of responsibility in the morality of care and the method of inclusion can reconcile law and justice in a way that enables justice to be achieved in its compromise with the crying of the Other and with the support of law.

Gilligan’s different voice promises a transformation in the conception of law through an emancipatory practice of justice in law. The ethic of care, identified in the moral development of women, has a transformative significance for law and social life alike, to the extent that it liberates a silenced voice. This voice dispenses with rules and rights in solving disputes and considers “the specific needs of all the parties, as articulated from those parties’ own perspectives, and by attending to particularized contexts rather than abstract rights and universalizable rules (...)” (Bender, 1990:37).

## **VI- Gilligan and the Life of Law: Access to Justice as Care**

This section aims, in Gilligan’s own words, “to explore whether women’s experience illuminates the (...) nonviolent strategies for resolving conflicts” (Gilligan, 1996:47). The move that the morality of care suggests is from law to life, from male to human, inserting the female different voice and justice as a feminine practice into the social practices of the culture.



Gilligan offers to law an understanding of separation as a human issue and a legal question to be equated in private, social and institutional public life alike. The moral quality of responsibility in relationship reclaims space for a female voice that feels responsible as a way to be human and moral. The legal qualification or ascription of responsibility in male terms is a mathematical and mechanic activity, which provokes isolation and separation. The self becomes moral through female responsibility in relationships when he is able to look at his own Otherness and see the Otherness of Others to shape his responses. The focus of female responsible action is at odds with “do not think about it” that characterises law because demands to think through and through.

The environment of negative responsibility, expressed by the attitude of refraining from injuring Others, needs to be disempowered by a pedagogical strategy which may highlight a different and valuable way to deal with legal responsibility. This pedagogy is about teaching love, *interesse* and care as moral and institutional practices. In law, the pedagogical project has two moments: first in law schools and then in settlement of disputes.

Gilligan’s moral theory needs a practice able to harmonise the moralities of rights and care. The practice would reveal the conditions for such a theory to bring the feminine, the private, love and care into the public realm. The practice would resolve the tension between rights and care, rights and love whereas the human contingency of the separation from the mother, from the feminine, would be also overcome through re-connection and responsibility. Simultaneously, one could mend the fracture in the separation of law from morals and the disconnection of law from justice.

To acknowledge and resolve the men’s separation from women and the alienation of women from themselves is to challenge untouchable patterns of social organisation, incontestable legal practices and dominant forms of rationality.

The responses of two 11-year-olds, Jake and Amy, to the Heinz dilemma clearly show the model of rights based on a male moral standpoint and another model based on a female one. The question was “should Heinz steal the drug?” Jake said that Heinz should steal the drug adding that perhaps he will find a judge able to understand his reasons and maybe Heinz would not even be convicted and if so, the sentence would not be severe. Under the veil of ignorance, says Kohlberg, the most rational thing to do is to steal the drug.

Amy, however, sees the moral problem from a totally different viewpoint. She tries to find a way through which Heinz avoids stealing the drug by talking to the pharmacist, who, as a reasonable human being, would be able to understand Heinz’s reasons and give him the medicine his wife needs for free or allow him to pay for it later. “Amy (...) thought that talking was a good way to solve entrenched and difficult

problems (...) [and thus] opened up the possibility of arriving at something new, a solution that was not imagined when the conversation began” (Gilligan, 1994:29-30).

Spiegelman elaborates the differences between Jack’s ladder and Amy’s web in the following way: the former praises rights, condemns interference with rights of others and inequality. It understands human interaction as atomistic and competitive, and relies upon rules, principles and hierarchies. It privileges adjudication as the method to resolve disputes. It aims at knowledge and stimulates the development of adversarial skills, analytic and critical abilities and scepticism. It teaches through formal discussions, hypotheticals with given facts and debates; the student is a detached observer. Logic is the mode of thought, and the reasoning process is self-contained and vertical. The role attributed to emotion is negative and excluded from rational discourse. It focuses on abstractions, on evaluation through ranking based on comparative master. Its hidden agenda is one of individualism, amorality, professionalism and cynicism, and the role of scholarship is to arrive at “the” truth.

Amy’s web is quite different: it praises care and concern whilst condemning indifference to Others and detachment. It understands human interaction as interconnected and co-operative and relies upon responsibility in relationships. It privileges negotiation and mediation as the method of resolving disputes. It aims at understanding through the development of co-operative skills, synthetic and integrative abilities, and reflective values. It teaches through simulations, clinics, conversations and reflections; the student is an involved participant. Experience is the mode of thought and the reasoning process is interactive and lateral. The role attributed to emotion is positive and assists in interpretation. It focuses on context, on evaluation through conveyance degree of competence. The hidden agenda is one of community, personal responsibility and trust and the role of scholarship is to communicate ideas (Gilligan, 1988:250).

When Amy sees the moral dilemma as a problem of communication and tries to see a possibility for a relational background to be built, it reminds us the non-existent net that 22% of women put in the scene with the acrobats on the trapeze flying high in the air. The net is the relational background and brings about the possibility of dialogue, communication and mutual discovery because a relationship is likely to be established and must be cared for.

Jake’s position does not consider the dialogue as an alternative and is clearly based upon the understanding that Heinz would not be convicted if and only if there were a general rule previously established and endowed with authority to be applied to his case. The particular case has to be subsumed into the general law, following a principle which regulates the whole legal judicial system.

Amy expresses a feminine perspective of the problem and obviously distrusts both judicial systems and judges who can see Heinz only through the rules of law. Heinz and the judge, as legal subjects, have no self to be transformed by a given situation and are not in relationship since the law impedes the encounter.

Legal practice could use the morality of care in non-adversarial alternative forms of dispute resolution. Mediation and conciliation emerge primarily as a reaction against the adversarial system identified as male, patriarchal, competitive, based on rights, principled, objective and rational. The alternative ways of dispute resolution uphold a great potential to concretise the promises of a female morality of care and responsibility.

Dialogue is fundamental in these practices, just as Gilligan proposes the reconciliation of the two moralities through dialogue. “Through their dialogue, (...), these languages address the moral problem of how we can live at once as separate individuals and in continuing relationship with one another. This dialectic of separation and attachment informs an understanding of moral maturity that encompasses both relationships of equality, sustained by the logic of justice [or rights], and relationships of interdependence, relying on an ethic of care” (Gilligan, 1983:48).

Jackson (1995) discusses a model of relational, consequentialist and holistic adjudication which “may take account rights *if [they] are defined (as some would do) in relational terms.*” On the other hand he envisages a rules or rights-based adjudication which “may take account of relations, consequences and need *when the rules so provide*” (319) (My emphasis). Unfortunately, the practice he suggests is far too poor for what a morality of care inserted in the legal realm can concretely offer. The emphases show, the interplay between the two moralities is based upon the existence of authoritative rules or norms, and their application is not a question of discretion or relational adjudication, rather it is obligatory. The Relational Justice would base care on a “sense of duty, or obligation”, which sounds very different from the care based upon responsibility of Gilligan’s moral theory (Schulter, 1994:21). Duty and obligation are intimately connected with the contractarian idea of relationship in a morality of rights. They suggest the separation and isolation of the subjects involved as their background. Furthermore, that model needs external authorisation because the resolution of the conflict belongs to somebody not involved in it.

The presence of a third person, non-interested, power-holding and exercising his duty to tell Others what is right or wrong, is the first obstacle to a practice of law that encompasses a morality of relationships and has dialogue as its centre. The process itself of settling disputes in the realm of law is based on procedural norms, vital for any adjudication, relational or not, which limit the wide process of listening and dialogue that a resolution of disputes, that takes into account relationships, entails. Procedural rules exist exactly to limit proofs and dialogue or listening procedures in the process of

settling disputes. Besides, the dialogue and listening procedures established happen only around the *iure* question, which again is extremely limiting.

Moreover, listening in a feminine way is wide *par excellence* and follows the “method of inclusion”, whereby everything counts, everyone is cared for. A feminine decision may cause difficulties because the female process of decision-making can be permeated by many “I don’t know” to be equated by affective imagination. That phrase does not indicate ignorance, rather too much knowing or eagerness to know as widely as possible the circumstances of a situation in order to weigh as precisely as possible all facets of it. It also arises from a fear of judging and hurting if an important circumstance is missed out from the reasoning.

The autonomous subject in law is dead because his needs in face of a dispute have to be tailored to the right proportions to be possibly subsumed into the patterns of law and they are violated by the law’s own closed logics. In addition, the satisfaction of one entails the dissatisfaction of the opponent. The relational self in a morality of care requires a feminine, and win-win process of dispute settlement. She challenges the “seller-buyer model” of human social interaction and encounter informed by an ethics of rights. The model the relational self imposes is closer to the mothering or friendship one, in which affective imagination is the thread with which one stitches together the fragments of a chopped humankind (Held, 1993:71-73).

The morality of care equated with law brings about the transformation of the public nature of rules, destined to regulate social pacification, by introducing a more domestic and private perspective.

The transformation of the public is the counter-movement of the publicisation of the private by the law and, especially, by the destruction of household practices by market practices which, together with individualism and bureaucracy, destroy private life. Thus, the feminine wisdom confined in the domestic is held in abeyance, waiting for an opportunity for its expression in public life in order to make the public private, personal.

The male way of fighting injustice has “(...) become more important than people who were to be served. (...) Justice not grounded in the care and friendship of particular persons too easily becomes abstract. The monologue of dictators and lawyers replaces the dialogue of friends. Principles replace persons. Justice, losing touch with humanity, becomes unjust. (...) Justice that abandons care self-destructs. If justice becomes a devotion to the ideal of justice in and of itself, rather than caring for particular persons, it becomes a tool of oppression” (Bartlett, 1992:86-87). Justice as a feminine moral and legal category will talk from the margins, as a marginal language of care, from the domestic, the private into the centre, the social, the public, carrying along

the principles of caring and responsibility in relationships, where lawyers and judges have no place, where friends talk toward care, love and peace.

The validity of a policy that could try to harmonise law and a caring perspective, as understood by Gilligan, rests in the question about the reality of a project in a society where people are not encouraged to deep relationships, where isolation and individualism are values that money and power allow. A feasible question would be: what is the place of such a system when the parties in conflict are marked by a profound inequality, as in the relationship between buyer and seller in a market without boundaries? *Institutional will* is the condition of practical possibility of such a system and will be discussed in the next chapter.

## Chapter III

### The Practical Life of Legal Justice as a Feminine Virtue

The current chapter concludes part one and aims to elaborate the conditions for the possibility of legal justice as a feminine virtue. This task complements the advancements of chapter one and two. The former diagnosed a moral crisis of law in accordance with male modernist legal theory, due to the effects of separation as a legal and male process. Because of the shortcomings of modernist legal theory, especially acute in consumer law of common markets as the EU, chapter two turned to the findings of the female moral development theory as a promising field through which the difficult relationship between justice and law as a problem of separation could be overcome. This chapter intends also to offer an empirical example for the building of the framework for access to justice for consumers in the EU.

The important point about justice in this context is the difficulty to dissociate, especially in small claims, legal and ethical aspects of a dispute. The two last chapters claimed that this difficulty characterises this dispute as relational. Furthermore, its resolution seems to demand a relational framework for the sort of justice to be applied.

This thesis challenges formal adjudication as the suitable form of justice to be adopted and defends a justice informed by care and responsibility in relationships and before the Other or justice as a feminine virtue. The critique rests upon the fact that any kind of adjudication (by a judge or arbitrator) will require a claim of rights (Fuller, 1978:369). In other words, adjudication entails a morality of rights opposed to a morality of care, a feminine moral way to resolve dilemmas and conflicts in life and in law, discussed in the second chapter. Moreover, adjudication demands conventional rationality with which morality of care seems to dispense. This morality is formulated in the realms of the female moral development which is considered deficient by male parameters of excellence in moral and legal reasoning. The rational administration of justice, following the Weberian advice, must exclude arguments of love and personal feelings of sympathy or antipathy as a basic criterion for the legitimacy of official enterprises as such (in Rheinstein, 1969:351). Thus, on the Weberian parameters, a morality of care lacks rational legitimacy.

This thesis differs from the work of certain American feminist legal theory that tries to integrate empathic accounts in both language of courts and legal proceedings. This thesis defends the necessity to create official forums of legal justice as avenues for a different practice or for justice as a feminine virtue. To some extent this thesis recognises the need of categorical abstract legal principles for the achievement of

certainty but refuses to call it justice especially when strong moral demands call for attention in consumer small claims which were born from uncountable facilities and attractions of an integrated market. Certainty and security are surely important but the market, which aspires to prosperity, cannot forget confidence, satisfaction and happiness. The judicial apparatus of courts of law, as the expression of male modernist legal thought, fails to provide consumer confidence, satisfaction and happiness while searching for security and certainty. Then, rational criteria for legitimacy of official undertakings seem at risk of being challenged by irrational criteria as satisfaction and happiness. One has in mind “hard easy cases” or even “nuisance cases” (Yngvesson, 1989:1700) to which the established judicial environment of justice dispensation is too expensive, time consuming and unable to hear personal stories and consider particularities without remaking them by following abstract criteria for the sake of certainty and security. Thus, the official practice of justice as care would sustain the post-modern qualities of being fragmented, decentered and diffused. These attributes seem to be required by the challenge of respecting diversity in an integrated market. Moreover, they could not be harmonised with justice as legal proceedings in courts of law while informality or informalism should co-exist with effectiveness. This thesis aims to overcome the contradiction of modern legal theory which is “the contradiction between its two basic purposes, the purpose to preserve order and the purpose to do justice” (Santos, 1995:105). That formulation suggests that justice is a task that entails the post-modern qualities aforementioned and deserves to be called “punctual”<sup>58</sup> which reminds, in many ways, the characterisation of the feminine moral development in Gilligan’s formulation. This chapter will be developed with the view to the transformation of this assumed contradiction into a tension that could be useful for the tasks of law in plural societies or at least in integrated markets.

The outcome proposed is that the feminine framework for justice should find a point of harmonious conviviality with male patterns of law and borrow from the latter legitimacy support. The construal of justice would overcome the necessity of order and realise the aspirations of love and care as a feminine enterprise (Burnside, 1994:43). For that, this thesis follows the advice of Carol Smart (1989:164) in the direction that one should challenge law’s power to define and disqualify instead of seeking a programme of reformulation of law, which is Marta Minow’s intention. One cannot dispense with law and one recognises its power. One challenges the power of law which defines the normal and the norm and disqualifies what rests at the margins by establishing

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<sup>58</sup> “Punctual” is used by postmodern literature and it is drawn from the works of Douzinas & Warrington. Its use entails both temporal and spatial dimensions of an approach which is not early or late and, especially, does not entail a grand narrative in modernist ways. The verb “punctuate” stresses the spatiality of a punctual approach like what a “point” does to the paper on which it is placed.

conditions for legitimising a feminine practice of legal justice, deemed to be reputed irrational and deviant.

The aim is to overcome the binarism of male and female paradigms and propose conditions to nourish a tension necessary for the conviviality of and co-operation between them. Besides, these convivialities (the one between law and justice, between the morality of rights and the morality of care, or still the male legal reality and the female aspiration of justice) require a greater effort than the mere mixture of male principles as, for instance, the equality one and a female approach of care. It means that it will not satisfy the mere juxtaposition of equality which establishes that everyone in the same conditions should receive the same treatment and care which demands that no one should be hurt. The application of both principles can suggest difficulties in regard to the need to respond to particularities not covered by equality but a central exigency for care. Whilst care emphasises the relational aspects of a dispute towards the continuity of the relationship, equality discusses the application of law which warrants that like cases are treated alike, in an abstract, universal, hierarchical and principled way. In this sense, the feminine enterprise in law counts with the possibilities of the imaginative thinking to redefine law's power in the name of different values to be enforced by different attitudes and also redefine "hopeless disputes", so considered by the male legal approach –which is adversarial and against empathy or personal feelings in legal matters-, in such a way that they might be worthy of a solution (Davis&Bader, 1985:84). Empathy "can lead to revolutions in habitual legal thinking and transformation of legal problems" (Henderson, 1987:1577).

Furthermore, what is at stake is the power of formalism in the struggle of liberal theories to survive the post-modern attack. The empirical discussion in this chapter challenges formalism and puts forth a view of justice based on care, through challenging the power of law to normalise and marginalize and using its power to legitimate to a feminine practice of legal justice. The argument against formalism and simultaneously for justice as care unveils a fear of a world without principles, based on particularities, misguided by personal preferences and at risk of authoritarianism (Fish, 1989:5,6,10). Then, the theme of legitimacy becomes important in this context since this thesis defends public engagement for the application of a feminine practice of legal justice, which goes beyond the limits of simple ADR system, in conflict resolution for consumers in integrated markets. It may be prudent to warn that the empirical character of this chapter is rather restricted and that one labours still in the normative stream of thought working hypotheses and offering potential explanations due to the fact that the feminine is socially and culturally anaemic. It means that the voiceless feminine, its silence and absence from concrete expression in the western legal, political and social worlds, have severe limitations. The experience to be explained in the following section



had a short duration and was overcome by the formalist or legalist trend of the male pattern of law. Thus, the empirical data responds to anthropological requirements.

This chapter will expose the conditions through which legality<sup>59</sup> could possibly allow empathic handling of disputes or the achievement of justice as care, as a feminine virtue. Formalism is the most important adversary of justice as care. Furthermore, the feminine reasoning is known as an emotional mode of argumentation or coalescent argumentation to which the male organisation of law is impermeable and does not allow spheres of relevance and reasonableness (Watson, 1996:99). The tension that seems insurmountable is exactly the force that can possibly sustain a new armoury of a new legal practice of justice which one calls feminine or compromised with care and responsibility in relationships and before the pain of the Other. The paradigms are not to be related to each other in competition neither to co-operated with one another but to co-exist in order to create a tension that can lend legitimacy to the mentioned new practice. In this sense, the problem seems to reside in the way justice operates, in its structure and not so much in its content<sup>60</sup>. Chapter one showed that substantive justice results in formal justice which cancels out the eventual advancements of the former. This fact informs the background of the framework upon which this thesis works which is engaged to a mode or practice that allows justice to be made by the parties with purposive institutional engagement characterised as care, *interesse*, or love as institutional will. This point raises considerations about the public character of the present discussion on private justice for particular individuals in a private, emotional and empathic way and reaffirms the post-modern scepticism regarding public values but refusing the also post-modern denigration of institutionalised structures of power and law (Collins, 1993:309).

The practice suggested is to identify the punctual, fragmented, particular and elevate it to the category of public institutional *interesse* in order to legitimise the action of promoting peace between particular parties to a dispute by considering and applying their own reasons (Woodman, 1997:156).

This chapter will be developed in three sections. Section one describes the empirical data about a feminine practice of law. Section two discusses the legitimacy problem of justice as care. The last one offers a model to be used in the second part of

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<sup>59</sup> Formality is understood as a component of legality or its pure expression (Henderson, 1987 and Unger, 1976). Unger says: “ A system of rules is formal insofar as it allows its interpreters to justify their decisions by reference to the rules themselves and to the presence or absence of facts stated by the rules” (In Henderson, 1987:1588). About the incompatibility between legality and mercy and love, see chapter one applicable also to the considerations about empathy in legal reasoning.

<sup>60</sup> It is known that the choice of the system for dispute resolution advances certain related values (Menkel-Meadow, 1985:490). Accordingly, settlement more than adjudication can attend the personal needs of particular parties. It is worth mentioning the effort of Wilhelmsson and his theory of need-rational principles in modern contract law, which will be hinted at below and in chapter seven. The critical position against courts reveals that they do not act essentially to resolve disputes but to “give meaning to public values” (In Ibid., 498).

the thesis which considers the gap in access to justice for consumers in the EU and formulates a framework to bridge it.

## **I- An Institutional Practice of Justice as a Feminine Virtue**

This section intends to describe an institutional practice of justice in the feminine ways. However, it is recommended to review the concept of legal justice as a feminine virtue or legal justice as care, a task done in a much greater length in chapter two.

### **I.1- Legal Justice as Care**

Two examples seem to be of help to clarify in a synthetic way the feminine way to deal with disputes. Firstly, the example quoted in chapter two on a dispute between a boy and a girl about the game they wanted to play. He wanted to play “pirate” and she “the next door neighbour”. The solution came from the girl’s suggestion to play “the next door neighbour is a pirate”. The solution seems to attend everyone’s needs/expectations and somewhat upgrades the dispute giving a solution which changes its terms while resolving it. The game proposed as solution is no longer the boy’s game either the girl’s. However, both theoretically have the opportunity to play they own choice in a third different possibility. Two remarkable points deserve to be highlighted: the capacity to hear and consequently to respond in the terms of the needs communicated and the creativity in arranging a solution that responds to both needs, by creating a third harmonious solution.

A second example described a dispute between two persons in a library about whether the window behind them should be open or not. The discussion is overcome by the interference of the librarian, by coincidence a woman, who asks each the disputants what each one wanted and why. The one who wanted to open the window argued that the room needed fresh air. The other wanted a closed window because the draught was unpleasant. The librarian then resolves the dispute opening the window in the next room letting fresh air in and avoiding a draught in the room where they were (In L. Cardoso de Oliveira, 1996:77).

The examples highlight one of the most important feminine moral abilities. Gilligan defines it as a fundamental characteristic of the justice as care: the ability to hear and to respond in the terms of the Other. Gilligan, when paying attention to the post-modern object of worry: the Other, offers a real possibility to access him in his own terms and calls that ability a female moral one. The Other is clearly inaccessible for one who does not have the capacity to hear. In order to respond one must hear. To

postulate the inaccessibility of the Other as an ethical condition and not as an ontological one is the genius of Levinas and of the post-modern effort to advance his ideas. Gilligan, then, shows how the ethical isolated condition of the Other is not more than the consequence of a specific gender inability, namely, a male cultural imposition which has very deep roots and wide consequences in the western industrial society.

The capacity to respond in the Other's terms is connected with the call for responsibility before the pain of the Other. Gilligan contextualises this response in an interpretative context: the relationship. The response is to happen in a relationship and the web it creates, while trying to mend the ruptures eventually done by the process of disputing. The solution or the response beyond the settlement intends to strengthen the relationship between the parties.

Then the second component is the moral quality to hear and respond with responsibility to preserving the relationship which Gilligan calls "care". However, one must understand that the quality of care is substantially different from the care which sets somebody free from responsibility in case of behaviour that causes damage. Care obliges the self to act until the Other rests satisfactorily responded. Care is much more than "I did everything I could do in that situation". Care obliges the self to do as much as necessary to satisfy the Other, to integrate the Other again in the web of relationship that rests damaged by the event of a dispute. Care is not the capacity to respond in view of the self's abilities or possibilities but in view of the Other's necessities.

The third component is the ability to hear and then to respond. It calls forth Gilligan's principle of reversibility as a very inspired evolution of the version defended by Kohlberg in his explanation of male moral development. This principle in Gilligan's formulation requires that, in order to put oneself in Other's place, one must to put off his own shoes. This formulation characterises justice as a feminine virtue and entails the complete abandonment of the traditional logical-legal process of subsuming a given situation into a formal, abstract and previous set of norms or rules. Consequently, an empathic translation of the Other's needs into the possibilities of the legal system is a very much feminine virtue and its integration in the male system of law is postulated by this thesis. It needs to count on "love as institutional will" which chapter one described. The responsibility for caring should be characterised as an institutional duty. The process of dispute settlement should be oriented by the principles of care and the institutional activity would, at once, implement and stimulate the parties to exercise the ability to hear and respond in the Other's own terms; with responsibility beyond one's restricted possibility in order to reach the Other; and through empathic listening in order to respond promptly to the needs and not to rights. Love as institutional will so applied also entails that love is a practice that one can teach, learn and, above all, that can be imposed by the force of law. Love as institutional *interesse* and institutional practice is

the link that care establishes for the healing of the separation that maculates personal, legal and institutional relationships.

Finally, a last methodological component must be added for justice as a feminine virtue to sustain its own power and neutralise the danger of ideological contamination by the male dominant environment. It is the method of imaginative thinking implemented by the experiential feminism exposed by Arrigo.<sup>61</sup> This method constrains the institutional movement to go beyond routines, rules and pre-established standards and patterns in order to push forth the achievement of answers able to consider, equalise, harmonise and respond to needs and not to rights. Rights would function in the whole scene as mere reference and plastic guidelines for the exercise of imagination necessary for the configuration of possible solutions. Rights work by establishing possible limits for compromise, requests and negotiation.

## **I.2- An Experience in Consumer Protection Through the Office of the Public Prosecutor in Brasilia-Brazil (MPDFT) as a Practice of Justice as a Feminine Virtue**

The exposition of the experience of consumer protection by the Public Prosecutor in Brasilia-Brazil needs to be systematised in four sub-sections in order to facilitate the comprehension of the practice this thesis identifies as a manifestation of justice as a feminine virtue.

### **I.2.1-The Brazilian General Political Background**

The Brazilian Constitution now in force dates from 1988 and was enacted to respond to civil society's aspirations to a democratic political environment after more than 20 years of authoritarian military rule brought to power by a military coup in 1964 that had deposed a social-democrat President.

The drafting of the mentioned Constitution went through a very hard legislative process because of the necessity to respond to an uncountable number of civil aspirations, bred during a long transitional period from the military regime to civilian democratic one, started in 1974. Thus, the Brazilian new Constitution is known by "an exercise in transient constitutionalism for a transitional society"<sup>62</sup>.

The present effort does not require an overview of the Brazilian Constitution. However, it seems necessary to understand the meaning of the transitional character of

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<sup>61</sup> See Chapter I.

<sup>62</sup> See Rosenn, 1990 and Osiel, 1995.

Brazilian political background in 1988 and the reallocations of power promoted by the new constitutional order especially regarding the office of the Public Prosecutor.

The transitional character of Brazilian society, in the description offered by Teitel (1997/2000), can be identified by the fact that the new constitutional order followed a long period of repressive rule and was deemed to remove the old legality and replace it with a democratic one. Nevertheless, this process was not smooth and quick. It rather demanded a period through which the new order has to deal with old problems. Thus, a transitional pattern of justice functioned as an instrument for political and legal transformation. The old legality lacked legitimacy and the new one was not yet formally established or did not offer sufficient means to deal with the persistent or remaining past. This situation promoted emancipator practices of justice and law while raising important dilemmas for the public bodies responsible for the defence of the rule of law. The emergence of a paradigm shift in the conception of justice in transitional justice put forth the necessity of new reallocations of power to create competence for the exercise of the possible new practices of justice. Teitel characterises the idea of justice in transitional societies as “compromise” in view of “the tension between idealized conceptions of the rule of law and the contingencies of the extraordinary political context” (1997:2016/21).

The transitional order needed to respond to problems created in the repressive period whilst the elaboration of a new constitutional order had a basically forward-looking characteristic (Ibid., 2057). Justice gained then a very pragmatic aspect and the challenge was to respond to needs created in the past with tools constructed to attend the future democratic society. In Brazilian constitutional order, this tension was acutely present. The solution came through reallocations of power and the understanding that it was necessary that old institutions implemented new and wider powers. For at least during the transitional period, a legal order, which would be more relational, contextual and responsive, should be able to respond to concrete demands of justice.

An institution with such an endeavour would prevent a practice of justice, which could collapse law and morality or law and politics too quickly. However, it could, at the same time, promote the moral contamination of law and the public recognition of new collective understandings of truth without opening the rule of recognition established for the transitional period. In the Brazilian institutional scene, the *Ministère Public* (MP) appeared to be the body destined to play such role.

In the Brazilian new Constitution the basic reallocations of power were about weakening the Executive in benefit of the Legislative and the Federal order in favour of local orders. The Judiciary was also strengthened through basically the creation of many new judicial remedies especially against public institutions and to protect diffuse or

individual-homogeneous interests. However, the most substantial change came with the reallocation of power to the *Parquet* or *Ministère Public*.

### **1.2.2-The Position of the *Ministère Public*<sup>63</sup> in the General Political Framework**

The political and constitutional position of the *Parquet* during the authoritarian military rule was progressively changed from auxiliary body of the Judiciary to a body administratively and politically strongly subordinated to the Executive with the duty of criminal prosecution and surveillance of the application of the law by the Judiciary.

The new Constitution endowed the institution with financial and organisational autonomy, and determined also that its members should act autonomously, without hierarchy, in their understanding of the law and in the persecution of justice. The responsibilities and powers of the institution were accordingly accrued with its new configuration as a political body of the civil society before any state or civil power. Soon, the MP started to be the receptor of all public and private complaints repressed during the authoritarian period. The judicial function of the institution persisted but it was of less importance than the new role as a political agency in the action of the *Parquet* in areas like: consumer rights, urban order, health, education, environment, public property, community conflicts, street children, racial inequality, women and Indians rights, foundations, organisations with social interests and control of the police force's activity. Consequently, the institution, despite lack of clarity in the Constitution, was quickly considered the fourth power of the Brazilian society and environment and consumer matters were the main areas where the activity of the *Parquet* created a reliable avenue to embrace uncountable civil complaints repressed in the authoritarian period.

The first impulse came with the Brazilian National Environment Policy Act (Law no. 6938/1981). However, this law did not authorise the public prosecutor to claim redress on behalf of individuals. The new impulse in this direction came with the famous Brazilian Law of the Civil Public Action (Law no. 7347/1985), source of inspiration for the Swiss law. "The real break with this individualistic system took place, however, with the enactment of the Federal Constitution in 1988, and approval of the Consumer Protection Code in 1990" (Benjamin, 1992:143-145).

The *Parquet* started to act in accordance with the feeling of justice, thereby responding concretely to civil aspiration of justice in areas such as environment and consumer protection before the enactment of the Consumer Code in 1990. These activities had basically the support of a very wide and general prescription of the

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<sup>63</sup> *Ministère Public* or the Public Prosecutor Office will be used as "MP" or "*Parquet*".

Constitution in its article 5, item XXXII, which affirms that the State will promote consumer protection.

The general constitutional prescription and the legal vacuum of almost two years confirmed a practice already started after the Environment Law of 1981. The Constitution brought the independence to the *Parquet* to execute the public duties of promoting justice for consumers with more effectiveness. This practice indeed overlapped the period of the Consumer Code despite its text which restricted the public defence of consumer interests by public means or authorities only to public, collective, diffuse and individual-homogenous rights with public relevance.

It is interesting to add that the members of the Brazilian *Parquet* are known as “independent, professional and extremely competent (...). Unlike in Europe, (...) [they have] played an extremely aggressive part in protecting the environment, consumers, and other diffuse or collective interests or rights” (Ibid., 153).

### **I.2.3- Care in the Consumer Protection in the *Ministère Public* in Brasilia**

The ethnographic field for the identification of the practice of legal justice as a feminine virtue is the MP in Brasilia-DF-Brazil (MPDF), defending consumer rights. Its activities were chosen insofar as they offered a possible way to insert in law a practice of justice guided by care and responsibility in relationships.

This thesis do not analyse the disputes themselves and their resolution but an institutional behaviour that seems to contain the characteristics of justice as care.

The method used to support the present analysis is anthropological and consists of interviewing the two prosecutors involved in the first phase of the consumer protection office and four others recently in charge but under a more legalist or male orientation. It was also interviewed the person in charge of the new body created to substitute the MP in its practice of justice as care.

The work for the protection of consumers through the MP in Brasilia started together with the protection of the environment with the enactment of the specific Law in 1981. There was already a pre-constitutional transitional milieu in political and legal terms. The military regime was still the power but the democratisation process with the re-organisation of civil society had started by then. The recourses of that Law did not cover the redress of individual consumer claims. The Law of Civil Public Action of 1985 put the challenge to differentiate the two protections (consumer and environment matters) by then under the same Public Prosecutor Office. The spirit of the new Constitution was already very strong and even before its promulgation in October 1988, the consumer protection in the MP gained autonomy and individuality. The practice of justice as care was in force between then until 1992, two years after the enactment of

the Consumer Code of 1990 and that was a period when the Brazilian Public Prosecutors in general had a clear picture in their minds of what their official names mean: “Promoters of Justice”. This consciousness was bred by the transitional character of justice then in force, i.e., old repressive order still in force and new order already in the spirit of civil society but not yet fully effective and by the constitutional background which was extraordinarily rich and also full of legal vacuums which were demanding legislative complement. Civil activity was required to respond to uncountable small and/or serious injustices even before the enactment of the new legality.

In the interest of confidentiality, the Public Prosecutors will be called Mr. A., Mr. R., Mr. L., Mr. M., Mr. G. and Mr. T., and the person responsible for the new body created after the male overtake of the Office will be called Mrs. L.S..

The interviews had a set of questions at the very beginning which were deemed to identify certain practices in consumer protection which could be called justice as care. The questionnaire was sent to each person interviewed before the interview, except in the case of Mrs. L.S.. However, the conversations were a lot richer than the questions indicate at a first glance and especially the commentaries were very much particularised. The questionnaire was important only to indicate a common method and area of investigation in all interviews. The variety of answers however showed a coherent framework where justice as care was firstly inserted and then banned in the name of legality and security in the public task of consumer protection by the MP.

The present section will be divided in three subsections in order to group the interviews by different moments of the justice promoted for consumers by the MP in Brasilia-DF-Brazil (MPDF) and to individualise the experience of a body not endowed with the power of the former.

### **I.2.3.1- Interviews and Some Analysis of the Practice**

Mr. A.: “Role of the MP responsible for consumer protection was essential, even before the Consumer Code and also after it, because of the resistance of the business, of paramount importance to create a culture of the defence of consumers through conferences and above all through settlement of disputes, while guaranteeing a high level of parties satisfaction.”

“The MPDF had abandoned a practice of law that was changing drastically the conception of justice and it was a great fault of the body to decide to apply purely the formal law.”



“We were making a different justice, a justice of good sense, trying to promote peace in private conflicts and at the same time in the social tissue.”

“The case of the dissatisfaction of a tourist and a package holiday: The MPDF had no competence to promote the settlement but we found a way to “publicise” the case calling before us the public board responsible to regulate tourism (EMBRATUR) together with the enterprise and the consumer. The case was resolved indirectly because the enterprise could understand the inappropriateness of its behaviour and felt compelled to redress the consumer. The EMBRATUR could transform the case into public advice to all enterprises involved in the business. The consumer was obviously satisfied and in future cases we were making the settlement based on the official position of the EMBRATUR. A formal sentence would not promote at all this level of effectiveness, neither privately nor publicly.”

“The process of settlement had the effect of approximating the parties while reminding them of the advantages for both that an amicable agreement could be achieved for the case at stake and for the future of their lives as consumers and traders.”

“The audience of conciliation was indeed an opportunity for making friends, to spread a culture of respect and acceptance of others conditions and to teach the parties societies aspirations in terms of good consumer relationships and humanly profitable encounters.”

“The practice of settlement taught us to relax the parties and to dissolve any misunderstanding so far planted in their views of their dispute. Almost any commentary was accepted towards the dispelling the bad mood regarding the dispute. After this, normally the conversation was more profitable in terms of conciliation and re-establishment of their relationship.”

“We accepted any kind of complaint because our goal was to pacify the social tissue through responding to people problems. Sometimes the situation was not clearly a consumption relationship nevertheless, we were engaged in the process of finding a way to help parties.”

“The motivation for our work was coming from a high level of enthusiasm that was reaffirmed each time a fruitful encounter between parties happened under our conduction. The sad thing came with our marginalization in the name of more formal application of the law.”

“We were not asking much more on public/private, individual/collective aspects of the disputes. The tourist case shows that. We were welcoming any kind of disputes. Better saying that the more particular, private, individual the better for us. We could always find the public or collective behind any dispute to justify our interference that was at last much more to attend particular parties involved because we were sure that the social tissue would also benefit from the peace that could be re-established between them.”

“We understood that our work would not only pacify people and the social tissue but also that it was healing personal conflicts. Furthermore, we were convinced that a sentence, does not matter how precise it could be, would have promoted separation and division among parties while our work was healing the problems created by the event of a dispute.”

“I never knew how the audience should be conducted before starting it. I always let the parties tell me the right approach to help them helping themselves. It was always very exciting.”

“Parties were brought before the MP with a great trust that that man/institution could help them to find a solution for their problem.”

Mr. R.: “Our work in the defence of consumers was towards the conciliation of the parties in order to avoid the recourse to the judiciary apparatus which was not efficient enough, above all the satisfaction and pacification of parties were our most important objectives.”

“In our work maybe we were working as parents embracing the parties and maybe giving more than what was formally permitted differently than a judge who for the parties is more like a God that gives only what is strictly said by law.”

“In the process of disputes resolution, the parties had freedom to build their personal justice and the State, through the MP, offers an opportunity for the parties to exercise a humanised law different from formal law. The MP is not behind law or Codes, he is together with the parties trying to settle their dispute in terms of their own view and needs, having in mind what is reasonable.”

“The ‘God-MP’ closes his doors to the people and put himself in the position of Judges. Judges are necessary but like God, more than one for one case is not a good idea. We

defend the MP action, as a picture, more a father figure that keeps his doors open and embraces the parties and their aspiration to justice.”

“I always used to start an audience saying: “We are not enemies. We have not even met each other before. Then it is an opportunity to meet each other and above all to become friends, to learn each other’s needs and limitations to fulfil them.”

### **I.2.3.2-The Male Overtake**

Mr. M.: “The use of the Judiciary is a wonderful tool to force agreement. Without the threatening of the formal procedure in a court of law, the force of the MP is relative or almost nothing. The judicial procedure gives credibility to our work.”

“The role of the MP is to create the culture of the Civil Public Action to attend collective, public or individual-homogenous rights with public dimension and to change the attitude of the Judiciary instigating or forcing it to accept the new advancements of formal law.”

“I was the one who introduced the culture of the Civil Public Action in the MPDF. I refused to make conciliation of individual rights saying that we do not hold competence to deal with individual rights. It was a riot, a mutiny. The confusion was of great proportions and I won against the argument that I was trying to transform the Office into a laboratory given the insecurity of the judicial dispensation of justice. I was convinced that our duty was and is to provoke the Judiciary power to apply the law in suitcases involving collective and public rights.”

“The MP’s action is eminently punitive.”

Mr. G.: “Nowadays our action is punitive. In the past, it was different. We have in a more accentuated way the preoccupation to attend the letter of law. The MP is the defender of the citizen within the strict limits of law.”

“The legitimacy of the MP is due to the fact that he is searching for justice through the correct application of law.”

Mr. T.: “The first line of action of the defence of consumers through the settlement of disputes involving individual rights was highly non-productive.”

“The action of the MP defending consumers is punitive.”

Mr. L.: “I started thinking that the MP should trust the Judiciary and propose as many Civil Public Actions as possible to resolve collective problems of consumer nature. However, today the reality changed my vision and I am more for conciliation than litigation. I know that adjudication does not resolve the problem and I avoid a law suit as much as possible.”

“The difference between public and private, collective and individual has relevance for judicial litigation. But I came to know that the most important thing is to attend the particularity of a case and then I act informally contrarily to my first position for a formal reading of the features of a dispute.”

### **I.2.3.3-A Quasi-Remedy**

Mrs. L.S.: “I gave a social direction to consumer protection by implementing the politics towards the formation of a political and social consciousness of the population.”

“Before me the body was eminently punitive and that was due to the omission of the body toward more conciliation talking to traders. In case of failure to resolve an individual dispute, the body was using the media to expose the problems caused by traders behaviour denounced in disputes.”

“I promoted an approximation with the MP and that gave more credibility (a legal one) to the body.”

“The conciliation of private or individual disputes always gave the opportunity to discuss the problem in public or collective level and also national level. The Code permitted us to fine traders and, when the individual complaint opened the access to tackle a wider dimension of the problem, the fine was always a powerful measure to press for both conciliation in private disputes and change of professionals’ behaviour. The support of the MP (legal and also moral for the past action of the body) was of crucial importance for the effectiveness of the procedure.”

### **I.2.4-Normative Considerations**

The anaemic condition of the feminine in culture justifies the normative contours eventually present in the following exposition. The empirical character of the

data above explored shows a certain fragility that is common in the feminine expression in the culture, as argued in chapter two. Gilligan's findings have also a methodological value since they contest the empirical exigency of universality of the modernist and male mind to stress the value of a different human voice. Her method of argumentation is powerful enough to show how the publicisation of the feminine moral reasoning is possible. Gilligan's claims are at once substantive and methodological and argue for the value of the different since it can suggest a great deal of creativity and moral willingness to resolve human moral dilemmas and maybe legal problems in a different way. In Gilligan's groundbreaking work, normative and empirical aspects are almost inseparable and deeply interwoven. Consequently, it is important to undertake a brief normative consideration about the data exposed above. On the one hand, the intention is to clarify how, the feminine voice was responding to needs, stressing the public duty for caring about personal situations and promoting responses based on responsibility in order to preserve relationships. On the other hand, it intends to show how the male reaction argued with principles and legality against a practice of care.

The interviews showed the polycentricity of consumer problems brought to knowledge and action of the MP who needed a kind of "managerial intuition". Contrary to the way adjudication deals with a conflict, a female rationality and moral disposition to respect and approach the polycentric character of the conflict with managerial imagination, intuition, and willingness demanded from the action of the MP to accommodate the form of law to the problem and not to adapt the problem to rigid and preconceived law. Moral enthusiasm and sense of duty towards promoting a reasonable solution to disputes were diagnosed; they worked as internal legitimating factors of the practice.

The counter-argument identified by the male reaction is about the populist and arbitrary character of the dispute' settlement because firstly it was against law since the MP had no competence to protect private individual rights. The Constitution did not establish this limitation in the general disposition about the public duty to promote consumer protection. Nevertheless, the male reading of the legality and argumentation forced violently the feminine practice of justice into illegality. Secondly, the MP could not act as a mediating institution between private persons to implement a public policy. The scene, where this MP must act, should be only legal proceedings in courts of law because MP's role was "basically punitive". This mediating structure, says a more leftist male position, would rather promote a disorganisation of collective reaction against injustices perpetrated by public and private agents, while impeding the development of communitarian feelings. That position was already called conservative. Above all, the feminine sort of justice here exposed justifies the analysis made by Arno on informalism which does not transform disputes into banalities, neither "seek[s] to avoid

the complexity of conflict cases but rather attempt(s) to deal with the total relationships and total social personalities, thereby admitting the unique nature of every case” (1979:44).

In reality, the MP stimulates self-help, against the normal practice of lumping unpleasant resolutions of consumer contracts and avoiding adversarial procedures in courts to resolve small claims that normally would rest without attention, through promoting mediation and peaceful settlement of consumer conflicts. This work has the educative character of mediation through adjusting traders behaviour regarding law and feelings about adequate standards of consumer protection. It also shapes a moral-legal order which is contested by legalist and principled male understanding of the public duty of promoting consumer protection. What could be taken as a promising practice towards the elaboration of “a new or altered image of legality”, compounded with “ways of infusing legal regulation with moral meaning”, was simply put into marginality as illegal practice (Cotterrell, 1992: 205/215).

Furthermore, this exemplifies Gilligan’s characterisation of the male morality of rights as occupied with “problems of inequality and oppression and hold[ing] up an ideal of reciprocal rights and equal respect for individuals, [whilst a] care perspective draws attention to problems of detachment or abandonment and holds up an ideal of attention and response to need” (In Jackson, 1995:318).

The consumer protection, which was promoted in accordance with the main characteristics of justice as care, was provided in a period of legal vacuum regarding substantive and procedural law. In this sense, the analysed MP’s activity did not resemble the active judge promoting the equalisation of the parties. Contrarily, the action was towards understanding their differences and to allow them to find their way to reach peace and a reasonable agreement for them in their terms, having formal law as a reference of the reasonable. The law was used, especially after the enactment of the Consumer Code in 1990, to set up limits for the possibilities of moral or quasi-legal settlement of consumer disputes. The moral quality was not coming only from the nature of the agreements but above all from the attitude of the MP promoting care and responsibility between the parties to a dispute and acting informed by the same parameters of listening to needs and responding to them in their own terms.

The male legalist attack against justice as care seemed to define that the regime of the rule of law is contrary to the practice of relational justice or justice as care. This point needs further explanation in the next section.

## II-The Question of Legitimacy as Parties Trust in Justice as a Feminine Virtue

The promotion of justice as a feminine virtue was based on a very peculiar reading and interpretation of the Constitutional duties in the practice exposed above. General dispositions of the Brazilian Constitution, such as Article 5, item XXXII, which determines that the public power should promote consumer protection, was used as the authorisation to accept any kind of complaint in order to deliver the widest amount of assistance and help to the biggest number of people possible. The male reading of the legality took Article 127 and saw there legal reason to provoke a “mutiny” against the “banalisation” of the MP action in consumer protection. The disputes involving individual rights should not be the object of ministerial action. Another public body should take over this duty. Defenders of the “paternalist” form of action were vesting individual cases with public or collective interests in order to justify ministerial action but the first aim was to respond to individual problems and urgent needs brought before the authority. The male overtake reputed that illegal and non-productive and promote the creation of another body not connected to the MP which should pursuit in courts the application of law in public, collective or inalienable individual-homogenous rights.

Nevertheless, justice as care certainly was behind the general understanding that Article 5, XXXII, had lifted consumer relationships to the condition of public matter. In this sense, the intervention of the body was justifiable. After the 1988 Constitution, MP intervention in judicial disputes involving consumer relationships became obligatory for better protection of consumers.

Law, through constitutional rules, seemed to support in a way both positions and the victory of male conventional readings imposed itself as a question of *Gewalt*, of force. It is equivalent to saying also that the force of male argumentation was based in its legitimacy lent by the past, by the intersubjective validity of its positions and, then, in the appearance of consensus that its argument seemed to reveal. The feminine practice had on its side a great deal of intuition of the just and the good, the sense of mission, the moral enthusiasm in promoting peace and encounter between parties in conflict. It is remarkable the absence of *Gewalt* of the feminine position, its vulnerability before one single voice (Mr. L.) that was able to canvass a great deal of support in his solitary mutiny, transforming it into a riot that forced the withdrawal of all representatives of the different justice.

One must shed light on the legitimacy of the feminine position by responding to the question: “which is the discourse able to legitimate the promotion of justice as a feminine virtue?” The victory of male law’s *Gewalt* should not withdraw the legitimacy

of using the feminine practice of MP as a model to bridge the gap tackled in the following part two.

The male counterattack based its legitimacy on a traditional Weberian framework in which the delivery of justice should be based on rational, objective parameters and avoid emotional and subjective feelings. Law gives them and the judiciary applies them. The MP provokes the judicial machinery asking for sentences in the limits of legal authorisation. Legitimacy is, in this sense, a function of a normative prerequisite of rational patterns of legality. However, the male position also used more modern criteria of legitimacy to justify its institutional adequacy or to find forums of consensus in the institutional community of the MP as a whole. The consensus criterion of legitimacy of male discourse is a strong Habermasian conception and seems to call for a moral justification for the decision to take a more legalistic and formalist reading of law. The consensus argument is not placed in the process of resolving disputes but in the institutional fight for recognition of a given style of action (rational/irrational), a form of speech (rules/relationship), or a different sort of voice or rationality (male or female following Gilligan's findings).

The male argumentation drove the service into a bureaucracy with clear routines justified by the fear of authoritarianism and paternalism, without legal basis. The female response was against the computerisation of MP action or its transformation in "a laboratory of experience" or rather a game in the taste of boys. The game was to guess which would be the Judge's decision. The consequence was to deny the opportunity to parties to settle themselves their disputes through their own understanding of justice.

The theme is very wide and one must draw here a line in order to mention just the criteria which was heard in the male justification of its force. The aim is, indeed, to survey conditions of validity and practical feasibility of justice as a feminine virtue by having in mind the practical example exposed above. To this, this thesis turns now.

## **II.1- Parties Satisfaction and Happiness as Contours of Legitimacy of Justice as a Feminine Virtue in *Parquet's* Action**

Firstly, the MPDFT in its promotion of consumer protection is the ethnographic field of this thesis and it offers, instead of disputes, a feminine institutional approach to be analysed. It is necessary to understand that consensus, as a criterion of legitimacy, is of difficult acceptance even when one examines disputes<sup>64</sup>. The consensus of parties around a specific outcome for their dispute would be a factor of legitimacy of the outcome that respected the limits of law only in case of symmetric relationships.

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<sup>64</sup> Lyotard says, commenting Habermas: "Consensus has become an outmoded and suspect value (...). We must (...) arrive at an idea and practice of justice that is not linked to that of consensus" (In Benhabib, 1991: 205).



Besides, the discussion of the legitimacy of a practice in an institutional environment demands not a political criterion such as of consensus but a moral one. Furthermore, it is inserted in the special relationship between official agents who act morally or with great moral enthusiasm and parties that are helped and instructed on the ways to be morally careful in the search for an outcome for their disputes through listening and being heard. The legitimacy question is highly dependent on declared needs if one assumes that people involved in the process of settlement are able to hear and to respond with care and responsibility, criteria that enable one to gain legitimacy in asymmetric relationships. The process of listening and responding turns into a very delicate undertaking that seems to ask for criteria or rules, better identified by personal fulfilment by authorities of a list of particular personal skills (like empathy showed in two different ways by Mr. A and Mr. R.) necessary for a feminine practice of justice. This seems to be a promised avenue to equalise the theme of legitimacy in a male way: setting a list of general and abstract requisites to be met by officials responsible to conduct the process. Nevertheless, this thesis argues for more internal and unstable criteria of legitimacy: the achievement of personal satisfaction and happiness by parties and officials alike, by disarming the adversarial atmosphere of unilateral victory and reaffirming the value of relationships. Then, trust become the core of the legitimisation process of institutional practices at parties' eyes even lacking legitimacy at institution's eyes as an actor that judges the practice and can force it into the marginality of illegality. Legitimacy and trust seems to be a continuum between the dispute itself and the institutional practice of settlement which aims to function as a regulative criteria to overcome the ambiguity that the feminine morality can be accused by male abstract and mathematical ways of reasoning (Blegvad, 1997).

This ambiguity comes from the fact that legitimacy in a feminine moral frame is not about the application of norms but it is the ability of hearing and responding in the Other's terms towards the attainment of satisfaction and happiness. Feminine legitimacy cannot be checked by the rightness of the application of any normative set of instruction, legitimate or not, since feminine moral practice is based on mending webs of relationship through care and responsibility and the practice of empathic and inclusive hearing.

### **II.1.1- Reflexive Law: Help for the Empathic Institutional Practice of Justice as Care?**

The arguably unstable character of empathy (Henderson, 1987:1649) would be overcome by the potential for "legal reflexivity" that the process of settling dispute through the ethics of care could entail. It happens through the creation of specific rules

and routines for concrete cases and particular features of parties that alters the practice of justice “from being a mere function of the market, or of the courts of law or other legal agencies, to being a process sensitive to the needs of the disputing parties. These reflexive features (...) are necessary for (...) the emergence [of the process of disputes settlement] as an autonomous legal subculture while creating the framework within which it can legitimize itself” (Banakar, 1998:349).

The reflexive practice of law eases the reductive character of law and its “stilling” effect; it makes law reflexive like love; it is the capacity to think things through. The punctual proceduralisation aims at creating rules to warrant the reflexive condition of love in the empathic institutional handling of a particular dispute considering needs, happiness and satisfaction of parties.

Reflexiveness of law facilitates justice as care since it is “content free”. It happens through the absence of material rationality. “[It] does not, for example, decide what is in the consumer’s interest: it confines itself to defining who is competent to express such interest and to safeguarding their representation” (Wilhelmsson, 1992:62). The parties will be competent to decide the content of the outcome of their disputes towards satisfaction and happiness.

Reflexive law gives to parties an opportunity to influence and participate in the process of norm formation which is the outcome itself of their dispute. The punctuality of the process warrants the possibility to think things through, a necessity in justice for asymmetric relationships (Ibid., 63/71).

Wilhemsson quotes the Nordic Ombudsman who negotiates with business representatives as an example of reflexive rationality, which was observed also in MP practices of settling consumer disputes. The author quotes Teubner in order to warn us that reflexive law has an emancipatory and a conservative side. The former, says Teubner, is expressed by the capacity of an institution to respond to human needs.<sup>65</sup> The emancipatory side is the capacity to open the closeness of law for a practice of open justice, easing the reductive character of the former (Ibid., 63/70).

Wilhelmsson offers us the conception of “learning law” to be exercised by consumer authorities when they discover in their practice new patterns of law able to respond to human needs or more punctually to parties’ happiness and satisfaction. He proposes the legitimacy of this practice through the action of public authorities. In addition, this thesis proposes the adoption of private or feminine methods of conducting learning process in settling disputes by public practices, institutions and authorities. This learning is about what is “love”, how to love, how to hear and respond to the Other in his own terms with responsibility regarding the relationship.

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<sup>65</sup> Teubner “stresses *responsiveness to human needs* as central normative criterion for judging social institutions” (Wilhelmsson, 1992:70). It has nothing to do with justice as care.

Through reflexiveness and empathy, justice as a feminine virtue, like law does, in Cotterrell's words, can free itself from the sources that could challenge its legitimacy. The sources are the institutional organisation of the MP itself, or the constitutional background or any grand narrative represented by male rational requirements that prevent the process from being punctual, contextual, asymmetric, particular and not consensual. The death of general criteria for truth asks for the legitimisation of local discourses and particular voices. It could be argued as well whether the death of transcending criteria of truth would not be the end of legitimacy requirements. The challenge however, seems to be the legitimacy of *les petits récits* and of any free expression of personal parameters of satisfaction and happiness in a given concrete dispute (Benhabib, 1992:225).

There is a very wide source of inspiration in anthropological works about the problem of understanding and translation of needs, parties' satisfaction and happiness mainly in adjudicative dispute resolution. The work of L. Cardoso de Oliveira in his still unpublished PhD thesis<sup>66</sup> is exemplary and an excellent revision of the field. He proposes the analogy between problems of legitimacy and understanding and suggests that to identify legitimacy with parties' satisfaction and happiness is problematic, since these criteria are too accidental. The warning seems more relevant for the case of adjudication where needs, satisfaction or happiness have to be determined by a third impartial judge who does not have any reliable normative criteria for that. However, this is not the case in the process of conciliation where justice is not delivered but self-made by parties under a strong institutional engagement of a very trustworthy and relational authority, competent and legitimate to understand the rule-oriented narrative but with no power to adjudicate.

The other work worthy of mentioning is the research of Conley and O'Barr, a lawyer and an anthropologist respectively, that seemed to be inspired by Gilligan's findings<sup>67</sup>. They heard in courts of law two different voices, storytelling strategies and judge's ability to hear and respond: a relational voice and a rule oriented one. The former was identified as a feminine way of expression and moral standing and the later a male logic one. The judge's ability to express law in a relational or rule-oriented voice, despite the fact that they prefer normally to use the rule-oriented one, would legitimise and guarantee success to relational litigants<sup>68</sup>. By contrast, he would fail

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<sup>66</sup> Many thanks to Prof. L. Cardoso de Oliveira for having allowed access to his work, thesis and many other publications which are worthy of more attention than the limits of this thesis allow.

<sup>67</sup> They say: "the parallels between our observations and the work of Gilligan ... are significant" (In Cahn, 1992: 1713 and Conley and O'Barr, 1990: 79).

<sup>68</sup> Conley and O'Barr define relational litigants as people who expect "the law to be interested in the whole range of their personal and social problems. Judges often excoriate such people for 'wasting the court's time, and their own lawyers sometimes label them 'illogical', 'stupid' or even 'crazy'. (...) By contrast, *rule-oriented* litigants interpret disputes in terms of rules and principles that apply irrespective of social status" (1990:60/58).

under the rule of a rule-oriented judge, more easily found in courts of law. Justice as care would nevertheless constraint this ideological process promoting the free expression of any voice or the expansion of “unconstrained storytelling” and the possibility of reciprocal listening. Justice as care would have the power of lightening the insulation of law and legal systems not only from morals and politics but above all from the larger culture (1990:177/176). The empathic nature of the settlement process is again a point upon which the legitimacy of justice as care based on parties’ satisfaction and happiness would rest.

The next section will discuss whether the male rational grand narrative could represent a source of legitimacy for justice as a feminine virtue beyond the “immanent appeal to the self-legitimation of ‘small narratives’ and the establishment of categories for the organisation of perceptions that could preclude the creativity and freedom of the process” (Ibid., 229 and Cahn, 1992:1709).

### **III- The Tension between Demands of Legitimacy and its Promises**

For Levinas, legitimacy for judging is impossible because any judgement is marked by a deficit of information on and access to the Other’s reality and face. The Other as inaccessible makes legitimacy for judging dependent on normative patterns derived from formal-rational pre-established criteria which cannot be applied to the Other. Ethics of care, through dissolving the inaccessibility of the Other as a moral responsibility which is well-responded to by the feminine, very much absent from the culture, re-installs the demand of legitimacy. However, legitimacy here is a moral exigency not a formal-legal one; it is fulfilled by a moral attitude which differs from the normal male morality of rights. The feminine ethics offers as well the conversation with the Other not as a way to achieve general peace, consensus or the creation of a “discursively organised social rationality” but the opportunity to equalise justice with care, needs and responsibility in a relationship with the Other. (Docherty, 1993:25). The ethics of care dissolves Levinas' paradox about the activity of judging which is a need in any specific case because the Other “summons me, calls for me, begs for me” despite the lack of legitimacy of such an endeavour (In *ibid.*, 16). The ethics of care reproves judging and offers care as a pattern for justice as a feminine virtue.

The emancipatory conception of reflexive law can also be facilitated by building this tension. Reflexive law needs a material rationality; it is the precondition of reflexive justice, says Wilhelmsson. “The material and reflexive elements support each other” (Wilhelmsson, 1992: 67). How is it possible without transforming parties’ needs into material, normative and fix rationality? The aim is to keep them punctual and

reflexive, not reduced to legal patterns and/or to establish the re-materialization of law by re-inserting moral patterns in law.

The tension explored here comes from negating the separation between the normative criteria of legitimacy and the moral ones or from the establishment that legitimacy as a moral standard can be or should be supported by a normative democratic criterion expressed by legality. The normative and the feminine criteria of legitimacy could be understood as a continuum rather a dichotomy that must persist. This is possible in view of the peculiarities of feminine moral patterns which argue for hearing and responding as means of mending the web of relationships. In this sense, the discussion on legitimacy is of a very different quality when one thinks about legitimising a practice of justice as care.

The legitimisation of feminine moral patterns, or the rematerialization of law through care offers us the possibility to refuse a criticism that was to a certain extent in the position of the male overtake diagnosed in MP consumer protection. That criticism says that the remoralization of law “promotes the change in the legal structure to suit the needs of situative administrative action and substitutes the deficits of political legitimation” promoting authoritarian administrative systems (Maus, 1988:152). It does not apply to justice as care, because the door to court proceedings is never closed. The guarantee against situationism and authoritarianism is a normative engagement in the practice of justice as care where the access to the Other is mediated by the ability to hear and respond in his own terms. An “opportunistic treatment of values” is prevented through the feminine remoralization of law that attends to particular needs expressed in a process conducted by the ability to hear and respond without any transcending criterion of truth. The normative support, nonetheless, must not reproduce or re-install such criterion. Its position regarding feminine practices is of tension because no statute would be able to enumerate legitimate needs to be observed in any process of promoting justice as care. The tension between female and male paradigms would be translated in the tension between a practice that renders homage to particularities and a normative apparatus that would keep a possibility of revision in case the practice shows itself contrary to personal interests within the scope of law. On the one hand, the practice will keep the clue to free oneself from the trappings of the closeness of normative systems. On the other, normative patterns that guarantee a possibility of revision of such practices will provide a remedy when satisfaction and happiness were not achieved or properly observed, reducing them to the patterns elected by law and substituting the moral legitimacy by the normative one as the price for the failure of care in achieving agreement in dispute resolution (Christensen, 1995:240).

The discussion of tension intends to bypass the binarism discussed so far. In this sense, the question of legitimacy demands the abandonment of order without law,

justice without law, feminine without masculine, satisfaction and happiness without normative autonomous legality, soft law without hard law. It appears necessary, especially for the case of integrated market with a remarkable level of diversity, that these dichotomy start to be elaborated as continuums able to propose effective changes in law. This is maybe different from the inspiration L. Nader (1984) had drawn from Auerbach's work (1983) about being justice with law a feasible promise as the following necessary stage of a development that started in Auerbach's formulation from justice without law passing through law without justice. This thesis is not evolutionary but suggests a possibility to be fought for through the re-integration of the feminine in the culture and in the institutional legitimate life of western human society, before the well-admitted failure of established legal institutions to provide justice.

Feminine insertion in law humanises cruel market's reality to which litigation is an enemy; an idea that maybe explains the fact that litigation for consumers in cross border disputes in the EU is almost impossible. The inconsistency of litigation in a vigorous market regime pretends to legitimate the "lumping it" imposed to consumers. Thus, the possibility of a justice that strengthens relationships seems to dissolve the inappropriateness of litigation in a market regime especially in the EU and to create a possibility for the market to respond positively to its moral responsibility vis-à-vis consumers.

Furthermore, the co-existence between personal criteria of legitimacy of empathic feminine process of justice promotion and masculine rational-legality could be elaborated in three different moments of the tension regime. Firstly, the possibility of the official promotion of justice as care should integrate legal statute and routine. Secondly, the tension would also be healthy if a normative legality of substantive and instrumental rules could be provided to regulate disputes in which feminine justice fails in the sole judgement of the parties and their aspiration to satisfaction and happiness. Thus, the fear of a world without principles seems to be resolved with a safety net. It recalls the example quoted in chapter two of the safety net added by women to a scene where trapezists were flying high in the air. One can go as high as possible in his aspiration for relational resolution of one's disputes, the net of legality will stand just there in case of failure, in case of a fall despite the fact that the net will not be comfortable but will prevent a tragic outcome. Moreover, the tension is in the fact that the net of legality is part of the scene of justice as care but not in the flying itself or in the process of dispute resolution through hearing, being heard and responding towards satisfaction and happiness. The net, standing in between the trapezists, will disturb their piece of art, of encounter, of understanding and harmonisation of particular aspirations to satisfaction and happiness. Nevertheless, the tension has also a third function which is to offer a regulative idea to direct and limit satisfaction and happiness. However, law

in this case should have a “minimalist” position. In this sense, as the rule of law freezes judge’s empathic decisions, law should not do that to the public authority with competence to conduct settlement of disputes through justice as care (Massaro, 1989:2110-11).

The tension proposed is indeed a luxury in terms of legal system that maybe only affluent societies and markets like the European one can afford or rather have the duty to promote, thereby recognising the richness of human possibilities in overcoming differences and resolving problems. Moreover, the tension recognises the limitation of unitary Kantian morality and modernist legality and legitimacy. In order to embrace the tension as suggested political maturity, material prosperity and institutional availability are required and are certainly to hand for EU, as it will be demonstrated in part two of this thesis.

The tension proposed has also the value of avoiding the human irresponsibility and the moral failure in a feminine sense of “ducking of moral choice via refuge in legality”. Furthermore, it prevents the market from being regulated by pure private means and soft law. These are the two sides of the gap object of the next part and chapters: legalism in national courts of law or private settlement of disputes through soft law. The insertion of the feminine in legality through a reliable public and European institution can secure a feasible moralisation of law and an empathic institutional action. Moreover, it “also reminds us of our common humanity and responsibility to one another” beyond diversity brought together by a common market (Henderson, 1987:1653).

The tension goes beyond the fears of post-modernism regarding grand narrative; it inflicts utopia as practice, and transforms the normative legal apparatus in a safety net. The feminine as utopia is also in the tension proposed as the “ practical-moral imperative (...) without [which] such a regulative [moral] principle of hope, not only morality but also radical transformation is unthinkable” (Benhabib, 1992:229). Moreover, the future of law is also uncertain and threatened by stiffness without the moral aspiration of having rights forgotten in the name of care or having the former transformed into the latter. This transformation would be a task for love, *interesse* or care as institutional will before the willingness of the parties to settle their disputes without substantive or procedural rules in the realm of the official duty of dispensing justice. Normally, legal systems exist to transform care into rights, i.e., to embrace a demand for rights when care had failed. The tension here proposed resides in the inversion of this process at its outset in the sense that rights are suspended for care to be achieved. The feminine moral understanding is that encounter cannot happen in rights but only in care or in relationships very much threatened by the force of law not tempered by love.

## The European Context



## CHAPTER IV

### Understanding the gap

#### I - Bridging Parts I and II

The first part of the thesis was dedicated to building a redefinition of legal justice. This was done through the study of the problems with the relationship between law and justice as a post-modern question. Feminist legal thought was also a source from which a great deal of inspiration was drawn. It was argued that law and justice entail a sort of power relationship, which has been resolved in the frames of modernist legal theory, which comprises the understanding of justice as mere application of law. The rule of law is the measure of justice as much as male parameters are the measure of humanity.

Having postulated the difference between law and justice and demonstrated the impossibility for normal legal theory to offer a more favourable window through which law could be seen differently, a new paradigm was embraced to support a special quality of justice required by consumers' disputes. This paradigm was taken from the moral debate between Lawrence Kohlberg and Carol Gilligan, which took place in Harvard-USA during the early eighties. This debate is upon two different models of moral development: one characteristic of male human beings and a second one, discovered by Gilligan when trying to contest Kohlberg's male approach, shown more by female ones. These two different moralities correspond to two different models used to resolve moral conflicts, which suggest two rival ways of settling disputes in legal arenas. A concrete experience of the feminine model was explored in chapter three in order to corroborate a new paradigm for the legal settlement of disputes, which corresponds to the contra-model developed by Gilligan.

The following question applies: why use consumer law for a special sort of justice?

Firstly, the feminine model of justice is a response to a very precise necessity and the theoretical formulation of such a model is a translation of a practice previously experienced in the settlement of consumers' disputes. Therefore, the theory reflects a certain practice and responds to a very concrete necessity expressed by the special nature of relationships of consumption and, consequently, disputes involving consumers. Moreover, EC law, apart from reopening old and already settled questions, such as those concerning citizenship and sovereignty, accentuates in the most radical way the contradictions and peculiarities of the role of the consumerist approach in contemporary society. It turns the banality of consumption into the generator, the motor,

and the fuel of the most ambitious project of cross-border co-operation and social mobility known in mankind's history. The fundamental human rights and the political conquests of citizenship are tantamount to the rights of consumers in a number of ways. To disregard that fact is to take the risk of working towards the withering away of a unique experience in the political history of the peoples of Europe.

In addition, cross-border disputes are the first immediate consequence of the flourishing of the internal market. They offer the opportunity to test the model of justice for consumers in its most radical form: the encounter with strangers, with the stranger,<sup>69</sup> not only with a foreign person, but another language, another way of being, of reasoning, of feeling, of cooking, of mothering, of healing, of collecting the trash, of approaching otherness: in other words, banality has been turned into the sacred, unapproachable, untouchable, and still unforgettable: it cannot be renounced or disregarded.

The present thesis, while discussing the relationship between law and justice, will place the special sort of justice required for consumers' disputes in an out-of-court site, taking the fourfold reasons exposed by the current literature about the civil justice crisis: courts "are too expensive; too time consuming; too intimidating and too unpredictable in their delivery of justice." (Lowe, 1993:66) Another common argument in favour of a special sort of justice for consumers is the reduced value of their complaints. Without denying the truth of that diagnosis, and to the extent to which courts are indeed too intimidating, they should be avoided for the settlement of consumers' disputes given, in reality, the essential feature of consumers themselves, which is called here "relational". The consumer is a relational partner, irrespective of being individually or collectively considered. Indeed, this relational quality pervades the whole consumption relationship, assuming that any businessperson runs his/her business with the goal of continuity, expansion and success.

The weak condition of the consumer vis-à-vis the position of the merchant does not play a special role here, since disputes involving consumer rights are special cases to be used for a justice informed by an ethic of care understood as opposed to a justice informed by the ethics of rights. Instead of rights, justice for consumers will search for sensible solutions that attend to needs, happiness and satisfaction rather than legal rights or legal decisions.

The plight of consumers goes beyond mere economic weakness and it leads to a more comprehensive phenomenon when one looks into the legal systems, especially the European one, in order to identify the options for consumers in disputes against merchants or professionals.

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<sup>69</sup> In Portuguese when one goes abroad, one says that "one goes to the stranger".

The redefinition of justice proposed goes beyond the mere understanding of access to justice as a legal right to embrace the idea of justice as a moral exercise that law must support. It may be considered the place of law and the important social political conquests of the enlightenment such as the principles of rule of law, equality, impartiality, legal certainty and the like, since this thesis works to demonstrate their relative and reduced usefulness for justice for consumers especially in cross-border disputes. Moreover, given that there is little doubt about the necessity of the establishment of redress mechanisms for consumers in cross-border disputes and that access to justice is part of the economic and political integration of Europe (Weatherill, 1994:69), especially after the establishment of the single currency, being also ancillary to the four freedoms of the European Community, (Fallon, 1992:259) one has to ask: “which justice?”.

The feminine justice developed in the first part of the thesis, and which will be translated and adapted to the European reality, is not a pure reproduction and defence of the ADR system and its methods of the settlement of disputes. Surely, the justice informed by the ethics of care resembles mediation and, in some respects, the ombudsman system. Nevertheless, mediation needs to be endowed with authority, and the Ombudsman is a kind of adjudication, who suppresses the freedom of the parties to settle by themselves their disputes, and frustrates the encounter between strangers and the profound pedagogical meaning of such opportunity. In turn, feminine justice does not embrace the purely informal solutions where lawyers and formalities are forgotten and adjudication can take place without those common elements of any proceedings of law, since it is unlikely that the relationship involved and its relational feature will be protected. Feminine justice argues against the ability of adjudication, which is based on the rule of law and the principles of equality, impartiality, and legal certainty, to care for the relationship involved in a legal dispute, since the practice of adjudication entails the formal-abstract model of legal reasoning used by the morality of rights.

At this point, having argued that consumers need a special quality of justice, it appears convenient to try to answer a couple of questions as such: why focus on EC law and cross-border disputes?

EC law is used because of the uniqueness of the European experience of economic, monetary and political integration. This integration represents a great challenge in promoting togetherness and respecting diversity. Justice as an experience of the encounter of strangers could not have a better background. Cross-border disputes are chosen here for they actualise the challenge of the EU order: to promote togetherness while respecting diversity.

This chapter will be developed in three sections. The first defines the gap to be bridged, setting up firstly four landmarks for the discussion of the present chapter. The

main question will be: “which gap in the EC consumer policy concerning cross-border disputes?”<sup>70</sup> The second section will be devoted to the analysis of the Private International Law regarding cross-border consumer disputes that do not involve tort liability. It will also include a modest consideration upon the Rome and Brussels Conventions and Regulation 44/2001<sup>71</sup> and the gap in the light of the Europeanisation of private law and PIL and the findings of two studies prepared for the Commission of the European Union on the costs of judicial disputes for consumers in the internal market. The third section will analyse the out-of-court project as expression of the gap.

## **II- Defining the Problem**

It is necessary to discuss the general ideas that compound the theoretical background of our discussion on consumer protection in general and in the EC legal and political environment. It will, hopefully, strengthen the frames of the discussion as a whole. Besides, it may be prudent to warn the reader that these considerations are deemed to be repeated throughout the rest of the thesis, especially the discussion upon the gap, the object of the current chapter. Another prudent warning refers to the sketchy nature of these considerations since each one of them could entail in itself a lengthy discussion. They are solely landmarks of the general configuration of the object of the European part of the thesis.

The gap in EC consumer law and policy regarding access to justice for consumers is informed by a peculiar problematic correlation of four pillars, namely: the centrality of consumer issues in the consolidation and expansion of European economic integration and therefore in EC law; the inability of law to shape consumers’ transactions; the inappropriateness of national solutions for the internal market problem regarding access to justice for consumers; and the somewhat problematic position of courts to settle consumer disputes.

### **II.1- The Centrality of Consumer Issues for the European Legal and Political Armoury**

The first pillar of the discussion is the centrality of consumer issues in European integration and its troublesome nature, which is due to its erratic, patchy and incomplete development. Consumer protection is “(...) probably the most central issue (...) of European market integration.” (Weatherill, 1997:1) This seems to be so because “[c]onsumer law relates to the quality of life.” (Reich, in Stuyck, 2000:370) This is said

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<sup>70</sup> This sentence does not have a verb based upon the well-known title of Alastair MacIntyre’s book: “Whose justice? Which rationality?”

<sup>71</sup> OJ L 12/1, 16/1/2001.

because the politics of European economic integration, whilst bringing forth the market without boundaries, has to take account of the role of the individual. The argument is that the individual that emerges as a responsibility of the internal market is a consumer. The imposition of the consumer as the subject of the market brings forth a quite special transformation in the quality of consumer law. Consumer law has been developed worldwide away from the frames of the private law of contracts to enter the realm of public-social policies<sup>72</sup>. This entails, on the one hand, that the frames for a special sort of justice adapted to consumer needs will demand a transformation in the public way of dealing with private problems. On the other hand, the public safeguards will probably demand a retention of very specific tenets of private relationships as a counter movement of the publicization of private matters.<sup>73</sup> Thus, as seen in the second chapter, the private seems to grow and demand space in the public realm whilst provoking a transformation of the latter by the adoption of patterns of the former.

Regarding EC consumer law and policy, the theme of the “gap” is manifold, especially because the development of consumer law and policy in EC law has happened in an indirect way: consumer protection was not an aim of the founding fathers of the European Economic Community. The EEC Treaty did not contain explicit provision for the adoption of any kind of legislation or policy in favour of consumers. Nevertheless, EC consumer law and policy did not wait until Maastricht to start its life in EC law; it developed before Maastricht and was based on the political will and necessity to establish a “level playing field” also for consumers, as economic integration became increasingly consolidated. The regulatory gap was, nevertheless, always present insofar as the Treaty until Maastricht did not offer any constitutional base for derived legislation and policy. Articles 94, 308 and, after the Single European Act, Article 95 were the legal base for the formulation of EC consumer law and policy.

In addition, more remarkable is the solution offered by the European law case, on the abandonment of the rhetoric of consumer rights to the benefit of the consumer choice policy as a way to fill the legal vacuum. The consumer benefits from economic

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<sup>72</sup> Away from Weatherill’s argument, consumer policies increasingly demand a forum of social policy, especially in the realm of foodstuff regulation, weakening or even leaving behind the “scepticism about whether the EC should even have a consumer policy at all.” (Weatherill, 1997:4) “Within the field of civil law itself, consumer legislation is a prime example of the (...) intrusion of mandatory rules into the once free territory of the law of contracts, thus resulting in a reduction of the freedom of private parties to contract.” (Erauw, 1990:71) Besides, the indirect growth of EC consumer law and policy seems to be a thing of the past. Moreover, one could affirm that nowadays it has achieved a central place in the general frames of EC law and policy despite the claimed constitutional gap or “absence of any explicit base in the Treaty” to push forth a coherent EC consumer policy and law. (Ibid., 12) “Environmental protection and consumer protection are new concerns which were of little political importance when the original Treaty was drafted. They have now become so important that no politician or government can afford to ignore them.” (Edward, 1987:19-20) Indeed, the truth is that consumer policy has been seen as the “kleine Schwester” of environment policy. However, the relevance of EC consumer law is increasingly asserted and it “seems to have outgrown its ‘Schneewittchenrolle’ (...)”. (Stuyck, 2000:367)

<sup>73</sup> It does not mean soft law, against which the following chapter argues.

integration insofar as the choice in consumption enlarges with the effectiveness of the internal market. The Treaty is an instrument of the Market and the Court is the guardian of the Treaty and of the consolidation and flourishing of the internal market, which guarantees the enhancement of consumer choice. The free movement of goods and services throughout the Market must not be obstructed by restrictive national policy unless mandatory requirements are at stake. The Cassis de Dijon and Dassonville doctrines, judicially elaborated, in different directions, are examples of the way the European Court has bridged the legal gap in EC consumer law. The protection of consumers is effective through clear information by efficient labelling and advertising, for instance. Consequently, the well-informed and educated consumer does not need protection; he has benefited from the expansion of the market and the lack of formal legal base seems not to be a problem. Consequently, EC consumer law and policy has been developed in a patchy way against the background of the absence of constitutional basis for that.

The European Court of Justice has been acting within the framework of EC legality in order to outline a possible EC consumer policy and law, by dismantling the language of consumer rights and inaugurating the realm of consumer choice, in response to the silence of the Treaties and secondary legislation. Weatherill has been very precise in characterising the actions of the Court to promote awareness on the role of consumers in the evolution of the internal market. He understands the evolution of EC consumer law and policy, promoted by the Court, from being based on the informed consumer (Cassis de Dijon and Dassonville formulas) to the stage when the market needs the confident consumer to continue its growth. The Amsterdam European Council in June 1997 stressed the vital role of the confident consumer for the continuity and “viability of a cross-border market.” (Weatherill, 1999:714) Thus, the question of access to justice, already crucial for EC consumer law and policy, becomes extremely urgent insofar as the European Court whilst filling up the regulatory gap by establishing consumer choice in the absence of consumer rights, establishes the situation where informed consumers need no protection and no justice. “Consumer rights have, it seems, been overridden by consumer choice.” (Reich, 1992:25) It is to be wondered whether the definition of consumer by Community Law has “been inspired by the idea that the advent of the Internal Market renders protection unnecessary.” (Reich, 1995:293) In truth, the language of rights filling up the legal gap offers “choice” as a substitute for justice and ultimately turns the regulatory gap into a moral one.

## II.2- The Purposeless of Consumer Legislation

A second background idea regarding consumer protection in general refers to a very interesting fact that consumer legislation seems to lack serious purpose or intention. One calls it “symbolic legislation”. It refers to the one that “appear[s] to help consumers, in order to legitimise the current political and economic system while simultaneously failing to alter significantly the power and economic relations between merchants and consumers”. (Whitford, 1981:1018) This severe critique is applied to the erratic and patchy growth and development of EC consumer law and policy in case no purposive action is performed in the crucial area of access to justice for consumers, in coming years. Without effective access to justice, the sophisticated armoury of substantive rules will not produce any effect either on righting or preventing the wrong. The only way to remove this criticism against consumer legislation or policy is to set up effective mechanisms for the realisation of legal justice. Another aspect of this argument is the peculiar “limited ability of law to affect consumer transactions”. (Ibidem) This aspect will permeate the very special quality of justice that consumers’ disputes require, and called here justice as care or as a feminine virtue. Besides, the symbolic nature of consumer legislation is to be overcome by “hybrid remedies” which consist of, for instance, “the availability of informal dispute settlement mechanisms” and a strong role for public authorities. (Ibid., 1043)

## II.3- Consumer Protection as a Moral Responsibility of the Market

The third pillar of this present framework is the increasing ineffectiveness and inappropriateness of national solutions for consumer protection in a market economy in general and especially in cross-border disputes. Firstly, one must consider how extremely cumbersome, erratic and time consuming the process of transposition of directives to national orders is. Apart from the difficulties about harmonising legal concepts at both substantive and procedural levels, one must consider the long period of time usually required for the transposition. For instance, the Directive on Unfair Terms in Consumer Contracts of 1993 was implemented in the UK on 1<sup>st</sup> October 1999, replacing an earlier version of 1<sup>st</sup> July 1995. (Ervine, 2000:2) Transposition is necessary because of the verticality of directives, which impedes their binding effects among private individuals

Nonetheless, the *Francovich* principle, on the one hand, teaches that national courts must apply national law observing Community law, namely, directives, which

are clear enough not to depend upon further national measures or interpretation. On the other hand, it lays down the liability of the member state that causes damage by failing to implement a directive, which does not sound realistic in the case of small consumer claims.

The national transposition of directives in practice means “that the effectiveness of Community law is almost entirely dependent on the quality of the legal solutions adopted in the national context.” (Curtin&Mortelmans, 1994:432)

The gap in this respect is due to the fierce defence of national legal orders, which impedes a proper legal response at the Community level to problems arising from the establishment of the internal market, with extremely prejudicial effects on the functioning, unity and growth of the common market.

#### **II.4- The Role of Courts**

The fourth pillar regards the role of courts concerning the empowerment of consumers. The absence of effective access to justice has also been said to be a very important cause of the impoverishment of the socially and economically weaker party in a legal dispute especially when it involves a consumer. (Da Veiga, 1992:270) Besides, this impoverishment is much wider than its mere economic expression and it includes important aspects of the human integrity of any person. The consumer in court proceedings is not only economically handicapped; his inability to deal with this normally very formal environment and the inadequacy of his means to behave in the scene are manifold, especially when the dispute is of little economic importance. The presence of a lawyer is likely to be needed. Furthermore, the theme of access to justice, especially for consumers, embraces many aspects of social conviviality to a point that it may be wondered whether it “peut imposer une inflexion dans les principes généraux de l’access à la justice”. (Ibidem) The argument goes further to propose a quite substantial inflection of principles of law to empower the person behind the consumer and deconstruct the cruel reality that “all is market and everyone is a consumer.” (Rawlings&Willet, 1994:3)

Having accepted the crucial necessity of tackling diverse aspects of EU consumer law and policy, like access to justice, the general discussion thereupon is likely to happen in the realm of the syntax of rights, through the language or morality of rights. Therefore, the gap to be bridged has ultimately a procedural nature and consumers’ disputes in the EU demand a special kind of justice.

Furthermore, it is helpful to look at the relevance of courts in international disputes. Empirical studies have demonstrated, on the one hand, their general importance especially in matters related to non-economic disputes, but on the other, its



“rather marginal role (...) in complex and –in terms of money- important disputes.” (Von Freyhold et alli, 1996) The big money tries to avoid the interference of impartial third parties, like judges, acutely in cross-border litigation, preferring to reach settlement through alternative ways. “Some business branches such as the banking, insurance, and maritime industries evade the courts by self-regulation.” (Ibid., 277)

The case of consumers in cross border disputes seems to be related to the problematic role of courts and to the necessity that one establishes “a complex legal-cultural environment around the judicial process”. (Ibid., 280) This complexity means that justice for consumers has to happen outside courts since they are deemed to apply well-established general principles of law, by subsuming the particularity of a case into general rules. In this sense, the first part of this thesis defined a moral gap of law that courts, as courts of law or agents of proceedings of law, express. Diversity collapses into generality in any “fair” application of law and a great deal of individual and personal needs are deemed to be equalised with a general formula, or subsumed into a legal provision or, ultimately, to be ignored. Thus, the framework for access to justice for consumers in cross-border disputes in the EC internal market will formulate in order to respond to this first general gap –understood as ancillary to the specificity of consumer’s relationships- and to the very specific European procedural gap.

Thus, there are two different gaps: first, a general moral gap regarding the ineffectiveness or incapability of adjudicators to respond to needs, satisfaction, happiness and particularities involved in consumers’ disputes by means of fair application of legal principles, rules or codes of conduct abstractly enacted. The moral gap of law grows since the market does not offer institutional spaces where individuals are more than consumers. The moral gap of law is a function of access to justice in the frames of the language of rights. Courts as a place where individuals are mere bearers of rights establish a gap called moral.

The second configuration of the gap regards the concrete difficulties in the EU for a consumer to be heard before a judge in order to resolve a dispute, quite often of low economic significance, originating from a cross-border purchase. These difficulties amount to a real impossibility and a denial of justice in the sense of recognition and enforceability of rights, as discussed in the next section. Access to justice for consumers in the internal market has already been understood as a “perennial problem in consumer protection” in the internal market. (Weatherill, 1994:43)

The Commission has been very careful in tackling consumer protection because of the problems regarding the subsidiarity principle. Nevertheless, there is a very inspiring reading of subsidiarity which enumerates three dimensions thereof. Apart from the competence and the institutional dimensions of subsidiarity, Micklitz offers a third dimension in which the individual has to be considered. This third dimension calls on

the Community to accept the responsibility of promoting “a minimum social integration” (at the level of the market) as the price of economic integration. (1993:511) This social integration, following Micklitz’s argument, seems to be facilitated by the role of the consumer in the internal market. Access to justice for consumers in the internal market, in its double gap, is the vein through which a new avenue can be forged for social integration and redemption of the social debt of the market. The aim is a market where one denies “[t]he preference for economic right over a human right in its fullest sense”, and the identification of consumers’ rights merely with its economic expression, the consideration of which is warranted by consumer choice and information. (Schilling, 1994:247)

Thus, the argument to be defended in the next section is that the second gap cannot be bridged by the rules of private international law (PIL), because, firstly, it does not sound morally appropriate that the market generates the problem and let the solution to be dealt with by national orders following the rules of PIL. Secondly, because of the overwhelming dimension of the practical problems that PIL puts for a consumer involved in cross-border disputes. Furthermore, “both the Sutherland Report and the Green Paper on Consumer Guarantee share a common scepticism about the efficacy of the rules of private international law in building consumer confidence”. (Weatherill, 1994:46) The question of the next section is: Would exclusive reliance on rules of PIL to determine which court has jurisdiction and which law it will apply to resolve a consumer dispute provide the ‘high level of protection’ required by Article 153 of the Treaty on European Union?

### **III – The gap under the rules of Private International Law (PIL) – The Provisions on Consumer Contracts of the Brussels and Rome Conventions and Council Regulation 44/2001**

The gap regarding justice for consumers in cross-border disputes is usually denied since the Community legal order provides two European Conventions, which, added to the armoury of PIL, help to decide both the law applicable to trans-border disputes in private matters and the competent court to settle them. They are the Rome Convention<sup>74</sup> of 19 June 1980, on the law applicable to contractual obligations, and the Brussels Convention<sup>75</sup> of 27 September 1968, on jurisdiction and the enforcement of judgements in civil and commercial matters, converted into the Council Regulation 44/2001.<sup>76</sup>

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<sup>74</sup> OJ L 266/1, 09/10/1980.

<sup>75</sup> OJ C 189/1, 30/10/1978.

<sup>76</sup> See footnote no. 3.

One can see an incontestable gap in the legal framework of EC law regarding the settlement of consumers cross-border disputes. This entails a great deal of intimidating factors such as cultural and language diversity, physical distance and disproportionate financial costs. Moreover, the low redress usually sought by consumers does not justify the legal effort. Therefore the demand that is upon the consumer is disproportionate, consequently unjust, and amounts to a denial of justice. A simple cross-border purchase of a durable product can entail a number of problems which might discourage a more thoughtful consumer. These problems can arise from not having technical assistance in the country of the residence of the purchaser, to very complicated legal questions on which law would be applicable in case of dispute and to which court the claim should be addressed, to whom to talk in case of problems, since language diversity is likely to be an issue, how to return the goods and obtain the necessary redress, inter alia. These alone are able to discourage cross-border purchases, compromising to a great extent the free movement of goods and services, for example in the case of financial services across frontiers and e-commerce.

The rules of PIL establish the law applicable to a dispute and the court competent to decide the case. PIL is important in the realm of the EU because the dispensation of legal justice remains a national duty given that political integration keeps the organisation of the judicial system in the hands of national sovereignty. In this sense, “once problems and disputes arise, the idea of the internal market just vanishes to make space for the reemergence of (...) [fifteen] and even more judicial systems, jealous of their sovereignty.” (Goyens, 1992:90-1)

PIL was born out of the coupling of national sovereignty jealousy and necessity “to protect the fulfilment of the obligations of cross-border contracts (...). (...) Thus, private international law is understandable as an attempt of legal science to avoid gaps in legal regulation, but in practice it contributes little to resolving the insecurity problem of cross-border legal relations.” (Gessner, 1996:19/21) This is said regarding the situation of access to justice for traders in the international scene. However, it is even truer regarding the situation of consumers in cross-border disputes in EU, where PIL leaves serious problems, such as the high cost of security in identifying both the law applicable and the competent court to settle the dispute. In fact, it means denial of justice and, in practice, great insecurity and a hurdle for the expansion and consolidation of the internal market. “Indeed, one of the elements which places consumers in a weaker position than professionals is the complexity of the law itself. This complexity is a deterrent for the consumer seeking proper redress as well as a matter which makes the struggle for such redress more expensive.” (Lewis, 1992:145) The critique against the adoption of the rules of PIL has not been overcome by the recent Europeanisation of the Brussels Convention, since that security for the settlement of consumer cross-border

disputes actually promotes adversarial justice. The inadequacy of the adversarial spirit of proceedings of law, especially for consumer disputes, configures the gap.

The analysis of the texts of the Rome Convention and Regulation 44/2001 concerning consumer's contracts serves to understand the degree of complexity of the rules of PIL in consumer cross-border disputes, and the proportions of the gap. A line is drawn here in order to exclude tort liability, to stay only with contract liability, in the hope of demonstrating fully the extension of the procedural gap in EU consumer law on cross-border disputes. Another restriction will be regarding the capacity of associations to cross frontiers in order to sue. In sum, this discussion will approach only the case for individual consumers without denying the gap on consumer representation in cross-border disputes in EU, even after the Directive on consumer injunctions.<sup>77</sup>

### **III.1 – The Rome Convention on the Law Applicable to Contractual Obligations<sup>78</sup> - The Case for Consumers**

In cases of a claim with a foreign element, the first question that arises is to determine the law applicable. Thus, the Rome Convention is the source of help if the claim involves member states which have signed and ratified the Convention, otherwise one has to observe the national rules of PIL of the legal orders involved.

The legal determination of the law applicable to a cross-border dispute will demand a search as to whether the countries involved are signatories to the international Convention and whether it has already entered in force therein. Most probably the party will need to contact the consular representation of the countries under question since normally the literature available is never updated, nor comprehensive enough. This is invariably time-consuming. In the case of the Rome Convention, which involves the member states of the EU, each time a new accession happens, as with Finland, Sweden and Austria, new terms are negotiated and then a new round of deposit and ratification might be necessary. Consequently, it is highly prudent to make sure the convention regulating the conflict of rules applicable is in force in the specific country whose law seems to be the one applicable to the case.<sup>79</sup>

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<sup>77</sup> OJ L 166/51, 11/6/98.

<sup>78</sup> This refers to the consolidated version of the 1980 Rome Convention, published in OJ C 27/36, 26/1/98.

<sup>79</sup> The words by Mr. Mario Monti, Commissioner of the European Commission, responding to a question on the Brussels Convention on 11/10/96, as published in the OJ C 83/36, of 14.3.97 can be applied to the Rome Convention. He says that Austria, Finland and Sweden are obliged to accede to the Brussels Convention under the Article 4(2) of their Act of Accession to the EU Treaties. He continues saying: "An accession convention could be signed before the end of the year [1996] after which the fifteen Member States will have to start the ratification procedures provided for by their constitutions. It is planned that such a convention will enter into force on the first day of the third month after the date on which two signatory States, (...), have deposited their instruments of ratification. Belgium has not yet ratified the 1989 accession convention." He also said that the Commission was taking the necessary proceedings

The preamble of the Rome Convention says that it was elaborated “to establish uniform rules concerning the law applicable to contractual obligations”, aiming at security for contractual relationships. Thus, it makes clear the rules for choosing the appropriate law applicable to a contract with a foreign element in it.

Regarding consumer protection we must mainly analyse Articles 3, 4, 5,7 and paragraph 5 of Article 9.

Article 3 establishes the main characteristic of the Convention which is about freedom of choice. This means that the parties to a contract may freely choose the law that will govern it. The article permits *depeçage* or severability, which is the possibility that the contract can be governed by different laws regarding different obligations within it. The choice must be asserted with “reasonable” certainty, which creates a problem, because it seems that it does not need to be written or clearly established, remaining always, or especially in cases of dispute, to the judge to say whether choices are made reasonably certain way. Another peculiarity is that the Convention permits the parties to a contract to change their choice of the law applicable to it if it does not maculate the validity of the contract and does not “adversely affect the rights of third parties”. The freedom of choice enshrined in the Convention cannot however derogate “mandatory rules”. Furthermore, the validity of the choice will depend on the observance of the capacity criteria for being party to a contract, formal and material validity of the choice. The rules that determine the law applicable to these aspects are enshrined in Articles 11, 9 and 8 respectively.

Nevertheless, the choice might be absent, or not be reasonably certain or not valid. In these cases, article 4 might be applicable despite the fact that its text mentions just the hypothesis on which the law applicable to the contract had not been chosen. To exclude the other two hypotheses for the application of Article 4 does not sound in keeping with the whole spirit of the Convention. The general criterion is “the law of the country with which [the contract] is most closely connected.” The problems with the application of this rule have been severe. Firstly, the same first paragraph establishes the possibility that different parts of the contract can be governed by different laws. Paragraphs 2, 3 and 4 offer “presumptions” which, in accordance with paragraph 5 “shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.” The presumption in paragraph 2 is “that the contract is most closely connected to the country where the party who is to effect the

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under the provisions of Article 10 of the EU Treaty in order to remedy this situation of that Honourable Member. Stone (1998) says that in Oct 1997 the Brussels Convention was in force in Belgium in its 1989 version and that the 1996 version was not in force in any of the Member States. The Lugano Convention can supplement any eventual gap but it was not in force in Belgium and in Greece in 1998. The Commission states in the COM (1999) 348 that “[t]he Brussels Convention, as amended following the accession negotiations with Austria, Finland and Sweden, has not yet entered into force for all Member States as only a minority of them have ratified it.”

performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in case of a body corporate or unincorporate, its central administration.” However, in the same paragraph, one reads that “if the contract is entered into force in the course of the party’s trade or profession”, then the most closely connected country shall be the one “in which the principal place of business is situated or, (...) the country in which the place of business other than the principal, under the terms of the contract, influences its performance, is situated.”

Paragraph 3 regulates the hypothesis on immovable property by presuming that “the contract is most closely connected with the country where the immovable property is situated.”

Paragraph 4 establishes that a contract for the carriage of goods does not fall within the presumption of paragraph 2. The contract is most closely connected to the country in which the carrier has, at the time the contract is concluded, his principal place of business, if that country is also the place of the loading, or “of discharge or the principal place of business of the consignor is situated”. The paragraph does not offer another presumption in case none of the coincidences enshrined in it rest verified.

Paragraph 5 introduces the concept of “characteristic performance” to establish that paragraph 2 does not apply if it is not possible to determine which is the characteristic performance of a contract. It also says that “the presumptions in paragraph 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.”

Article 5 regulates “certain consumer contracts” and thanks its provisions the Rome Convention is considered consumer-friendly. Nevertheless, the advantages of this Article benefit a very low number of cases. It does not cover all the situations where one can identify a consumption relationship with a foreign element in it.

The first paragraph establishes that the Article applies to a contract whose object “is the supply of goods or services to a person (‘the consumer’) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.” The paragraph adopts, in large terms, the definition of consumer from the Brussels Convention and this definition sets the first landmark for the characterisation of a contract as a consumer contract. The party to a consumer contract has to act outside his trade or profession but, at first glance, could be a legal person.<sup>80</sup> There have been countless problems with this concept in the jurisprudence of the courts<sup>81</sup> because of the potential exclusion of many situations, for instance, a lawyer

<sup>80</sup> The Article 2, first indent, of the Directive 87/102, OJ L 42/48, last amended by Directive 98/7, OJ L 101/17, on consumer credit excludes the possibility of being consumers legal persons. In the same vein the Directive on doorstep contracts, 85/557, OJ L371/31.

<sup>81</sup> The following cases deserve attention for details about the problems that this definition of consumer can provoke: C-361/89, *Di Pinto*, [1991] ECR I-1189, C-89/91, *Hutton* [1993] ECR I-139, C-45/96, *Dietzinger*, [1998] ECR I-119, C-99/96, Judgment of April 27, 1999, not yet published.

buying a personal laptop for his personal use. This provision is related to Article 13 of the Brussels Convention, which is also elaborated around a pure normative rather than empirical concept of “consumer”, and confirmed by the jurisprudence of the European Court when interpreting that Convention. Article 15 of the Regulation 44/2001 repeats it. Reich argues for the urgency of a concept of consumer in the terms suggested by Wilhelmsson’s writings, which propose that “Community law still has to develop a ‘need’ concept in contract law (...)”. (Reich, 1995:292) Besides, the settlement of civil disputes, especially consumer disputes, demands the elaboration of a practice of justice able to attend to needs, satisfaction and happiness. Moreover, the definition of “consumer” should undergo enlargement to embrace the conception established by the Directive on e-commerce. This differentiates, in its Article 2, “consumer” from the “recipient of the service”, who can be the legal or natural person acting for professional purposes or not.<sup>82</sup>

Paragraph 2 invalidates the choice of law in consumer contracts that prejudice the consumer vis-à-vis more protective and mandatory rules of the country where he has his habitual residence, in three hypotheses:

“-if in that country [of the consumer habitual residence] the conclusion of the contract was preceded by a specific invitation addressed to him by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

-if the other party or his agent received the consumer’s order in that country, or

-if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer’s journey was arranged by the seller for the purpose of inducing the consumer to buy.”

Paragraph 3 makes sure that if the contract is a consumer contract in the terms of paragraph 1 and 2 then the law applicable is the law of the country where the consumer has his habitual residence.

Paragraph 4 excludes from the scope of Article 5 the contracts of carriage and “for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.”

Paragraph 5, notwithstanding the provisions of paragraph 4, establishes that Article 5 “shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.”

The most important characteristic of the Rome Convention on consumer contracts, enshrined first in the Brussels Convention, is that only protects the passive consumer. The active consumer, who shops around and throughout the internal market in order to explore its advantages, is unfortunately excluded from the protective

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<sup>82</sup> OJ L 178/9, 17/7/2000.

provisions of both Conventions. In the case of the active consumer in cross-border disputes, the general rules are applicable and, certainly, it will require access to a foreign legal order. Regulation 44/2001 and the Directive on certain aspects of e-commerce changed this situation in order to extent protection to the quasi-active consumer.

To sum up, the Rome Convention permits the free choice of the law applicable to a consumer contract but establishes as well that such choice may not prevent the consumer from enjoying any protection from mandatory rules he might afford from the application of the law in his country of residence. In the case where no law has been chosen, the law applicable will be the one from the residence of the consumer. Nevertheless, those favourable provisions must not be applied in any case out of only four limited hypotheses established by the Convention. First, when the contract originates from an invitation from abroad received in his country of residence or from an advertisement in his country of residence and all the steps to the completion of the purchase is performed in his country of residence. Second, the consumer order is received by the supplier or his agent in the consumer country of residence. Third, the contract is concluded abroad having the transport of the consumer to that country from his own residence provided by the seller with the aim at persuading the purchaser. This is called the *Little Red Riding Hood* clause. Fourth, the contract of package tour which provides a combination of travel and accommodation for an inclusive price.

Article 7 is also important for the case of consumer contracts since it privileges the application of mandatory rules of another country with which the situation has a close connection whatever the rules applicable to the contract. The decision to apply mandatory rules to the disadvantage of whatever rule applicable to the contract has however to be decided regarding “their nature and purpose and (...) the consequences of their application or non-application”. Judicial discretion will play a major role in this matter. Paragraph 2 reaffirms the absolute primacy of the application of mandatory rules of the law of the forum irrespective of the law otherwise applicable to the contract. In this hypothesis, however, one could challenge this absolute rule when the law applicable to the contract is more favourable to the consumer. The mandatory rules will, following the application of paragraph 2 of Article 7, prejudice the consumer. In order to avoid this unpleasant consequence, one has to read paragraph 2 with the caveat of the second part of paragraph 1.

Furthermore, the decision whether a rule is mandatory or not and whether it will protect more than the law applicable to the contract is a complex matter left for the court. A legal professional will not be able to offer a secure opinion or advice on this and forum shopping is useless and unlikely to happen due to the unpredictability of the decision of a judge on this matter. However, the mandatory rules of the habitual



residence is deemed to provide minimum rather than maximum protection, which gives the opportunity to postulate the priority of the law of choice in case it gives more protection than the mandatory rules do. On the other hand, there is also the interpretation that the scope of this provision is not the maximisation of consumer protection but rather the mere preservation of mandatory rules. This excludes the possibility of cumulative application of rules “on a pick-and-choose basis” and amounts that the application of mandatory rules could hypothetically exclude the application of a law of choice more favourable to the consumer. (Kaye, 1993:212)

Finally, paragraph 5 of Article 9 determines that the formal validity of consumer contracts “is governed by the law of the country in which the consumer has his habitual residence.”

Among financial services, insurance contracts are excluded from the scope of the Convention and it is necessary to search for the law applicable in the appropriate Directive and its transposition into the national legal orders. Consumer credit not connected to the purchase falls outside the provision of Article 5 as much as any financial service contracted under the provisions of paragraph 4(b) of that article. Another important sector of consumer contracts excluded from the protection of Article 5 is contracts involving immovable property rights. This excludes the case of the rent of a holiday home. The law applicable will be the law of the country where the property is located.

This partial analysis of the Rome Convention has offered a sketch of an international convention based on 3 pillars: -the autonomy of the parties to choose the law to govern the contract; -closest connection of the contract determines the law applicable in the absence of the parties’ choice; -the primacy of mandatory rules over any choice of law. Two more pillars could be added. One concerns “the principle and mechanism of uniform interpretation (...) [and application] of the Convention as between different Contracting States” (Ibid., 3) and the other is the precedence of Community law over the Convention enshrined in its Article 20.

The real benefit of the consumer protection enshrined in Article 5 of the Rome Convention is indeed very narrow, as one of the participants in the negotiation of the Convention has remarked: “the conditions for the operation of the consumer protection rules in the Convention are narrowly drawn and the result is that Article 5 is likely to apply to a relatively small proportion of international contracts entered into by EEC consumers (...)” (Morse, 1992:11)

The above rather superficial analysis of the 1980 Rome Convention’s provision on consumer contracts shows the considerable complexity of finding the law applicable to a dispute with a foreign element in it. The complexity goes beyond the common sense of a lay person, challenging even the professional skills of lawyers and other staff

from consumer organisations.<sup>83</sup> Notwithstanding, it is not the end of the task if the purpose is to seek redress through legal proceedings in courts of law. The next step is to find a competent court to judge the case since the law applicable does not indicate necessarily that the court of the country of the law applicable will have jurisdiction over the case. It can happen that the competent court and the law applicable will not have the same nationality. Therefore, the rules of the 1968 Brussels Convention applicable to consumer contracts, transformed into the Council Regulation no. 44/2001, ought to be analysed.

### **III.2 – The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters Converted into the Council Regulation no. 44/2001 – The Case for Consumers**

The Brussels Convention and the Regulation are endowed with more complexity than The Rome Convention is. Therefore, only the provisions of Section 4 require analysis since they govern consumer contracts with foreign elements in them. It can already be anticipated that, like the Rome Convention, due to the very restricted terms of what is considered a consumer contract, the most common situations fall outside the scope of the aforementioned Section. The result is that other provisions of the Regulation will certainly be needed to respond to the question about the competent court to judge a dispute on an international contract.

Article 15 lays down the conditions under which the jurisdiction will be defined by the Section on consumer contracts. It defines consumer as the person “which can be regarded as being outside his trade or profession”, not excluding the possibility of the consumer being a legal person. Nevertheless, it will be difficult to find a situation where a legal person acts outside his trade. In practical terms, a legal person cannot be a consumer in the terms of the Brussels Convention and the Rome Convention as well. Besides, the rationale of the exclusion of legal persons is that they tend to be stronger than the natural persons who act outside their job or profession are. Furthermore, one must acknowledge the consumer-friendly intention of the Rome and the Brussels Conventions, repeated in the Regulation. Notwithstanding, the definition of “consumer” needs to be widened to embrace the provisions on the “recipient of the service” established by the e-commerce Directive, in order to include as many as possible in the net of access to justice as care.

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<sup>83</sup> See the discussion on the involvement and troubles of the VSV (*Verbraucherschutzverein*) in the *Kaffeefahrten* disputes in Germany in the following III.2 subsection.

Article 13 says also that a contract will be considered a consumer contract if it is: “-a contract for the sale of goods on instalment credit terms; or –a contract for a loan repayable, or for any other form of credit, made to finance the sale of goods; or –in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member States including that Member State, and the contract falls within the scope of such activities.”

The Regulation has changed nothing regarding the definition of “consumer”. Moreover, one must acknowledge the inclusion in the Regulation of active (or quasi-active) consumers in the scope of its protective jurisdiction enshrined for passive ones. It means that the protective jurisdiction “applies to contracts concluded in a State other than the consumer’s domicile [and] concluded via an interactive website accessible in the State of the consumer’s domicile [provided] (...) the contract is concluded with a person pursuing commercial or professional activities in the State of the consumer domicile directing such activities towards that State, provided the contract in question falls within the scope of such activities.” (page 16)<sup>84</sup> In view of such a restriction, it is advisable to consider “quasi-active” consumer the one protected by the Regulation.<sup>85</sup> The contracts concluded by telephone, fax or other similar way are in the same situation. The proposal includes time-share contracts and those of package tours.

Furthermore, this wording excludes the contracts entered into by the consumer after he has been “navigating” through the Internet, let alone the contracts entered into during a trip abroad. It is necessary, then, that the professional directs his commercial action or advertising towards that State where the consumer is.

In cases where consumers entered into a contract with a supplier not domiciled in the Member State, but that has a branch, agency or establishment in one of the Member States and the dispute arises out of any activity of one of the mentioned agency, branch or establishment, the supplier is deemed to be domiciled in that State.

Finally, Article 15 excludes, from the scope of the consumer contracts section, the contracts of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

After the definition of what a consumer contract is under the provisions of Article 15, Article 16 defines the jurisdiction over the restricted number of contracts so considered and its protection depends on the provisions of Article 14 and its three

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<sup>84</sup> The page refers to the Commission Communication COM (97) 609 final. Stuyck informs that this initiative of the Commission “has led to a fierce opposition from the Europe’s employer’s federation, but the Commission is backed by European consumer groups. For the Commission, the change is needed to encourage e-commerce and to give to consumers the confidence that their rights will be respected if they purchase products online.” (2000:396)

<sup>85</sup> It falls outside the limits of this thesis to explore the situation of the active, passive, quasi-active consumer regarding e-commerce. See Stuyck (2000:396) for further references.

paragraphs. The first establishes two possibilities of jurisdictions for the consumer to sue the supplier “either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.” The second determines that the consumer can only be sued in the courts of the Member State of his own domicile. The third allows for the counter-claim to be brought “in the court in which (...) the original claim is pending.”

Article 17 establishes that the protection enshrined in Article 16 can be departed from by agreement in three hypothetical situations: -if the agreement is settled after the dispute has arisen; - if the agreement permits the consumer to sue the supplier in different jurisdictions than the ones established in the Section on jurisdiction over consumer contracts; -and if the agreement confers the jurisdiction on the Member State in which both parties are domicile or habitually resident at the moment of the conclusion of the contract, provided that such an agreement is lawful in that State.

However, the special provisions on consumer contracts inserted in the above-analysed Section 4 cannot prejudice the provisions of Articles 4 and 5.5. Article 4 lays down rules in cases involving defendants not domiciled in a Member State, saying that the jurisdiction of the courts of each Member State will be defined by the laws of that State, subject to the exclusive jurisdiction enshrined in Articles 22 and 23. Against that defendant, says the same Article, a person domiciled in a Member State, whatever her nationality, can avail herself of the rules of jurisdiction of that State, in the same way as the nationals of that State.

Article 5 (5) establishes that “a person domiciled in a Member State may, in another Member State, be sued, as regards a dispute arising out of the operations of a branch, agency or other establishment (...)”. The competent court will be where the branch, agency or other establishment is situated. This provision annuls both benefits of Article 16, which confers to the consumer the privilege of bringing proceedings and for being sued only in the courts of the Member State in which he is himself domiciled.

Article 22 establishes five hypotheses of exclusive jurisdiction regardless of the domicile, which are theoretically restrictions to the benefits enshrined in Article 16. Practically only the provisions of paragraphs 1(a) and 5 are of interest in cases of consumer contracts. Paragraph 1(a) restricts the mentioned protection when it establishes the jurisdiction of the court of the Member State in which the property is situated for contracts involving *in rem* in tenancies of immovable property. Paragraph 5 determines that the court of the Member State in which a judgment should be enforced is the one competent for the proceedings concerned with its enforcement. These will most probably happen abroad, which would make any lawyer confident enough of the success of the claim sue the defendant in the same court with jurisdiction over the

proceedings for enforcement in order to avoid the *exequatur* or registration procedure, regardless of its degree of formality.

The Regulation offers, in slightly different hypotheses from the ones

The complexity of the law itself was mentioned before as a factor that promotes the weakness of the consumer vis-à-vis professionals and the market itself. Regarding consumer law, it is a truism that it “is reaching a degree of sophistication and specialization which threatens to make the field inaccessible to the non-specialist.” (Erau, 1990:71) The complexity of law and of the proceedings of access to justice makes the enterprise highly expensive. However, following the first part of the thesis, the complexity of the law responds to a very determined pattern of rationality based on separation, on competition and on the lack of togetherness and dialogue. The complexity of the law and its rationality has a very specific language and morality which we called morality of rights. Moreover, the gap in its second configuration is revealed by the impossibility for consumers in cross-border disputes to seek redress in the way the current legal system allows in view of its complexity. The establishment of the language of rights and its adversarial model of redress suppress a possible alternative model based on care for Others and responsibility in relationships. The problems for redress in normal proceedings of law for consumers in domestic realms are insurmountable in a common market with the proportions of the European one.

The gap consists of that sort of situation, which is highly inconsistent with the politics of an internal market that wants to flourish, one based on the ever-increasing confidence of the active consumer. This confidence, however, demands that the active consumer should be properly protected. Moreover, one may agree that “the traditional enforcement mechanisms have so far been unable to provide adequate remedies for cross-border complaints which will occur with more regularity the closer the internal market of the EC comes to completion.” (Micklitz, 1993:411) The work of the European Commission has been somewhat responsive<sup>86</sup> to two voices in the movement for the expansion of consumer protection through better access to justice: one that asks for harmonisation of consumer law within the EU and another stressing the urgency of community action to facilitate access to justice for consumers, especially in cross-border disputes. By analysing the movement of communitarisation, or harmonisation or Europeanisation of private law, one may see whether the gap diagnosed persists or not.

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<sup>86</sup> The responsiveness of the European Commission is, without doubt, a very aware answer to the necessity for the internal market that the consumers become confident by means of the facilities for redress and access to justice for cross-border disputes. Research carried out “by Eurobarometer and published in July 1991 revealed that difficulties in exchanging products or getting them repaired and in settling disputes are the main reason cited by consumers for not buying in another Member State. (...) The lack of suitable mechanisms to deal with cross-border disputes means that many are deprived of any effective means of asserting their rights.” (Gibson, 1992:409)

The gap persists despite the availability of the national order whose jurisdiction and law applicable is regulated by the Rome Convention and the Regulation. The procedural gap resists the legislative effort due to the special quality of consumer disputes, which also demands a special quality of justice; ultimately it is turned into a moral gap. It is true especially with the establishment of the single currency and the expansion of the financial market, bearing in mind that the Rome Convention excludes credit contracts from the category of consumer contracts. Another inconsistency can be noted between the desire for a single currency for the internal market and the fragmentation in and absence of European institutions involved with consumer policy, specifically, justice for consumers in cross-border disputes.

The gap relates to both national and community shortcomings in tackling the challenge to guarantee access to justice for consumers in cross-border disputes on consumers' own terms since the application of the Rome Convention and the Regulation, if it does not leave, from a strictly technical view point, a proper procedural gap, fails to offer a feasible system to respond to consumers' needs.

It seems appropriate that after this exposition of the Rome Convention and Regulation no. 44/2001, concerning their dispositions on consumer contracts, at least one example should be discussed in order to make clear the gap in the EU access to justice for consumers in cross-border disputes. The Community gap is by no means bridged by national law as one can see from concrete cases where the extraterritorial applicability of national laws, derived from community Directives, cannot be surely asserted. This was the experience with the so-called "Kaffeefahrten (coffee excursions)" [in Germany], which first started in Spain (and therefore are also called 'Spanish Excursions')". (Micklitz, 1993:412)

The cases happened in Spain, Italy, and Turkey and they have the same plot, varying in minor details. The cases involved German tourists on holiday in Spain. They travelled to Spain by their own means. Once in Spain they were approached directly or by advertising which invited them to go on an excursion, paying nothing or very little for it. During the excursion, the promoters, whilst entertaining the tourists with drinks, buffet and a lot of sightseeing approached them to offer goods for sale at very high prices. The ultimate aim of the excursion was obvious the selling of the goods (highly expensive) to cover the expenses of the excursion (usually free or very cheap to attract as many as possible).

The goods were bought on the excursion in Spain for later delivery in Germany where the tourists were domiciled. Another fact to be added to the story is that the seller or supplier was a German-based firm working with a Spanish/reseller. Problems started to come up once the goods were received and the buyers, if initially not happy with the purchase, were thoroughly upset by the whole story. The first problem for the buyers

was where to go to complain. The institution chosen was the VSV-*Verbraucherschutzverein* or the Consumer Association who would have to deal with legal and practical problems upon the standing of consumer organisations to represent consumers abroad if Spanish jurisdiction to judge the court cases were verified. In the concrete case, the German Association was representing Germans in a German court against a German supplier. Notwithstanding, in one of two decisions by the German Federal Court on the Spanish excursions<sup>87</sup>, in its “short *obiter dictum* at the end of the decision it makes clear that VSV’s standing would not automatically cover the competence to refer to the applicability of foreign law under the group action.” (Ibid., 414)<sup>88</sup> The commercial connections between the German supplier and the Spanish reseller were a quite difficult factual point to be proved and this difficulty was left for the Consumer Association, despite the fact that the German supplier would sue the consumer in the event of non-payment of the goods ordered in Spain.

The case was brought to the knowledge of and for judgment by German courts. Nevertheless, the latter did not reach a common solution about the application of German law on doorstep sales to resolve claims about contracts closed in Spain by German tourists in holiday with a Spanish reseller, even with a German supplier behind the scenes. It is worth noting that the Rome Convention is part of German international private law and that the transposition happened awkwardly. The contract, based on the Rome Convention, had established a choice of law on Spanish law, which did not allow the consumer to withdraw from the contract since the EEC Directive 85/577 of 20 December 1985 had not yet been transformed into national law.

Firstly, which court will be the competent court to hear the case? Based on Regulation no. 44/2001 the domicile of the defendant is the appropriate one since the contract is not understood as a consumer contract. But then, which is the defendant? This definition is important for the knowledge of which is the domicile of the counterpart. Taking the supplier as the defendant, Germany would be the country whose courts would be the competent ones. But the plaintiffs had a contract with the Spanish reseller. Therefore, it seemed that the right answer is that the defendant is Spanish and one had to go to a Spanish court.

The law applicable is the one of the choice expressed in the contract, which was not favourable to the consumers/plaintiffs. Therefore, the invalidation of the choice of the law was a goal to be pursued and it could be under either Spanish or German law

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<sup>87</sup> BGHZ 112, 204 = EuZW (1990), 546 = ZIP 1990, 1348 = RIW 1990, 546 on the AGBG, and BGHZ 113, 18 = NJW 1991, 1054 on the UWG. (in Micklitz, 1993: 431)

<sup>88</sup> The Directive 98/27, OJ L 166/51, 11/5/98, on injunctions for the protection of consumers’ interests, deals with the problem. Nevertheless, one point would remain because the Directive covers the protection of collective interests of consumers, which nature can be largely discussed and highly possibly denied in legal proceedings in courts of law. Another point with Directives is the very diverse way of domestic transposition into national legal orders especially when the Directive offers only a framework for national legal treatment of the issue.

which allows for correction of the choice of law when the consumer has not been really willing to bind himself to what he agreed during a tourist tour maybe after a couple of drinks. In case of success of this argument, German law could be applicable if one considers that the goods bought in Spain were to be delivered later in Germany. Thus, the contract was not “concluded” in Spain but in Germany. However, this is not the most acceptable interpretation and the case, for the application of the German law, does not fall within the scope of Article 5 of the Rome Convention since no relevant connection with Germany could be established. “The Federal Court recognized Spain as the country in which the advertisement was effective, because the contracts were concluded in Spain.” (Ibid., 415)

On the other hand, the German courts could have been competent to hear the case since the supplier was a German-based firm, whose address unfortunately neither the contracts stated nor was known by the consumers. Yet, the residence of the consumers could determine the competent court under the Rome Convention if the consumers had been taken to Spain by the sellers with the sole purpose of persuading them to buy their products. But this was not the case. They were taken on a simple excursion, which was not abroad –they were already in Spain and had reached there by themselves- when the purchase was offered and contracted.

The points of doubt in resolving the Spanish Excursion cases judicially were very complex and uncountable. Nevertheless, the German courts, after having accepted their competence to judge the cases, established a legal debate on the applicability of German Law on Doorstep Sales to them. The German Federal Court had been seized in two different opportunities.<sup>89</sup> “Preparatory measures as well as the delivery of the goods, both definitely undertaken in Germany did not –according to [the German Federal] Court – justify the applicability of the German Law.” (Ibid., 415) In the second case judged by the same German Court, it was decided to “set aside the extensive discussion undertaken by the *Landgericht* (LG – regional court) and the *Oberlandesgericht* (OLG – appellate court), as to whether German law or Spanish law applies. [To the despair and desolation of the VSV and the consumers represented by this Association,] the Federal Court simply decided that the German firm which supplied the products ordered in Spain could not be regarded as being responsible for the unfair contract terms which were used by the Spanish tour operator.” (Ibidem)

One does not need to explore any further the legal and judicial development of the cases to have a clear idea of where the gap in EC access to justice lies for consumers in cross-border disputes and of its configuration or architecture. Firstly and more essentially, in national legal proceedings the cross-border aspect of the dispute is pulverised to a point that the claim is alienated from its very meaning. AS with most

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<sup>89</sup> See footnote no. 20.



legal proceedings of law, the decisions are not able any longer to respond to the real needs of the parties. Secondly and more concretely, the level of complexity of the legal questions is immense for the individual redress of small economic complaints. Thanks to the collective aspect of the cases accepted by the VSV and not contested by the courts in Germany, the German consumers cheated in Spain had their day in various courts (*Landgericht, Oberlandsgericht* and *Bundesgerichtshof*), but one may wonder whether their problems were handled in the way the parties had firstly suffered and understood them. Suffice to say that in 1992, the cases had been in the courts for almost 2 years, which is not a long time if one compares it to more extreme cases.<sup>90</sup>

### **III.3 – The Rome and the Brussels Conventions on Consumer Protection and the Gap in the Light of the Europeanisation of Conflict Rules and Private Law – A Modest Account**

The Amsterdam Treaty brought an important change in the structure of the EU which is traditionally viewed as a three-pillared construct. This Treaty promoted the transfer from the third pillar (intergovernmental) to the first pillar (European Community) of the responsibility for legislation concerning judicial co-operation in civil matters. In other words, it furnished the legal basis for a communitarisation of the responsibility for civil legal justice.

Thus, the Brussels Convention became one of the targets of the new Community's responsibilities under the provisions of the new article 293(4). One may hazard an opinion that the reason for this is precisely because justice, or access to justice, is seen as a procedural matter, understood as the way a person can assert her rights before the courts.

The first important document for our discussion is the Commission Communication COM (97) 609 final, already mentioned above. This proposal to change the Brussels Convention was based on the former art. 220(4) but already with the view of the Union structural change enshrined within the Treaty of Amsterdam. "The major objective of the new treaty [-Amsterdam-] is to develop and maintain the Union as an 'area of freedom, security and justice'. In order to create such an area, civil judicial cooperation has been transferred to a new chapter of the EC Treaty relating to policies pursuant to this objective and appears in art. 73M." (page 9) The referred Communication is important to understand the next step the Commission took based then on the Amsterdam Treaty in order to propose that the Brussels Convention should be replaced by legally binding Community statute, namely a Regulation. This intention is clearly stated: "The Commission reserves its position to take new, complementary

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<sup>90</sup> See the end of sub-section III.4 for a 9 years-long case.

initiatives (...) within the framework of the new Treaty, consistent with transforming the Convention into a Community instrument (...).” (page 10)

The Communication reminds us that the Commission had “already highlighted the lack of *suitable legal framework in connection with the proper functioning of the single market.*” (page 16) (My emphasis) This affirmation expresses, in a very appropriate way, the Community movement towards communitarisation or the Europeanisation of the rules necessary to establish a more coherent *acquis communautaire*. This considers also the minimum social integration as a fundament for the consolidation of the integral market. The role of access to justice for consumers in this process is central or even overriding. Notwithstanding, the gap will persist insofar as the procedural gap has another face regarding consumer matters. This consists in the non-involvement of any of the Community’s institutions in the establishment of access to justice for EC consumers in cross-border disputes.

The enactment of a European legal instrument to substitute the Brussels Convention aimed to promote the enhancement of the free movement of judgments throughout the EU in order to furnish a more suitable procedural framework for “the sound operation of the internal market”. This would, theoretically, allow litigants to enjoy, in any Member State, the judicial protection they have in their own countries. In addition, the communitarisation of the Brussels Convention provides the opportunity to “introduce uniform modern standards for jurisdiction in civil and commercial matters; and simplify the formalities governing the rapid and automatic recognition and enforcement of the relevant judgments by a simple and uniform procedure.” (page 6) The emphasis on procedure as a measure of justice is clear and does not approach the gap in any of its configuration regarding consumer disputes.

The major improvement of the Regulation was on the widening of this protection to include the quasi-active consumer. Nonetheless, the complexity of the law persists despite a clear improvement of the EU consumer law as a step towards overcoming, even if in a minimalist way, “the economic law of the ‘passive’ European citizen.” (Reich, 1995:285) Therefore, the gap remains and seems to be unbridgeable through the communitarisation of the rules of PIL, despite their much heralded utility, (Reich, 1992:46) if their complexity could not be surmounted. Basedow has recently defended the concentration of the responsibility for conflicts of law at the Community level as a new approach able to remedy the shortcomings of PIL.

Another point of importance is the divergence between the Regulation with its inclusion of the quasi-active consumers into its protective jurisdiction, and the Rome Convention, whose communitarisation has not been proposed. It appears that the harmonisation of the private law by Directives seems to be the way through which the Rome Convention will become useless. Once all private law becomes harmonised, in

principle, the choice of the law applicable to a specific contract will not alter the final result since all Member States are supposed to transport Directives into their national legal systems. However, one has to take into account that Directives, in a great number of cases, are mere framework or indication of how a Member State should regulate matters in view of national diversity. The English problem regarding the application of the good faith concept from the Directive on unfair terms in consumer contracts is one very good example of how harmonisation through Directives has problems concerning national accommodation of alien legal conceptions both in the legislative and judicial legal apparatus. It is also an example of how troublesome it is to import legal concepts from diverse cultures. Some diversity is therefore possible to happen due to the freedom and domestic peculiarities of the national transposition of Directives. Therefore, the normative labyrinth is likely to persist, leaving it unclear whether consumers in small cross-border disputes will benefit from such communitarisation of the Rome Convention through Directives with work on the Europeanisation of private law. (Weatherill, 1995)<sup>91</sup>

This is relevant to the view that the Rome Convention was elaborated to increase legal certainty in the international adjudication of disputes. It was deemed to work together with the Brussels Convention, which was not able to respond to all questions a cross-border dispute might raise. The Rome Convention was designed to prevent forum shopping bringing security to international contractual relations. Article 18 of the Rome Convention lays down the obligation of the Contracting Parties to achieve uniformity in the interpretation and application of the rules of the Convention. “Thus the Rome Convention is linked to the Brussels Convention on jurisdiction and enforcement of judgments. At one point it appeared that together the two conventions would constitute the core of a future European conflict law.” (Sarcevic, 1990:38)<sup>92</sup> The reality, nevertheless, is of another sort and it supports the argument in favour of a different practice of justice for EU consumers in cross-border disputes.

As said above, it seems that this necessary communitarisation will be performed through the harmonisation of private substantive European law. The recent Directive 1999/44<sup>93</sup>, on certain aspects of the sale of consumer goods and associated guarantees, is an example of that, since it tries to overcome the shortcomings of the abandonment of the active consumer by the Rome and Brussels Conventions. “The Directive aims at protecting the European consumer irrespective of the place where he makes a

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<sup>91</sup> “(...) Notamment en matière de protection des consommateurs(...) [L]a diversité, voire l’incompatibilité, des règles de conflit nationales adoptées en exécution des directives communautaires va directement à l’encontre de l’objectif principal de la convention de Rome, et on se demande comment tant les opérateurs économiques que les consommateurs vont sortir du ‘labyrinthe’ normatif (...) que en résulte.” (Kohler, 1999:30)

<sup>92</sup> In the same line see Lando, 1987.

<sup>93</sup> OJ 1999, L 171/12.

purchase.” (Stuyck, 2000:395) Paragraph 2 of Article 7 of the aforementioned Directive establishes the mandatory feature of the guarantees and protection afforded to the consumers by the Directive. Therefore, the law applicable to the contract by choice or by the application of the rules of PIL, under the provision of Article 20 of the Rome Convention, which establishes the precedence of the Community legal order over its own rules, will be disregarded in benefit of the protection afforded by the Directive. This Directive greatly enlarges the protective provisions of both the Rome and Brussels Conventions against “the assumption that an active consumer who is shopping around in the Community expects the applicability of the law of another Member State and may thus be bound by that law (on the basis of the choice of the parties or the closest connection with the country of the seller) even if it gives him less protection than the law of the Member State of his residence.” (Ibid. 395-6)

The communitarisation of PIL involves a political challenge since it is based on the provisions of Title IV of the Treaty, which is not binding on Denmark, Ireland and the United Kingdom. Nevertheless, the generally accepted opinion is that the Protocols for Ireland and the United Kingdom contain a loophole for the inclusion of the two countries in future conflict legislation. The problem will remain for Denmark. (Basedow, 2000:695) The Regulation confirmed this point.

Regarding consumer protection, some benefit is achieved due to the fact that the normative labyrinth can become a bit less complicated. It nevertheless remains problematic to transpose Directives in view of national diversity. It appears that the criticism that PIL is basically consumer hostile will not be overcome by means of harmonisation.<sup>94</sup> (Koch, 1995:333)

It seems certain that integration through harmonisation and the free movement of judgements will benefit a notion of formal justice thereby resolving in part the procedure gap regarding access to justice in the EU for consumers in cross-border disputes. Nevertheless, as already said, the gap consists of, in its procedural configuration, the complexity of law, which can be overcome only partially through harmonisation. Regarding the substantive configuration of the gap, the special nature of consumer disputes remains inaccessible in formal proceedings of law.

Moreover, the process of harmonisation or Europeanisation of private law and the one of the communitarisation of PIL express a process of rationalisation of law deemed to offer security and certainty for the standards and criteria of justice that law must furnish. Joerges describes this process specifically as happening through the Directive on unfair terms in consumer contracts<sup>95</sup>. Harmonisation responds to the needs

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<sup>94</sup> Regarding europeanisation of private law, “it should be remembered that, in the area of insurance contract law, the Community law-maker has explicitly rejected harmonisation of contract law, and has enacted quite stringent conflict rules.” (Reich, 1995:303)

<sup>95</sup> OJ L95/29, 1993.

of the formalisation of law whilst promoting a change in the patterns of legal justice for consumers when, for instance, it widens protection to include the quasi-active consumer. In the same vein, it improves market conditions for the confident consumer to enjoy the benefits of the internal market more effectively than he has done so far. Harmonisation responds to the demands of formalism, procedural justice and the prerequisites of the establishment of an internal market governed by the rule of law.

The gap discussed will, however, require another approach since harmonisation had so far<sup>96</sup> appeared unable to resolve the inaccessibility of justice for consumers in cross-border disputes, especially in small claims. Furthermore, PIL will retain its importance in trans-frontier disputes insofar as the domestic transposition of Directives can assure neither equalisation of the standards nor the application of law. In this respect, harmonisation is not a seamless process.

The field of the Europeanisation of law is rather wide and fertile. Its full discussion would exceed the limits of this thesis. Nevertheless, it is appropriate to see that as the process has happened so far, the gap discussed retains its problematic feature for EU consumers in cross-border disputes even within the extreme proposal for “a single system for judicial resolution of disputes” in the internal market, following the *Storme Approximation of Judiciary Law in the European Union*.<sup>97</sup>

The Storme Report on the Approximation of Judiciary Law in the European Union emphasises what Professor Storme calls a “negative attitude” to procedural law in EC law, apart from access to the European Court of Justice which can only be indirectly accessed by individuals, through national courts. The aim of the Maastricht Treaty, reaffirmed in Amsterdam, was to bring the Union as close as possible to its citizens. Nevertheless, one can note a great lack of effective measures to turn such proximity into reality. Access to justice for consumers in cross-border disputes is certainly one of the points that shows that failure. However, the gap this thesis aims to bridge is of a different nature than a mere lack of procedural rules in consumer law; it refers to a special quality of justice that law or the rule of law alone cannot supply; it might also be characterised as a “gaping hole in the coherence and legitimacy of the Community’s enterprise”. (Himsworth, 1997:311)

Curtin and Mortelman’s study of the evolution of European case law, for instance, shows to a certain extent a failure in the Community’s legal and institutional framework to ensure compliance with Community law. They identify three generations of decisions from negative integration to an indirect integration, based on reliance upon

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<sup>96</sup> The next chapter explains the necessity of Community-wide hard law through Regulation, enacting general principles for consumer protection as a whole and creating a European system of redress and access to justice for consumers in the EU, departing from mere and detailed harmonisation which can be called rationalisation of law.

<sup>97</sup> Quoted by Himsworth, 1997: 302-3. The Storme Report was published in 1994.

national orders for the development of the soul of the Community, to a more complex approach, which is about Community legal power breaking “into the national rules of the Member States themselves”. (1994:434) Such evolution is likely to suggest as well a sort of incapability of Community law to deal with the soul of the European Union, as it has to resort progressively to national orders. Moreover, this incapability refers to a difficulty in converting the negative integration approach, which works as a shield preventing national orders from obstructing the progress of the internal market, into a positive one, whose function resembles to a great extent a sword necessary to clear space in the national sovereignties for the European reality. (Ibid., 446)

An initial idea to frame the bridging of the gap could be offered by a position on the applicability of PIL to employment contracts: “Ultimately a ‘labour law’ approach to the solution of many transnational employment problems proves preferable to the techniques adopted by a private international lawyer.” (Morse, 1992:21)

### **III.4 – The Cost of Legal Proceedings and of Their Barriers in the EU and its Weight in the Configuration of the Gap for European Consumers in Cross-Border Disputes**

The discourse on the costs of legal proceedings deserves a separate subsection since it influences substantially in the composition of the gap especially regarding its procedural configuration. The conclusions of two studies elaborated for the European Commission in 1995 and 1998 will illuminate the discussion as their numbers are impressive even if only for exemplification.

The importance of these studies is their focus on “situations of minor everyday cross-border disputes. The typical everyday dispute is a consumer claim (...).” (page 6)<sup>98</sup>

The general conclusion of the first study on the costs and duration of judicial proceedings in EU Member States is: “A rational actor would not pursue a cross-border consumer claim within Europe in court”. (page 125 of CJB)

The reasons for this are to be found in the cost and duration of legal proceedings in the EU. Table four on page 4 of the first annex on microanalysis offers the following numbers: For a procedure in the defendant State the minimum cost is 980 ECU, the maximum is 6,600 ECU and the average 2,489 ECU; the minimum duration is 13 months, the maximum 48 and the average 23,5 months. In the plaintiff State the minimum cost is 950 ECU, the maximum 5,850 ECU and the average 2,437 ECU; the minimum duration is 12 months, the maximum 72 and the average 29,2 months. These

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<sup>98</sup> Von Freyhold/Gessner/Vial/Wagner (eds.), (1995), *The Cost of Judicial Barriers for Consumers in the Single Market – A Report for the European Commission* (CJB).

numbers were collected just for standards procedure under the Brussels Convention, including enforcement. No counterclaim, no extraordinary procedures, nor appeals were considered. (page 17 of CJB)

Among all conclusions one sounds very important because it denounces the role of lawyers in raising the costs of the procedures since in many courts the procedures are very cheap or even free. (page 122 of CJB) In countries like Germany, where the fees of lawyers are strictly connected with the value of the claim, regardless of the amount of work, to blame lawyers for the fees might not be fair. However, one could wonder whether a lawyer would agree to work on a cross-border dispute, as he/she has to travel abroad, work in a different judicial system and use a foreign language, for fees that would not really be rewarding. It is perfectly reasonable that the professional should take the cases she/he wants and gets paid properly for the work done. Nevertheless, it is true that the lawyer factor in the composition of the costs of the claims is an indication that justice for consumers in cross-border disputes might happen without lawyers, especially in view of the reduced value of the claims. Lawyers could also be identified as the cause of the delays observed in cross-border claims. The presence of lawyers is justified by the complexity of law and because the system needs faithful translators of the feelings, expectations and anxiety of the parties into the rules of the proceedings of law. Lawyers, who are trained to respect and follow rules, help in the process of the continuity of the system and to improve levels of legal certainty. This leads the system to a dilemma or paradox, since the more perfect the dispensation of justice is the more denials of justice one can perceive.

Interesting situations may be found by considering each Member State, individually. For example, in Greece, one will find the cheapest place for claims at defendant's domicile but the longest duration. By contrast, Finland is one of the quickest but the most expensive places to litigate.

The study also covered a macroeconomic analysis of the cost of "legal uncertainty", indicating that direct costs for consumers in the EU are "in the range of 7.230 to 73.790 million ECU with a weighted mean of about 28 billion ECU." (page 421 of CJB) The analysis also stresses that indirect costs are higher and they relates to lower rates of return of transborder transactions and a lower permanent potential growth rate of the European economies, which negatively influences the growth of the internal market.

A second study in 1998 examined the cross-border appellate proceedings to re-evaluate "the question if a rational actor would pursue" a cross-border claim, based on a general result of the first study which diagnosed a "non-existent single legal market".

(page 1 of CLO)<sup>99</sup> In truth, the first study was based on the assumption that the costs of judicial barriers in the single market would be better formulated as “The Costs of Legal Uncertainty” or “The Costs of Non-Europe in Litigation” (page 5 of CJB). It appears that, for a professional lawyer not familiar with international litigation, the variety of courts, rules, languages, and so on is ultimately “a jungle of justice”. (page 2 of CLO) According to the first study, “most lawyers would advise their clients to initiate cross-border legal proceedings in case of a dispute value of 50,000 ECU.” (Ibidem) Of course, consumer’s everyday problems are likely to be far below this value.

One case can illustrate the difficult situation of cross-border consumer disputes in the EU and it is worth mentioning despite not being about consumer contracts in either the Regulation or Rome Convention’s sense. It is about a German national who raised a loan to buy a summerhouse in Spain and lost 50,000 ECU to a dubious real estate enterprise. If the claim goes through the three possible instances of appeal of the German civil procedure system, the plaintiff will be “left with a debt of additional total lawyers’ and court fees in excess of 30.000 ECU, as a minimum, after several years of litigation. These amounts are increased by other costs related to the procedures, such as expert witness fees, translation costs, bank fees for cross-border payments, costs for address location, for gathering information abroad, for service of documents abroad and for requests for assistance in evidence and discovery abroad.” (page 166/7 of CLO)

The second study has a section called “Real World”, where the report on the use of the Conventions, especially the European Convention on the Transmission of Applications for Legal Aid of 27.01.1977, should have been placed for the absurdity and inadequacy of the situations described. The 21 cases summarily reported were furnished by the Legal Aid Board of England and Wales and they reveal much more than any numbers. Here are three of them:

“Receiving country: 1-Portugal: Delay from February 1995 to January 1996 at which point an amended application form was sent for completion. Again this included confusion over the receiving authority and includes correspondence indicating that the Portuguese authorities had had a meeting to decide who was to deal with such applications to Portugal!

2- Spain: Delay from June 1994 to June 1995 when a lawyer was appointed. In September 1995 the English solicitor complained that the Spanish lawyer nominated in June had not contacted him or his client and that he had been unable to obtain a response from them.

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<sup>99</sup> Von Freyhold, Vial and Partner Consultants, (1998), *The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market – A Report for the European Commission* (CLO), available at the website: [http://europa.eu.int/comm/dgs/health\\_consumer/library/pub/pub03.pdf](http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub03.pdf).



3-Belgium: Application transmitted 31 December 1992. Acknowledgement and enquiry letter dated 16 March 1993 followed by a notification dated 8 July 1993 that it had been forwarded to the relevant geographical area followed by a letter dated 22 November 1993 indicating that the enclosures had become separated and the application could not be processed. The application was re-sent on 17 December 1993 and acknowledged on 27 April 1994. It was only on 7 February 1995 that Belgium indicated that a lawyer had actually been nominated in July 1993 and had done work on behalf of the assisted person. It appears that this was done without legal aid ever being granted and after correspondence with the solicitors we informed Belgium that they could close their file.”(pages 182/3 of CLO)

The study had collected positive opinions regarding the Brussels Convention from public authorities such as Ministers of Justice. However, it calls for caution in reading these positive opinions from authorities who never really deal with the reality of courts, proceedings of law and litigation, especially cross-border ones. (page 190 of CLO)

Before finishing this section, it is necessary to give an answer to the question that informed this presentation of the gap in access to justice for consumers in cross-border disputes. The question was whether the mere reliance on the rules of PIL would be enough to guarantee the high level of protection for consumers enshrined in the provision of Article 153 of the Treaty. Following the examples reported by the Legal Aid Board of England and Wales and their capacity to reveal more than any analysis, statistic or numbers, here is one report of a judicial case that happened in Germany involving a cross-border dispute. The case is quoted despite not having a consumer as a plaintiff because, as seen, it would be very unlikely to find one example of a consumer claim in courts, given the high costs and long duration of the proceedings.<sup>100</sup> Nevertheless, the case furnishes strong grounds to justify a negative answer to the aforementioned question.

“In 1985 the German Supreme Court (*Bundesgerichtshof*) decided a case which, up to that time, had gone on for about nine years and was heard before 8 different courts and instances. (...) The matter in dispute was the reimbursement of a loan debt by an Italian borrower who was sued by the German creditor in 1976. The issue was filed to the District Court of Munich which declared to have no international jurisdiction over the case. The plaintiff raised appeal to the Munich Court of Appeal which confirmed the first instance judgment. The creditor raised a cassation to the German Supreme Court

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<sup>100</sup> “If lawyers do normally not represent consumers in cross-border cases it is no surprise that these cases are rarely found in court files (in the year 1988 there were 4 cases filed in the *Landgerichte* Bremen and Hamburg and 1 case in the *Tribunale* in Milan). The Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgements does not seem to have any positive influence as regards the access to court for consumers or the enforcement of judgments (in neither of the mentioned German or Italian district courts an international consumer claim filed in 1988 was enforced).” (pages 419/20 of CJB)

which, in the year 1979, filed a request for preliminary ruling to the ECJ. Ten months later, due to its interpretation of art. 5 no. 1 Brussels Convention, the ECJ affirmed the international competence of German court. Accordingly, the case had to be returned to the District Court of Munich. Now the Court refused its jurisdiction with reference to art. 21 Brussels Convention. Again, the decision was appealed to the Court of Appeal which, in the year 1983, submitted a question on the interpretation of art. 21 Brussels Convention to the ECJ. This time the ECJ decided to the disadvantage of the creditor and the Court of Appeal finally dismissed the case because of not having jurisdiction under art. 21 Brussels Convention. The creditor filed cassation to the Supreme Court arguing that the decision of the Court of Appeal would refer him to the Italian jurisdiction, where the case due to formal reasons would not be heard any more. Accordingly, the decision would leave him without any legal protection. The Supreme Court denied a lack of legal protection and the file was finally closed in the year 1985 without ever having been heard on the merits.” (page 172 of CLO)<sup>101</sup>

To sum up: the present discussion about the gap in EC consumer law and policy had the special aim to disqualify the PIL as a sufficient tool to assure the high level of protection required by Articles 95 and 153 and to improve the level of confidence of the European consumer to explore and benefit from the expansion and consolidation of the internal market, supporting in this way the market in its development. As already said by Howells and Weatherill: “(...) the most damning criticisms of private law as a method of consumer protection relate to the inability of legal institutions to deal with consumer complaints” (1995:527). Moreover, it has been a characteristic of Community action in this regard. The special sort of justice required by consumers, developed in the first part of the thesis, tackles exactly that inability.

#### **IV – The Out-of-Court Project: The Gap Persists**

The sixth chapter shows the evolution of the theme of access to justice for consumers in EC consumer law and policy, indicating that the presence of the out-of-court project for consumers in the Community agenda is not new. The main characteristic of consumer disputes, which demands a special sort of justice, is recognised as the reason for the idea of providing the internal market with justice out-of-court justice for consumers. The draft agenda for the Tampere European Council<sup>102</sup>, by exposing the objectives for the development of a European judicial area, nevertheless, establishes only one priority out of 10 that is not connected with justice in courts. Despite the age of the inclusion of out-of-court justice in the consumerist agenda

<sup>101</sup> A footnote of this passage says: “Zelger/Salinitri, a summary of the case is provided by: Rauscher, *Ausländische Rechthängigkeit und Rechtsschutzeinwand*, I Prax 1986, p. 275-277.”

<sup>102</sup> <http://presidency.finland.fi/netcomm/News/ShowArticle.asp?i.../199>.

of the EC, when justice is the issue, the priority is to develop the action of courts as privileged bodies able to provide it.

The following assertion about the cross-border character of the international market that automation can accrue appears also to be true in the case of the increasingly fragile position of national borders regarding international trade: “The appropriateness of out-of-court dispute settlement for issues relating to international data interchange was already felt in 1995. Recent developments in automation, like EDI, have resulted in a shift in trading patterns, making the traditional legal instruments appear to be increasingly inadequate. This raises the question of whether national laws are sufficient to provide the conditions necessary for this development (...). Thus it was expected a shift from an intervening (national) court adjudication to a more autonomously operating (international) business adjudication in which rules are drafted on the basis of which conflict solving decisions will be made.”<sup>103</sup>

The gap in this respect is twofold: first, the project is not yet reality, despite being a long time under discussion, at both national and Community levels. The project has gained some substance in few pilot-areas, like the well-established and successful Arbitration Centre in Lisbon, on Communication<sup>104</sup> and two Commission Recommendation<sup>105</sup> that established the EJJ-NET.<sup>106</sup> The second dimension of the gap consists of the lack of legal and institutional framework, or of its soft-law basis. It lends to the project general principles for the work of national out-of-court bodies which lack institutional and legal force and, paradoxically, show aspects of out-of-court dispute settlement schemes that should be nourished for the achievement of satisfaction and happiness of the parties. The creation of clearinghouses which, inter alia, provide support and information to consumers, especially in cross-border disputes, by passing complaints onto the competent bodies to undertake the settlement of the dispute, just resembles a cosmetic strategy that entails more money and is time consuming for both public budgets and private citizens in a dispute. Surprisingly, something that was thought of as a facilitator of an already very confusing process is turned into a scheme whose effectiveness is highly uncertain. The question could be: why one does not simply transform national powerful bodies like, for instance, the British OFT, into clearinghouses and, at the same time endow the competent bodies with tools to settle disputes and seek settlement abroad on behalf of consumers? This question will lead us

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<sup>103</sup> Wilikens, Marc, et alli., (2000), *Out-of-court dispute settlement systems for e-commerce. The parties to the dispute*. Joint Research Centre, Ispra (VA)-Italy. This report can be downloaded from: <http://dsa-isis.jrc.it/ADR/>. Page 4.

<sup>104</sup> COM (1998) 198 final.

<sup>105</sup> Commission Recommendation 98/257/EC, OJ L 115/31, 1998, and 2001/310/EC, OJ L 109/56, 2001.

<sup>106</sup> A FIN-NET was also launched to tackle complaint in the financial services through e-commerce. See COM (2001) 161 final.

to a second aspect of the out-of-court project which has availability to be transformed into something effective and efficient to provide justice for consumers in their own terms.

#### IV.1- Directive no. 1999/44

The Directive on certain aspects of the sale of consumer goods and associated guarantees<sup>107</sup> is a good example of the extension of the gap under consideration. Its recital no. 25 mentions the Commission Recommendation of 30/03/98<sup>108</sup>, on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes<sup>109</sup>, and the national “possibility” of creating “bodies to ensure *impartial* and efficient handling of complaints in national *and cross-border* contexts and which consumers can use as mediators.” (Emphasis added) The verb “can” indicates no national obligation to create the mentioned bodies. Furthermore, the exigency about an impartial handling of the complaint is somewhat problematic when one thinks about the protection necessary for the weaker party to a contract of consumption. The first part of the thesis attempted to elaborate a special kind of justice that could respond to needs, happiness and satisfaction instead of legal principles and rule of law, and could overcome vicious notion of love that prevents it from integrating legal or non-intimate relationships. The aim was to place love in the core of institutional action, by having understood love as “institutional will” or “institutional *interesse*”.

Article 2, items 2 and 3, regulate situations that show with great appropriateness the reasons why consumers need a special sort of justice in the terms just described. Item 2 sets up rules about when a consumer good is presumed to be in conformity with the contract. Item 3, in its turn, builds a legal presumption about the impossibility or disproportionality of the consumer requirement of repair or replacement of the goods by the seller. Article 1, item 2f, establishes that any repair required is to be performed in order to bring “consumer goods into conformity with the contract of sale”. In cases which lack a contract or in exceptional circumstances that make the observance of the contract impossible or disproportionate, the law must furnish the rule to save the process from personalism or particularism in the resolution of any dispute. These legal dispositions cancel out the possibility of a justice of care that could operate to attend needs, happiness and satisfaction. One may wonder about the problems any justice based on impartiality would confront, if it would settle disputes by trying to bring the

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<sup>107</sup> Directive no. 1999/44/EC, OJ L 17/12.

<sup>108</sup> See footnote 36.

<sup>109</sup> The principles deemed to provide minimum guarantees for the parties are: independence, transparency, respect of the adversarial principle, effectiveness, legality, liberty and representation. The Commission enacted a new Recommendation on the principles for out-of-court bodies involved in consensual resolution of consumer disputes: OJ L 109/56, 19/4/2001.

consumer goods into conformity with the needs, happiness and sense of justice of the parties. This does not mean general clauses (good faith, honest business practices, reasonable expectations, fairness and the like) that, accordingly to Stuyck, appear to be preferred by the principle of proportionality in order to protect consumers. (2000: 400) It is not denied, equally, that those clauses can certainly have a positive role in a relational justice where the mediator, conciliator, arbitrator or judge directs the settlement of the dispute towards the consideration of the needs of the parties.

Articles 4 and 7 establish the application of national law to resolve cross-border disputes. In practice, PIL will be applied in disputes between the final seller, liable to the consumer, and the previous sellers in the chain of contracts; and in disputes involving a non-member state.

#### **IV.2- Directive no. 2000/31**

The Directive on certain legal aspects of electronic commerce in the internal market<sup>110</sup>, is another EC legal document that tries to respond to both sides of the completion of the internal market: business and consumer. The gap is confirmed because, by trying to respond to realities which are very different with the same tools, law forgets two points: the relational character of any consumption relationship and the particularities/special needs that it involves, especially from the point of view of the weaker party to the relationship. The gap widens and the objective of implementation of the internal market is hampered because consumer confidence remains low and no acknowledgement of the necessity to pay heed to the relational side of contracts can be effective. So, it is impossible to nourish a more effective and stable market growth. The relational side of a contract, as discussed in the first part of the thesis, is characterised by the aim of the parties to save their contractual relationship even at the expense of law or legalistic readings of the contract as a formal framework of rules. In order to preserve the relationship, the parties should acknowledge their needs and happiness, by finding a way to settle the dispute despite laws and rules.

Article 12 establishes the responsibility of the Member States regarding the implementation of “adequate and effective complaints and redress procedures for the settlement of disputes between suppliers and consumers.”

Article 16 elects codes-of-conduct as the sort of soft-law to be encouraged to regulate e-commerce and inform dispute resolution.

The provisions inserted in Article 17 about out-of-court dispute settlement confirm the national duty of providing this benefit, while excluding Community's responsibilities. The Community shall be informed of the decisions reached by the out-

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<sup>110</sup> Directive 2000/31, OJ L 178/1, 17.7.2000. This Directive has 65 recitals against 24 articles.

of-court bodies, but it will not be involved in any part of the process of dispute settlement. The principles of the Recommendation on the functioning of bodies responsible for out-of-court settlement are repeated without substantial changes or any further care.

Article 19 regulates the cooperation between national authorities, which should provide assistance to the parties of a dispute. The gap here is about the lack of a central regulatory authority at Community level to co-ordinate the formation of a European network for the protection of the consumer and national harmonisation of dispute settlement.

The Directive on e-commerce “approximates (...) national provisions on Information Society services relating to (...) liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions (...).” In so doing, this Community legal document repeats various inconveniences of EC consumer policy and law in general: its fragmentation, lack of hard law, inappropriate allocation of responsibility to national orders in cases of cross-border disputes, lack of suitable discourse to make out-of-court dispute resolution work for the protection of consumers in their own terms, legal justice to be delivered ultimately by courts.

### **IV.3- Further Improvements**

Consumer protection requires a proper language, a language of care. Therefore, it demands an overall legal framework to encompass all the internal market activities that involve consumption relationships at all levels: territorial (Community-wide), substantial (general rights regarding all the sectors of the economy) and procedural (access to a special sort of justice).

On the one hand, the institutional and legal current situation do not offer room for hope that individual consumers in small disputes will risk themselves in legal proceedings. On the other, the same lack of hope can be asserted regarding the possibility that an individual consumer will, for example, explore the internal market for financial services without quick, effective and protective mechanisms for redress or, in a word, without justice. Bourgoignie asserts “the modesty and lack of effective autonomy of (...) consumer law (...) in (...) the Community (...)”, and highlights the remarkably poor development of areas like access to justice which is due to the “inability of the Community authorities to obtain (...) tangible results” addressing policies reputedly essential for the transparency of the market but with a language different from that of the market (1992:313). The lack of autonomy and the fragmented character of EC consumer law “suggests that any gains for European consumers will be achieved on a strictly incremental basis – a laborious accumulation of ‘add-on’ rights, rather than a

coherent policy motivated by clearly identified consumer principles.” (Gibson, 1993:329) This has been acutely true for access to justice for consumers. Furthermore, it characterises one of the aspects of the gap discussed so far, and offers a possible avenue to create at the Community level availability for the effectiveness of a framework regarding access to justice that suits European consumers while allowing them to benefit fully from an integral internal market.

The establishment of out-of-court settlement of cross-border disputes is always reputed to be problematic due to the lack of legal framework or even the complexity of the rules of PIL. “Main issues concerning cross-border dispute settlement systems include: a set of rules applicable to cross-border disputes, the recognition of the settlement and its enforceability in a different country.”<sup>111</sup> Since the rules of PIL are not applicable and are far too complicated, the involvement of the Community through the enactment of a Regulation covering the gap in all its aspects will be the solution required. Moreover, hard law, public authorities and European involvement in the implementation of the project would guarantee clarity and would respond effectively to the needs of the EU consumer who, while exploring the internal market, finds himself in a cross-border dispute. Such involvement would also remove the burden of having to decide which system best suits a plaintiff. It represents an avenue for the attainment of happiness and satisfaction in the parties’ terms through justice as care in an environment of institutional *interesse*.

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<sup>111</sup> Wilikens, Marc, et alli., (2000), *Out-of-court dispute settlement systems for e-commerce. Report of an exploratory study*, Joint Research Centre, Ispra (VA)-Italy. This report can be downloaded from: <http://dsa-isis.jrc.it/ADR/>. Pages 6-8/32.

## Chapter V

### Enquiring about Availability

This chapter will build a more systematised exposition with the general aim at checking the availability of the EC legal and institutional system against a range of necessities identified for a project embracing a special justice for consumers in disputes across borders. This will be done through the dissection of Article 153 of the Treaty introduced by Maastricht and amended in the Amsterdam Treaty.

It appears worthwhile, firstly, to sum up the general characteristics of a justice for consumers informed by the ethics of care. The most basic points to be translated into the European context are: 1- Wide constitutional provisions to promote consumer protection. These would also include the derived and complementary legislation to the constitutional basis. 2- A hard principled law to function as regulatory provisions for punishing unfair trading, through civil or criminal penalties. This would require strong institutional apparatus to perform a responsive justice for consumers in cross-border disputes. 3- A lack of procedural law able to constrain a contextual practice of justice given the specificity of different disputes to be settled and particular needs to be cared for. This entails the need to overcome formalism with a special ability to adopt, with legitimacy and effectiveness, a practice of justice as care. 4- A strong public body responsible for mediating and promoting the settlement of disputes involving consumers and professionals and with the power to promote criminal and civil court procedures for the defence of consumers, in conjunction with them or their organisations.

This chapter will not undertake the task of pasting all the above requirements of our redefinition of justice onto EC consumer law and policy for one needs firstly an analysis of the European institutional and legal reality regarding access to justice for consumers. This is the aim of chapter seven.

The four requirements are all instrumental and they require a greater involvement of European institutions in promoting justice for consumers as a European endeavour. The gap verified by the use of PIL is aggravated by the absence of that involvement, which reinforces the moral aspect of the gap. The Tampere Summit<sup>112</sup>, whilst setting up conditions for the fulfilment of the objectives of the Amsterdam Treaty concerning the establishment of an area of freedom, security and justice, does not fulfil the political call of Amsterdam, because it has delimited the effort of European institutions to the development of a network system of national legal orders. The network relies on the transformation and/or adaptation of national orders to offer easy

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<sup>112</sup> President Romano Prodi. <http://www.europa.eu.int/rapid/start/cgi/guest>



access to justice rather than on the development of a genuine European area of justice with particular features to attend to the necessities of cross-border consumer disputes. The Amsterdam Treaty strengthened the first Community pillar in prejudice of the third inter-governmental one, by endowing the Union with more effective tools to implement a European area of justice. Justice, then, left the “legal sandstone” quality of the third pillar in order to integrate a more substantial realm of the “solid legal granite” of the first pillar (Müller-Graff, 1994:495). Thus, justice is reputed to have started a process of contamination between the Community and the intergovernmental areas of competence. It betrays, to a certain extent, a traditional compromise about keeping a clear separation between the two areas despite the bridge from the third to the first pillar established by Articles K9 and K14. The maintenance of clear lines between the pillars was a safeguard of national powers against ever-growing Community powers, which were strengthened.

The rhetoric of the Amsterdam Treaty is towards equipping the Union to respond to the aspirations of its citizens, despite the clear limitation of the great majority of European policies in attending inclusively to the exigencies of the Union as a common rather than internal market. The rhetoric of a supposed European citizenship certainly requires a special quality with which the internal market can furnish the Union, but which a common market cannot. The common market can grow through the mere adaptation of national legal systems. By contrast, an internal market will demand an internal legal order and its corresponding system of justice and will push forth the limits of responsibility at the European level thereby undermining national orders. Justice for cross-border disputes, especially for consumers, requires a European environment in order to achieve effective protection.

Access to justice has been transformed in a genuine Community responsibility beyond any limit set up by the exclusivity of the economic concern of European policies and law. Access to justice at the European level, after Amsterdam, is a constitutional responsibility of the Union and not necessarily related to the removal of trade barriers. In fact, this trend was already in Maastricht. Lane points out that many of the programmatic norms of Article 3 of Maastricht do not have an immediate or primary economic focus (1993:944). The exclusivity of the Community competence to act in trade matters was extended by Maastricht and more strongly in Amsterdam in the sense that the Community can act with a different aim from the mere economic one. The growth of Community responsibilities especially in Amsterdam provides ammunition for Weatherill’s plea for the development of the Community into a state.<sup>113</sup> Consumers have been playing a fundamental role in the transformation of the common market into

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<sup>113</sup> Weatherill wonders: “How long must we wait until the Community becomes a state not just a market?” (1994:33)

an internal one, the Community into a Union and maybe into a state. Consumer protection has been urging the adoption of a new post-normative model that can guide EC legal and institutional framework into post-modernity, beyond the widest citizen charter of individual rights.

The preparatory documents for the Dublin II conference of the representatives of the governments of the Member States assert that the Intergovernmental Conference “equip[s] the Union (...) to respond imaginatively to the aspirations of its citizens”.<sup>114</sup> The term “imaginatively” is very meaningful; it indicates the enormous proportions of the challenge of developing a Union, which considers the human beings in their specificity and particular needs along with peace, stability and prosperity. The entrance of social and individual responsibilities in the European legal framework and political discourse is an appeal for imagination beyond disputes among jealous national systems, given the major European challenge to respect diversity while harmonising common values.

This task will be developed in five sections all related to Article 153 concerning access to justice for consumers in EC consumer law and policy. The following section briefly reviews the specific context of the development of EC consumer policy and law as negative law and its relation to the implementation of the referred Article. The third section looks into the meaning of policy based on soft law and its use in the development of justice for consumers in the internal market. The fourth section considers both the theme of subsidiarity in its positive aspect and the responsibilities of European institutions regarding the development and effectiveness of justice for European consumers involved in cross-border disputes. These three sections intend to show the challenges negative law, soft law and subsidiarity represent for Article 153.

The two last sections undertakes a more dogmatic sort of exposition concerning the analysis of Article 153 in itself and its relationship to Articles 2, 10, 94, 95 and 308 in turn, in order to tentatively explain any gap in EU consumer policy and law as a lack of political will rather than as “an essential institutional [or legal] problem” (Dahl, 1993:70).

## **I - Article 153 and the Policy of Negative Law**

Article 153 is seen as the constitutional base of EC consumer law and policy, whose implementation has been underway since before the introduction of the Article in the EEC Treaty by Maastricht Treaty. Thus, despite the constitutional vacuum of the Treaty with regard to any sort of consumer protection at the market level, its development has taken place, since 1972, with the Paris Summit.

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<sup>114</sup> CONF. 2500/96, Brussels on the 5<sup>th</sup> December 1996, page 8.

Paragraph 1 of article 153 establishes that the Community, in order to *promote* the interests of consumers and to *ensure* a high level of consumer protection, shall *contribute* to protect the health, safety and *economic interests* of consumers and *promote* their right to information, education and organisation in view of safeguarding their interests. Access to justice appears to be connected with the economic interests of consumer. In this regard, the Treaty uses a very weak verb (*to contribute*) to assert the commitment of the Community to the defence of the economic interests of consumers. At the same time, the verbs “to promote” and “to ensure” suggest the intention of creating an obligation for the Community regarding consumer protection.

Paragraph 3 repeats the verb “to contribute” while enumerating the ways through which the Community will implement the contribution enshrined in paragraph 1. The measures would have two distinct characteristics: -they have to be adopted in the context of the completion of the internal market; -and, the measures available for adoption by the Community have to “support, supplement and monitor the policy pursued by the Member States”.

Paragraph 5 concedes to the Member States the authorisation to maintain or introduce more severe measures to protect consumers, of which the Commission should be notified, in order to verify their compatibility with the Treaty.

Despite the understanding that Article 153 represents “an important breakthrough for Community consumer policy at the formal legal level” (Weatherill, 1994:57-8), it appears that the constitutional base offered by its wording is quite narrow, especially if one analyses it in its political context, which is rather hostile to the uncontrolled growth of Community competences.

However, there are others who think of Article 153 as an example of an undefined provision or a typically wide constitutional authorisation and understand its wording as doing “little more than state that there is a need for a Community consumer policy. This does not define an objective, but rather an area of competence” (Bernard, 1996:650).

The evolution of EC consumer law and policy is profoundly similar to the development of access to justice for consumers. One can see how consumer protection has been to a lesser or greater extent contained by negative law, soft-law and/or subsidiarity.

Negative law could be understood as the prohibition of national constraints that, while aiming at protecting the consumer, hinder the development of the internal market, by boosting the process of national markets interpenetration (Weatheril, 1997:36). Negative law, mainly through European case law, has emptied rights discourse for consumers, patching together instead a discourse of consumer choice. The protection of the market under Articles 28 and 49 has provided EC law with a set of prohibitions

against hostile actions that could prevent the internal market from flourishing through its four fundamental freedoms. This is the basic mechanism of negative law.

The developing market would expand towards an environment of enlarged choice for consumers at the expense of a more positive perspective that would entail a practice of observance of and/or compliance with rights. On the one hand, negative law aims at the development of the internal market by re-shaping consumer protection in general and access to justice for consumers in particular. On the other, negative law as a background for the imposition of choice discourse over a discourse of rights entails an evolution in consumer policy, from the realm of protected consumers to that of informed ones. Informed consumers will not need protection in many respects since they will not be misled. Access to justice in such an environment is likely to be deemed unnecessary. Furthermore, for many economists, consumer protection is just a question of information, not of rights or regulations. (von H. u.d. Lasa, 1991:399) This is clearly a dispute between free trading and consumer protection, between deregulatory and regulatory strategies.

The *Cassis de Dijon* doctrine, for instance, essentially deregulatory, aims at assisting the implementation of free trading, by indirectly lending attention to consumer protection through information and labelling. The Court's positions in *Cassis di Dijon* and in the elaboration of negative law reveal the fundamental problem as the common market evolves into a Union, namely the difficult co-existence between free-trade and consumer protection. From a narrower perspective, informed consumers are not confident and confidence is necessary for the growth of the market and also for the consolidation of the political process known by "European integration".

The use of the rhetoric of choice in detriment of the rhetoric of right is a double-edged tool because the opening of the market without the corresponding protection, especially in the area of access to justice, undermines the enjoyment of that choice whereas trying to offer a wider possibility of choice. Consumers who are not confident enough to exercise that choice will turn their back on the market. Thus, this approach appears contra-productive and demands a more responsive consumer policy. It has become increasingly clear that the benefits of the common market, which the consumer has the right to enjoy, are also potentially dangerous. Well-informed consumers, without the security that would protect them in case of dispute, will not perceive the market as a benefit but a burden which they will avoid. The consolidation of the internal market depends then on the capacity of the European institutions of developing and supporting a very solid European area of justice for consumers in cross-border disputes. This requires the development of positive law in order to rescue consumers from the position of mere passive beneficiaries of the wider choice promoted by the expansion of the internal market, which in truth needs active consumers. Weatherill corroborates this

analysis when he posits that the development of confident consumers depends on two basic elements: access to justice connected with public enforcement and minimum community-wide rules (1995:319/326). National negative law requires positive law at the Union level if consumers are to be active, confident and able to treat the market as one.

Thus, Article 153 can be thought of as a tool to seclude or remove the effects of negative law from the development of consumer protection. “[T]he insertion into the Treaty of Article 129a [now 153] liberates pursuit of the consumer interest from the constraints of enforced linkage to internal market policy. This holds the potential at formal, legal level to clear the way for a significant increase in the level of Community consumer policy making, whether connected with substantive law or with procedural matters such as access to justice” (Micklitz&Weatherill, 1993:17).

Another effect of negative law on consumer policy and law in general is identified by its patchy development, which, especially before Maastricht, was not directed by clearly issued positive law or supported by a strong constitutional basis. This evolution was rather informed by the contingencies brought about by the expansion and peculiarities of the internal market.

The insertion of Article 153 into the Treaty shows the contradictions with which the internal market is surrounded. If on the one hand informed consumers, promoted by negative law, do not need protection, on the other hand the market needs confident consumers to act and support its development. Consequently negative law needs to recede if positive law has to respond to the demands of a market, which cannot survive without informed, protected and confident consumers.

“Rights rhetoric has been reinstated by the objective of creating a *Europe of citizens*. Citizens need more than open markets to satisfy their needs. The more active the consumer her/himself becomes, the more he/she moves across borders (...), the more he/she uses transborder communication to shop around for goods and services, the more the Community must harmonize (and not simply coordinate) legal standards of protection” (Reich, 1992:26).

Negative law in the specific realm of access to justice will provoke self-regulation which has been very much encouraged in the EC law, regarding consumer-producer dialogue. “Consumers may rightly fear a loss of power under self-regulatory schemes. Indeed, ‘any scheme of self-regulation must be viewed in the context of the general bargaining process implicit in such regulation. (...)’ For this reason, consumers would prefer to have at least some kind of controlling framework for self-regulation” (Kye, 1995:50). The self-regulation approach calls into question issues of responsibility and democratic accountability, which are of paramount importance for building public

confidence necessary for the prosperity of the market and also for the special sort of justice for consumers informed by the ethics of care (McGee&Weatherill, 1990).

Article 81 of the Treaty limits self-regulation regarding exclusively market problems; it does not affect or constrain self-regulatory power regarding the settlement of disputes, for instance.

This section has dealt with one of the problems in EC consumer law and policy and has stressed that Article 153 certainly offers legal basis for its equalisation toward the reality of active and confident consumers. Negative law does not work in favour of creating confident European consumers.

To sum up, the change from negative to positive law means a change from neglectful actions, which might harm the progress of the internal market, toward concrete actions to promote it. In this view, Article 153 is a strong enough legal basis for positive law in EC consumer law and policy, since it imposes this obligation on the Community. Article 153 is then both a landmark for a better systematisation of consumer law and policy and also in regard to overcoming the highly patchy and fragmented quality of this area of EC Law.

## **II - Article 153 and the Policy of Soft Law**

Article 153 is theoretically a watershed that marks an end to the string of soft law that had characterised EC consumer law and policy due to the lack of legal basis. Nevertheless, Article 153, introduced by Maastricht, had to bear the tradition of the practice of soft-law for the regulation of matters judged out of the context of the completion of the internal market. In truth, consumer policy in general, even after Maastricht, has been struggling to prove that it belongs to the heart of the development of the internal market.

The concept of soft law in PIL sheds light on the use of this instrument in Community law, regardless of the differences between these two fields of law. Soft law is related to the sources of PIL, to the essence of international legal obligation and to the role PIL plays in international affairs (Wellens&Borchardt, 1989:267-8). Soft law is understood as non-conventional and non-binding; as having insufficiently precise content and vague scope; as more programmatic than normative; as “law that cannot be enforced but has to be observed. Soft law therefore concerns rules of conduct that find themselves on the legally non-binding level (...) but which in accordance with the intention of its authors indeed do possess a *legal* scope, which has to be defined further in each case” (Ibid., 271-2/274). In PIL, soft law presents itself as: resolutions, codes of conduct, joint communiqués or declarations and gentlemen’s agreements, when disguised as hard law (Ibid., 274-6).

Soft law in Community law “concerns the rules of conduct which find themselves on the legally non-binding level (...) but which according to their drafters have to be awarded a legal scope, but (...) they influence the conduct of Member States, institutions, undertakings and individuals without containing Community rights or obligations. (...) In this light there can already now be stated that *regulations, directives* and *decisions* belong to Community hard law by nature, while *recommendations* and *opinions*, likewise by nature, form part of the Community soft law (...)” (Ibid., 285/289).

Soft law has also a special connection with the policy of consumer choice represented by the understanding established by the European Court of Justice in the *Cassis de Dijon* case, which generated the Commission Communication on the consequences of this judgement. After that, on the one hand hard national law that hindered the free movement of goods in the internal market should be contested. On the other hand, the strategy of harmonisation of national law recedes in favour of localised litigation and use of soft-law (Snyder: 1993a:3).

For the Commission, soft law is a very comfortable way to express its position about a certain matter without submitting a formal document of hard law for consideration by the Council, Parliament, and Economic and Social Committee. Besides, soft law minimises the erosion of Commission powers to submit and implement legislation imposed by Maastricht (Ibid, 4). Another advantage is that any soft law can be transformed into hard law if the circumstances will so demand. This transformation will always benefit from all the information about the appropriateness and legitimacy of the positions advanced by the soft law document.

Moreover, the political meaning of soft law is very important since through it, it is possible to agree on practical unacceptable forms of regulation to be put in non-binding documents as a desirable horizon for certain practices. Besides, soft law gives to its subjects the possibility to postpone forever the adoption of what it suggests, indefinitely delaying “the creation of formal Community rules within a true Single Market” (McGee&Weatherill, 1990:591).

Soft law does not create rights and obligations enforceable by legal proceedings; it lacks legally binding force as its most important characteristic. By contrast, self-regulatory agreements with contractual force are endowed with this characteristic. “These contractual relations however are difficult to achieve, since at Community level no legal framework to bargaining, or mechanisms to solve legal disputes exist” (Steyger, 1993:174). Thus, the effectiveness of self-regulatory agreements will have to rely upon national law and will be valid only for the parties involved. In case of cross-border disputes, the gap is insurmountable.

After Maastricht, soft law must be the bet choice since Article 153 is taken as a fragile constitutional base for action. Soft law in this context “comprises such techniques as (diminishing in ‘hardness’) model laws for voluntary incorporation, voluntary agreements with branches of industry, recommendations, resolutions and declarations, pilot projects, grants for research, etc” (Close, 1983:234). “EC consumer policy reflects such trends. It is characterized by a network of non-binding instruments” (Wheatheril, 1997:34).

It clearly appears that this form of law pleases delights companies expected to push forth the market and to drum up business, leaving consumers without protection. So, soft law is meant not to upset traders and yet gives to consumers the impression that something has been done. Confident and active consumers require more positive and hard legal action in order to behave as a real leverage for the market, to shop around as if they were in their own country, as if the market were one. Furthermore, soft law as a strategy to tackle consumer protection in the internal market undermines the effort of establishing a European system of out-of-court justice through harmonisation and communitarisation which requires hard law, especially in critical sectors such as financial services and e-commerce. Soft law leads to a watered down European legislation, and fails to improve consumer confidence. Soft law, whilst allowing more flexibility and swifter implementation, should not replace the legal binding force of hard law.

Issues like access to justice, understood as situated away from the core of the internal market, have been asking for a radically novel approach to the role of consumers as levers of the market. The recent development of the theme of access to justice for consumers in the EU appears to indicate that this understanding cannot be turned into reality unless it takes the form of soft law.

A recent example of the adoption of codes of conduct to regulate e-commerce is the Directive on certain legal aspects of electronic commerce in the Internal Market<sup>115</sup>. The Directive is itself written in soft law language when it says, for example, -in Article 16- that Member States and the Commission *shall encourage*. There is also an attempt to lend a contractual characteristic to the codes of conduct, by establishing that these codes shall be drawn-up by trade, professional and consumer associations, “in so far as they may be concerned”. This Article goes very far when it relegates public matters for the care of codes of conduct drawn-up without enough legitimation, by establishing that these codes of conduct should include the protection of minors and human dignity. A possible solution would require each user or recipient of a service to electronically “sign” the respective code of conduct each time he starts his shopping. It would, then, function as a contract between that particular recipient and the trader. Nevertheless, one

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<sup>115</sup> OJ L 178/1, 17.7.2000.



could never assume that each point was individually negotiated, which is the basic characteristic of any fair contract. Article 18 requires that Member States ensure quick and effective court actions to avoid any “impairment of the interests involved”.

Codes of conduct must work together with trustmarks. The former should be endorsed and the latter issued by accredited bodies with national jurisdiction and set up by the respective Member State. The codes should be judged against a common set of principles established by the Commission, traders and consumers in conjunction. One can find these details in a speech of Commissioner David Byrne.<sup>116</sup> He adds that codes of conduct are very appropriate for out-of-court settlements, which is the object of Article 17 of the Directive.

The Directive is very complex and it mainly aims at creating an internal market for the Information Society by guaranteeing that Member States do not create obstacles, as states Article 3. Article 22 imposes restrictions on national authorities in their duties to regulate and set up limits to the market or specifically for e-commerce. Thus, the Directive does not intend to protect consumers despite doing that indirectly to a certain extent, but aimed at opening space in the internal market for e-commerce. Consumer protection and access to justice are relegated to soft law and a just incipient out-of-court system.

The case of e-commerce shows the lack of political will of the Commission to take on the constitutional authorisation of Article 153 and responsibilities for a European area of security and justice in order to take one step further in the direction of clear and harmonic Community-wide rules. The understanding that confident consumers will not endeavour to explore the internal market as if it were one is a legitimate argument to place access to justice for consumers in cross-border disputes at the core of the internal market. The defence of consumers and the establishment of effective access to justice would then be the main point of a hard law as a European legal document, like a regulation.

The interest in soft law as an instrument to integrate EC consumer law and policy is remarkable. The adoption of this form of regulation in the Directive was brought about following a study<sup>117</sup> on “normes douces” undertaken for the Commission, which did not express its official position. It stresses that soft law consists of rules formulated by persons directly concerned in or with them (page 52). Soft law is regarded as consensual or ‘not imposed’ despite difficulties in assuring legitimacy to them especially when one intends their general application throughout such a diverse and complex market as the

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<sup>116</sup> Speech delivered on the 18<sup>th</sup> September 2000 by Commission D. Byrne at the “Cyberspace and Consumer Confidence” to the Annual Conference of the Kangaroo Group of MEP’s”. [http://europa.eu.int/comm/consum.../policy\\_speech](http://europa.eu.int/comm/consum.../policy_speech).

<sup>117</sup> “La meilleure pratique dans le recours à des normes juridiques “douces” et son application aux consommateurs au sein de l’Union Européenne”. (2000), Lex Fori – Groupement Européen d’intérêt économique”. Study gently forwarded to the author by the European Commission.

European one. The study criticises the use of the term “soft law”, by saying that “soft” is not a happy adjective since it already shows a certain weakness or lack of efficacy. The term “law”, says the study, is also inappropriate, because soft law works more as a norm in a very wide sense than as a positive legal instrument (page 53). The study identifies four sorts of soft law: *l'autoréglementation*, *les accords volontaires*, *la co-réglementation*, and *la quasi-régulation*. Self-regulation is drawn-up by the traders alone. Agreements are characterised by the participation of other groups. Co-regulation is done with the participation of public authorities and quasi-regulation is produced only by public authorities, although its implementation is left to the traders concerned.

The Commission has developed its own classification, as noted by the study mentioned: “les codes de bonne conduite, les accords de co-réglementation, les recommandations, les codes de bonnes pratiques, les déclarations communes d'intention, les normes de qualité et les procédures de recours. Elle a réparti ces instruments en deux grandes catégories: -l'autoréglementation: ce sont les normes juridiques douces élaborées par et pour l'entreprise; -la réglementation volontaire: il s'agit des normes juridiques douces encouragées par les pouvoirs publics et élaborées en coopération avec les acteurs concernés ou par la coopération entre ces derniers” (pages 62-3).

The study recognises the ethical value of soft law while deprived of legally binding force and indicates that institutional apparatus is necessary to lend more effectiveness to soft law (page 74). It also suggests that out-of-court procedures are ideal for the use of soft law. It is so insofar as soft law promotes a detached solution from public power and safeguards that such as equality, certainty, impartiality and due process of law. Soft law does not demand the legitimation of any of safeguards mentioned and can work based on the legitimation lent to it by the satisfaction of the parties promoted by its effective and quick outcomes. Soft law can provide faster “justice” in terms of case resolution since it is free from the constraints imposed by the exigencies of the due process of law.

It is also possible that soft law imposes sanctions which demand institutional mechanisms to promote their *crystallisation* into hard law (Bonnor, 2000). In this respect, the study explains that the involvement of the Commission in the implementation and adoption of soft law as the sole mechanism of consumer protection in the EC has been criticised by national authorities and seen with reservation by consumer representatives such as BEUC (Ibid., 267-8). About the role of the Commission, says M. David Gallina, an Italian authority from the area of Communication, fears that the Commission institutionalises a discretionary power, while growing in a way to cause conflict of competence among other European institutions and puts into question its own legitimacy. A Belgian authority has criticised

the adoption of soft law for the protection of consumers and posits that better results can only be attained by harmonisation. The plan is also encountering resistance in Germany, which indicates a cultural difficulty in welcoming soft law, but has been well received in Great Britain and in the Netherlands (Ibid., 267-8/272).

The essential features of soft law indicate that its use calls for caution. It is very easy to imagine the insecurity of consumers when dealing with professionals or traders who have established their own code of conduct and disputes settlement body without any public scrutiny or regulation. It is difficult to improve confidence for consumers in a context of high levels of freedom for traders but high degrees of uncaring subservience for consumers.

In turn, one must analyse Article 153 vis-à-vis the soft law recourse, regarding the verb “to contribute” which is used twice. The verb itself does not really imply a preference for the use of soft law instruments as recommendations or opinions; rather it suggests that the Community will act in co-operation and that its actions do not have the purpose of exhausting the problem while offering a definite solution or excluding help from Member States. Such action is a contribution and has supported the decision to avoid regulations, in consumer policy in general, in favour of directives precisely because they do not have an exhaustive nature.

As already discussed, soft law is an instrument appreciated by economists preoccupied with guaranteeing maximum freedom and minimum regulation and interference in markets. Thus, soft law in the Community’s legal structure is a combination of the delicate task of convening sovereignties and of operating in such a highly sophisticated context as the European Internal Market. Consequently, the protection promised by Article 153 when confronted with jealous sovereignties and supremacy of economic power is quite reduced. Soft law as an instrument of the subsidiarity principle, as it is understood in the Community’s balance of power, can be seen as the reaction against the “centralization of regulatory power which seems to be the ‘iron law’ of federalism” (Reich, 1992:866).

Soft-law has to evolve into hard-law in the name of effectiveness, efficacy and efficiency which all demand strong *institutional will*. A strong legal framework is necessary, especially for the out-of-court settlement of consumer disputes.

### **III- Article 153 and the Principle of Subsidiarity**

The principle of subsidiarity is the third constraint upon Article 153 that Community law and practice offer. Subsidiarity functions as a double-edged sword concerning the case of the gap in access to justice in cross-border disputes for consumers in the EU (Dehousse, 1994a:6). As such, subsidiarity will be considered in

both its positive and negative side. Firstly, subsidiarity will be considered negatively in order to characterise its positive effect in building and maintaining the gap described in the last chapter. The second approach is about highlighting subsidiarity as a tool to dismantle the gap acting negatively on it.

### III.1- Subsidiarity as a Hurdle

The principle of subsidiarity, enshrined within the EC constitutional order, can have a devastating effect upon EC consumer policy and law. It provides a good excuse for national orders to be burdened with caring for their consumers, who are expected to explore the market without internal frontiers. In this sense, “subsidiarity cloaks a failure to act with the respectability of a principled stand” (Gibson, 1993:55). Ultimately, subsidiarity can be identified as one of the causes of the gap discussed here, together with the understanding that access to justice for consumers does not have an immediate connection with the progress of the internal market. Consequently, consumer redress remains mainly a national matter whereas that reliance amounts to denial of justice in cross-border disputes.

The origins of subsidiarity can be found in “Catholic social doctrine and federal political thought” and particularly in the case of the European Community, it was firstly referred to in the Tindemans Report in 1975 in the following way: “... the European Union is not to give birth to a centralising super-state. Consequently, and in accordance with the *principe de subsidiarité*, the Union will be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently” (In Duff, 1997:100).

The principle of subsidiarity, introduced by the SEA in a mitigated form and substantially improved in Maastricht, gained momentum in the environment of uncertainty and political difficulties surrounding the ratification of Maastricht at the European Council summit in Edinburgh in December 1992. Subsidiarity has the role of safeguarding national powers and competence vis-à-vis the threat of an overwhelming increase of power of a Community managed by bureaucrats from Brussels.

In terms of political equilibrium between Member States and Community, subsidiarity has been understood as a reaction against the effects provoked by the SEA, which reduced Member States’ ability to contain the Community ever-growing influence. Subsidiarity re-established part of the power lost after SEA.

The Commission’s document on subsidiarity prepared at the Edinburgh Summit delimits the Community’s legislative jurisdiction towards a clear preference for soft law documents. It elects soft law as the “legal” tool compatible with subsidiarity. “[A]ll things being equal, directives should be preferred over regulations and framework

directives to detailed measures; non-binding measures such as recommendations should be preferred where appropriate” (In Reich, 1995:299). This is one of the rules furnished by the principle of subsidiarity understood in its constitutional status in EC legal order (Schilling, 1994).

Subsidiarity, as a way of determining or dividing competence between local and central authorities or, in the EU, between Member States and Union, is ultimately a way to avoid the over-centralisation of power (de Búrca, 1996:367). It is a political principle understood in the context of a redistribution of power, and functions as a limit. Article 5 establishes conditions for the Community’s role in situations which do not exclusively fall within its competence. This action is justified “only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community” (Article 5). This legal formula entails two tests: one of effectiveness and another of necessity.

Two conditions must be observed, under the subsidiarity principle in order to justify Community action in cases which do not fall within its exclusive competence: efficiency/effectiveness and the cross border nature or effect of the action. The criteria could be named: “the more effective attainment test” and “the cross-boundary dimension effect”. Community authorities, in accordance with the German recipe, will have a subsidiary power to act only in cases where local authorities cannot perform it in the most effective and efficient way possible. The German maxim reads: “as much central government as necessary, as little central government as possible” (Schilling, 1994).

Micklitz has developed another dichotomous way of seeing and applying subsidiarity. He identifies ‘subsidiarity from without’ as related to delimiting and defining competences and ‘subsidiarity from within’ as linked to what has to be done, by whom and how, once connected with defining structures. ‘Subsidiarity from without’ calls for a political approach can establish a dangerous rivalry and lead to paralysis or ultimately destruction.

‘Subsidiarity from within’, whilst still representing the negative approach of the principle, has a more dynamic expression and suggests that this dichotomy furnishes “a new and prospective reading of the principle” which upholds the action of the Community towards the repayment of the fundamental debt of economic integration, expressed in “a minimum of social integration” and the definition of the role of individuals in the market without frontiers (Micklitz, 1993:513/511/523). This sort of subsidiarity, as opposed to the focus on competence, is also connected to the analysis of institutional and organisational patterns and reveals how much better certain institutional bodies may perform.

‘Subsidiarity from without’ denies the existence of the aforementioned Community debt as ancillary to the theory of the economic constitution of the European Community. “The idea is to have a European market and European rules to guarantee market integration, but to leave social regulation to the Member States” (Ibid., 522).

‘Subsidiarity from within’ seems to call for responsibility, especially from national authorities in the furtherance of Community principles, under the provisions of Article 10 of the Treaty, which establishes the duty of fidelity of Member States to the Community. It re-states the division of competence in terms of shared-responsibility, of solidarity in implementing the responsibilities of the internal market and ultimately, the obligation of national governments in “develop[ing] a more supportive, communautaire attitude” (Weatherill, 1994:69).

The principle of subsidiarity (enshrined in Article 5) can also be understood in two ways. Firstly, it may be an administrative principle or subsidiarity from within, whereby the administration or the application of principles and legal regulations centrally decided is a local responsibility. The political side of the principle, or subsidiarity from without, is more radical and demands that the legal making process be dislocated or devolved to the local context (In Micklitz&Weatherill, 1993:305). The latter is devastating to the effectiveness of Article 153 and would turn it into a dead letter. In order to avoid this, one must take the verb “to contribute”, used twice in Article 153, to suggest an understanding of the subsidiarity principle as “a model of shared responsibility” for consumer protection. Otherwise, subsidiarity could lead EC consumer policy and ultimately the market to total stagnation or partial sclerosis through the adoption of soft law and self-regulation.

In the case of consumer law and policy, subsidiarity has been acting “as a brake on consumer policymaking” and there are warnings that subsidiarity might be abused and might jeopardise any EC initiatives for consumer interests. Rather than a principle to enhance democracy and openness of decision-making, which should be take as close as possible to the citizens, “[s]ubsidiarity sounds (...) like a behind-closed-doors excuse” (Weatherill, 1994:58).

“Currently, the principle of subsidiarity is being referred to in very many discussions of issues (...) such as (...) access to justice (...). The consequences of (...) this reference are twofold: On the one hand, the application of the principle (...) is often likely to imply abstention from any action at EC level; on the other hand, it may lead to a watered down EC legislation or to the use of self-regulation” (Goyens, 1993a:379).

Goyens attributes the adoption of self-regulation to the negative use of subsidiarity in EC consumer law and policy. She adds that subsidiarity “constitutes a genuine danger for EC consumer protection, as in areas (...) such as crossborder litigation. Some will push forward (...) subsidiarity to prevent Community action”

(1995:36). In the same vein, Gibson calls attention to the Community's resistance to establishing access to justice for consumers in cross-border disputes, and to the fact that national action is rather limited due to the cross-boundary nature of the problem.

“Legal uncertainty and multiple compliance create, (...) unnecessary duplication of legal costs for EU financial institutions when engaging into cross-border provision or investment services. It is very likely that these costs will be rolled over to clients and may, in turn, offset some of the benefits that investors derive from the drive towards an integrated market in financial services” (Avgouleas, 2000:87).

He shows how the negative dimension of subsidiarity has devastating effects on financial services in the internal market. For example, it impedes the process of rationalisation of the regulatory framework that harmonisation would install and hampers, consequently, the progress of the market (Ibidem). This conclusion could be extended to include the market as a whole<sup>118</sup>.

### **III.2- Subsidiarity as a Duty to Act**

The negative side of subsidiarity, regarding consumer policy, needs to be abandoned in favour of a more positive role of the principle in EC political and legal organisation in promoting confident and active consumers as levers of the market. Among the political and social advantages of subsidiarity, one can emphasise its capacity for fostering diversity in all areas. Another view highlights its inability to further common values. The latter position looks at subsidiarity from above and the former from the bottom up.

Concerning the first one, diversity in legal systems, like the EU, can be, nevertheless, a problem especially for legal certainty and in the view of the four freedoms enshrined by the Treaty. Diversity is a very difficult element to be equalised in a framework for justice in cross-border disputes. Furthermore, a centralised approach to the problem can protect diversity whilst a local approach to the issue can isolate such diversity, reinforce its problems and fail in spreading its lessons. This point is particularly important for a project on setting up access to justice for cross-border disputes at the Community level, especially regarding the furtherance of common values.

The second position argues that subsidiarity is by no means a way to settle conflicts about values which deserve general codification in organisations such as the EC.

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<sup>118</sup> Avgouleas argues for the creation at the Community level of a financial market regulatory body that could certainly work for the protection of consumers and lend to cross-border financial services certainty and security (2000:92), not provided by “the situation institutionalised in the European System of Central Banks” (Usher, 1998:97).

Community consumer policy, in general, under Article 153 and in view of the subsidiarity principle, will consist of actions to contribute to national consumer policies with the challenge of respecting diversity, converging common values and promoting consumer confidence in the name of market expansion.

The Commission stated in its 1990-three-year action plan, under the heading 'Subsidiarity Principle' that "[p]ractical consumer policy must be effectively managed in the Member States on an ongoing basis with the management (...) of redress being adapted in each instance to local needs. It would be unrealistic to undertake such task continuously at a Community level" (Micklitz&Weatherill, 1993:305)<sup>119</sup>.

Concerning access to justice for consumers in cross border disputes, subsidiarity will not however have such drastic effect, since the cross-boundary dimension is essential and will respond positively to the test of necessity. Besides, the test of efficiency and effectiveness also does not impinge on the constraints of subsidiarity upon the Community duty of providing this kind of consumer protection, since practically the whole EC institutional and legal framework will need further improvement in order to tackle the task. Another challenge is the exigencies of respecting diversity and promoting convergence of common values, regarding access to justice in cross-border disputes, once subsidiarity furnishes a duty to act.

In turn, subsidiarity, perhaps even in consumer protection in general, entails a question of how to act rather than who acts. More radically, subsidiarity obliges a process of building consumer confidence in the Community's programme of market integration, "ensuring that EC legislation is the most appropriate means of achieving a high level of consumer protection" (Gibson, 1993:323).

This understanding is at the core of the positive side of subsidiarity, which acts negatively upon the gap in the access to justice for consumers in cross-border disputes in the internal market, dismantling it. This positive approach of subsidiarity is urgently required in view of the progressive stagnation of the market caused by the timid actions of sceptical consumers. The future of the market today seems to lie in the hands of consumers. National fiscal and legal barriers to trade cannot easily resist the experience of 50 years of improvement of Community mechanisms developed with the specific aim of fighting them. Thus, the expansion of the market increasingly demanded by threatening rates of unemployment requires more aggressive, purposive and confident consumers. In this trend, access to justice lies at the core of any policy that has such an objective.

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<sup>119</sup> The negative action of subsidiarity upon EC consumer law and policy, which creates and maintains the gap in access to justice for cross-border disputes, can be seen in the preoccupation of the Council "with minimising financial and administrative burdens, protecting 'well-established national arrangements and the organisation and working of Member States' legal systems' and preserving broad discretionary decision-making powers at national level. This suggests a desire to maintain the status quo, warts and all, rather than actively to pursue efficiency." (Gibson, 1993:332)



The positive approach of the principle of subsidiarity, regarding access to justice for consumers in the EC, is a necessary requirement for the integral compliance with the exigencies of Article 153, understood as a constitutional obligation of the internal market towards the establishment of a high level of consumer protection. Thus, subsidiarity and access to justice, especially in the case for consumers, appears not to have very much to do with who acts, as with the action chosen and the method used. The quality of justice is of paramount importance in the equalisation of the gap in access to justice for consumers in the internal market.

T. Bourgoignie who discusses the positive approach of subsidiarity, regarding consumer protection, says that this approach entails that “une action de la Communauté est donc justifiée dès lors que les mesures prises par les Etats membres ne permettent pas de garantir aux consommateurs résidant dans la Communauté un niveau élevé de protection” (In Reich, 1995:299-300).

Weatherill says that “the creation of a confident consumer could provide a rationale for the legislative development of a wide range of minimum rights for the consumer in the market. If the internal market cannot be completed without such a legislative commitment, then the subsidiarity principle in Article 3b [5] EC must point in favour of Community action” (1995:315).

De Burca also suggests that subsidiarity should work for the Commission more as a legitimizing principle than as a restricting or limiting one, especially in areas which call “simultaneously for the strengthening and expansion of Union policies (...) such as environmental policy, consumer rights and tourism, which necessarily would involve increased powers for the EU institutions” (1996:366-7).

In the financial market, especially after the completion of single currency policies and given the facilities and danger of e-commerce, access to justice integrates the core of market responsibilities, and subsidiarity must then be understood in its positive aspect. Subsidiarity in this case is demanding full responsibility and interference from the Community powers to offer protection for consumers attracted by facilities and new products available in a financial market unified by the single currency and more easily accessible by electronic means.

Some academic discussion has understood consumer protection, environmental policies and workplace regulations as areas difficult to control by the EC since they are characterised as “market without government” (In Reich, 1992:889). This argument is based on the understanding that they are areas of social policy control and regulation, which are very complex and delicate in the EC political context. By contrast, Koch seems to argue that the Europeanisation of basic norms of European social public policy would not conflict with the subsidiarity principle, despite claims to the contrary. The core of his argument is that “mandatory substantive community laws operate as

independently enforceable norms, because they rank higher than national laws in a supra-national system”, when one does not have a way to opt-out (1995a:338). The argument progresses to establish that “if we regard mandatory European economic law as forming part of public policy, as it often does, then provisions like Articles 85 and 86 EC Treaty would be viewed as public policy principles, and could even be enforced against national laws” (Ibidem). Thus, consumer protection as a social debt of economic activities cannot be relegated to national law. This radical national surrender of powers in the area of economic and financial policies in favour of the Community has to include consumer protection. Koch defends the development of a distinctively European concept of public policy whose contours are better defined than national ones and can be more broadly harmonised and implemented. In this respect, the same argument applies to the implementation and inclusion of consumer protection in the concept mentioned and practice beyond the traditional minimum protection policy imposed by the principle of subsidiarity. The minimum protection policy is defended on the basis that it allows concurrence among different and more stringent legal orders, thereby augmenting the possibility of protection. Nevertheless, for consumers in the EC market, especially in cross-border disputes the concurrence mentioned amounts to a denial of justice, lack of protection and problems for the market at the end of the day.

Weatherill defends the positive side of subsidiarity and says that “if access to justice and information provision is left to Member States, yet they are unable effectively to develop it, it may then be the case that the matter is shown to be more effectively achieved by Community action. In that sense, Article 3b [now 5], the subsidiarity principle, would be seen to empower the Community to act, doubtless via Article 129a [now 153], perhaps even by Article 100a [now 95]” (1994:69).

The Community project on out-of-court justice for consumers is cloaked in ambiguity. This is so since the intervention of the Community does not lend any legal security to the project, due to the lack of hard law. Rather soft law deepens the problematic view of the negative approach of subsidiarity regarding access to justice for consumers. Furthermore, it leaves Community responsibilities to be implemented by national authorities, which, due to their particularities, do not give uniformity to the process. The project has, however, its positive side. The ambiguity of the situation suggests the “paradox of subsidiarity” formulated by Snyder, which refers to the legitimation crisis, that justified the introduction, in the SEA, and widening, in Maastricht, of the subsidiarity principle and the lack of legitimation provoked by its unwise or even wrong application (1993a:7).

The next section will explore further the progressive change towards another understanding of the involvement of the Community in the resolution of the problem of access to justice. The change, if not toward asserting Community responsibility on

consumer access to justice, especially in cross-border disputes, is, at least, towards the awareness that courts are not the most reliable institutions to produce confident consumers the market needs in order to flourish. The change does not acknowledge, however, that confident consumers are not bearers of rights; they are above all bearers of needs, searching for happiness and satisfaction. This would entail a totally different conception of legal justice as care. The change that is needed, one could hazard an opinion, follows the comment made by the Commission in its 1993 report: “subsidiarity cannot be reduced to a set of procedural rules; it is primarily a state of mind” (In Weatherill, 1994:33).

In accordance with a different state of mind, another viewpoint on the problem of access to justice for consumers has started to claim for room in the institutional approach to the theme. The first impact will be the acceptance that “[t]he concept of consumers’ access to justice *is not restricted to the problems of access to the courts (...)*”, says the Commission in an informative document called “Consumer Disputes Labyrinthian Thread”.<sup>120</sup> The question that follows is on whose state of mind does the approach to subsidiarity depend? *À la limite*, one could also ask: whose state of mind has to change in order to give subsidiarity its most appropriate application?

The new state of mind should, above all, find a new way to bridge the gap as discussed in the present chapter, in order to actualise the potential availability of Community legal order for developing a special justice for consumers in cross-border disputes outside the frames of PIL and given the even partial repayment of the immense debt of economic integration to the individual through voicing consumers’ neglected needs and distress caused to them by the market.

#### **IV – The Out-of-Court Project as a Solution?**

The discussion of the out-of-court project as gap in chapter four intended to leave open a possibility from where one could start to weave a sort of availability in this project for the implementation of the framework for justice as care. The aim of this section is, then, to explore the recent discussions of the out-of-court justice project expressed by the EEJ-NET (European Extra-Judicial Network) and the features of the bill especially conceived for e-commerce in the EC regulated by Directive no. 2000/31.

##### **IV.1- The Case for e-Commerce**

The first pillar of the discussion on e-commerce as a special case of the EEJ-NET project is the formulation of codes-of-conduct, based on core principles, discussed

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<sup>120</sup> [http://www.europa.eu.int/comm/consumers/policy/developments/acce-just/acce-just05\\_en.html](http://www.europa.eu.int/comm/consumers/policy/developments/acce-just/acce-just05_en.html), at 7.

among traders, consumer groups under the supervision of the Commission, that intends to “endorse these principles, probably through a Recommendation”, said Commissioner Byrne<sup>121</sup>. The Commission reached the understanding that codes-of-conduct are suitable for out-of-court settlement of disputes. Nevertheless, consumer justice needs to acknowledge the power imbalance in consumer relationships, which makes hard law necessary to guide negotiation and inform any imposed outcome in case of failure of the mediation process.

Availability in this case could be created through using the discussion about principles in order to initiate a collection of best practices in consumer transactions in general, and to resume a more systematic writing of a code for the protection of consumers in the European internal market. On the one hand, this would simplify the initial thought of accreditation bodies set up in each Member State to endorse the codes-of-conduct vis-à-vis principles, by eliminating the necessity of both codes and the mentioned bodies. On the other hand, it would guarantee uniformity throughout the internal market, which could be adapted to or respond to diversity in terms of national or regional customs and habits at moments of dispute with regard to the needs of the parties.

The second pillar of the out-of-court project is the creation at national level of “clearinghouses” which will be responsible for information and support, working as point of contact between consumers and suppliers in case of cross-border dispute. The availability represented by this mechanism could provide each clearinghouse with a European link through the Commission as the body responsible for the implementation of internal market policies and law. The clearinghouse would be nationally organised but attached to the Commission supervision to implement a European model of justice for consumers. The clearinghouse should be endowed with the necessary material tools, legal power and, above all, “institutional will” to promote justice between the parties to a dispute, following the example of the Centre for Arbitration of Consumer Disputes of Lisbon.

The out-of-court project relies heavily upon the technique of soft-law called “co-regulation or self-regulation”. The model is deemed to reflect a co-operative enterprise to be undertaken by all groups involved, thereby assuring a high level of “democracy” and transparency. Nonetheless, an effective protection of consumers needs to re-place the co-operative mood in the last part of the process, especially in disputes. In the background, business and consumers need a clear, hard legal apparatus with a language that empowers an enforcement body that is competent to settle disputes and to endeavour prosecution in criminal and civil judicial and administrative instance as well if necessary. Especially in e-commerce, consumers can be victims of crime consistent of

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<sup>121</sup> See footnote no. 6.

tortuous behaviour from traders. The prosecution would need European and national law and it could be an element of negotiation to be waived in case where traders repair the damage and mend the web of relationship with consumers, while re-establishing confidence in the market.

The involvement of public authorities at national and European level alike cannot be effective without hard law and this involvement should be established to happen at the moment of settling a dispute.

In another speech<sup>122</sup>, Commissioner Byrne asks the question whether Europe could have consumer protection and trade liberalisation at the same time. The present analysis of the availability of the European legal and institutional framework seems to suggest a positive answer with conditions. The condition for both to happen together is the establishment of a language of care that could hear both consumers and traders requests not as excluding clauses but as strands of the same web that needs to be mended. The language of trade liberalisation -used in a more powerful way in the current discussion of access to justice, as a way to build consumer confidence in the internal market, especially for e-commerce- clearly does not suit the special features of consumer disputes. Neither an exclusive protective language will encourage traders to cross frontiers in order to win new markets. Thus, a language of co-operation and dialogue, which entails a strong ability to hear and respond in the terms of the Other, is needed, but not at the moment of setting up the system itself. Hard law has to prepare the field for this quality of justice to happen and has to provide a strong institutional framework to guide the process of dialogue and co-operation toward happiness and satisfaction, through settling a dispute. A system that has soft law at its heart and courts at its top level sounds extremely cumbersome. It is too soft for the beginning and too hard for the end or for resolution of possible damage to the web of relationships or relational contracts of consumption. The ethical implications, mentioned in the referred speech as a concern to be tackled in consumer protection, is a rich field for improvement in EC consumer law and policy, especially in access to justice in an out-of-court system. This is said with regard to the framework necessary for a practice of justice as care, since the latter demands another ethical conception. The ethics of rights and contractualist readings of disputes are unhelpful. By contrast, the ethics of care, expressed as care for Others and responsibility in relationship, and known as a feminine expression of justice, finds a fertile field for application in consumer disputes in the EC.

In this resides the availability of the out-of-court project, which cannot be taken as out-of-law, but beyond law as offering mere legalistic and contractualist solutions for disputes. Law would embrace the project by offering an institutional space for the

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<sup>122</sup> Speech delivered at the Centre for European Reform, Breakfast Seminar, London, 21/07/2000. See footnote no. 6.

resolution of disputes according to the understanding of the ethics of care, which is one prepared to listen and respond to needs. Law is the force, which has the responsibility, through hard legal instruments and powerful institutions, for mediating the aforementioned *institutional will*. Law is the way to overcome the *Unmittelbarkeit* of will and supply a legitimating stream to the process. Law as the tension between these two apparently contradictory terms -“institutional” and “will”- can offer justice when applied from the ethical perspective of care. Law must function as a background net of protection indicating possible ways to frame shared outcomes, and also as a last resort in case care fails. In this respect, the present discussion refuses the Commission policy or “strategy”, of placing soft law at the beginning of the process and courts at the end, since there is no possibility of mediation between these two poles of the process. In fact, the process needs three elements or terms: 1- Community-wide hard law, in order to eliminate the inconveniences of soft law and PIL in cross-border disputes; 2- out-of-court justice endowed with institutional will or justice informed by the ethics of care and the needs of the parties to the dispute to be settled; 3- public enforcement authorities with relation to courts and competence for criminal, civil and administrative prosecution, for cases that are more serious or fail in the amicable process of “adjustment of behaviour”.

#### **IV.2- The Case for the EEJ-NET**

The European Extra-Judicial Network (EEJ-NET)<sup>123</sup>, launched in 1998 with the adoption of the Communication 198<sup>124</sup>, is composed of national bodies responsible for settlement of consumer disputes. They are supposed to work for cross-border matters by the intermediation of clearinghouses and in line with the principles established by Recommendations 98/257 and 2001/310, in order to be credited by the respective Member States and then to be able to integrate the European network. Consumers and trades alike could rely, theoretically, on a body in that position if they need justice to be achieved with independence, transparency, respect of adversarial principles, effectiveness, legality, representation and fairness -as principles enshrined by the aforementioned Recommendations.

The gap in this formulation can be seen in the national character of the project, based on clearinghouses; in the lack of a justice able to respond to needs in accordance with the nature of consumer disputes; and in a still complicated process for consumers with small claims. The tasks of the clearinghouse are: “-determine, upon receipt of a complaint, whether an extra-judicial body would deal with the complaint, whether a

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<sup>123</sup> Commission Recommendation 98/257/EC, OJ L 115/31, 1998.

<sup>124</sup> COM (1998) 198 final

small claim procedure would be more appropriate or if other types of consumer resolution schemes, such as conciliation, may be helpful; -provide information on the appropriate out-of-court dispute resolution bodies in the jurisdiction of consumers and pass appropriate complaints onto those bodies; -provide information on national small claims procedures; -provide assistance to consumers in formatting and filing complaints for both national and cross-border disputes; - provide support in cross-border disputes by identifying and then sending the complaint to the appropriate extra-judicial body in the other member state; - monitor and store information about the level and nature of complaints for future policy development”<sup>125</sup> (24-25). The role of clearinghouses seems to complicate the process by making it even longer than it could normally be, in cross-border disputes. It is time-consuming for consumers to go first to a clearinghouse, which will contact another clearinghouse in the supplier’s country, which will contact the out-of-court body to contact the supplier. Besides, this process will certainly take away the force of their claims in the bureaucratic ways through which their complaints will have to be. It would make all the difference if consumers could count on the “institutional will “of a body which would contact the supplier immediately in order to try to settle disputes. Consumer confidence would increase if the body were a European agency for their protection and defence with the European flag in its logo. Confidence would increase even more if this body were a public body with power to prosecute using criminal, civil and administrative instances alike, at national, international (foreign) and supranational levels, in the defence of consumers. This process of building up consumer confidence is of paramount importance for financial services in the internal market, in order to publicise, as in most Scandinavian countries, the suspicious justice delivered by private ombudsmen or in-house private schemes. Another inappropriateness that could be avoided by the establishment of unique European public agencies is the competition between different methods and bodies for dispute settlement.

The lack of hard law is again the problem. The new Recommendation<sup>126</sup>, for instance, on principles to cover less formal ADR mechanism such as mediation does not overcome the need for a more complex legal expedient, such as a regulation to set up a general European code for the protection of consumers, giving especial emphasis to or even centring it on access to justice. This is in line with Commissioner Byrne’s declaration on the Community policy on working toward a “more long-term solution [which] would pursue convergence of basic principles of national consumer protection

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<sup>125</sup> Wilikens, Marc, et alli, (2000), *Out-of-court dispute settlement systems for e-commerce. Report of an exploratory study*, Joint Research Centre, Ispra (VA)-Italy. This report can be downloaded from: <http://dsa-isis.jrc.it/ADR/>.

<sup>126</sup> OJ L 109/56, 19.4.2001.

laws”<sup>127</sup>. Nevertheless, it sounds contradictory to pursue protection through soft law what would deepen the fragmentation of EC consumer law and policy. An umbrella regulation to unify and harmonise consumer protection, under the title of access to justice in the internal market, seems to be the way to guarantee a strong background for producing confident consumers through whom the market can overcome stagnation and flourish as desired.

The availability that the EEJ-NET project brings about is the possibility of adopting and adapting national bodies under the co-ordination of the EC legal and institutional framework. The adaptation would respond to European parameters founded upon justice out-of-court, through the framework of the ethics of care as an ethic of virtues<sup>128</sup> implemented by a strong public body able to enforce hard law.

## V – Analysis of Article 153

After having analysed Article 153 in the context of soft law, subsidiarity and before its analysis against some articles of EC Treaty, let us take a closer look at its wording.

*1. In order to promote the interests of consumers and to ensure a high level of consumer protection...*

Article 153, as said earlier, was inserted into the TEC by the TEU and enhanced by Amsterdam on the basis of Finnish, Danish and Belgian proposals but left untouched by Nice. It did not inaugurate consumer concerns into EC consumer law and policy since they were originally mentioned in other provisions: Articles 39(I)(e), 40(3), 85(3), 86(now 33(I)(e), 34(2), 81(3) and 82). Nevertheless, Article 153 is the first specialised constitutional basis for EC consumer protection in an environment of soft law and subsidiarity as a hurdle.

The first words of the article should be taken as its *caput* since they are certainly the most important ones for they oblige the Community to promote the interests of consumers and to ensure a high level of consumer protection. As affirmed by Weatherrill (Church&Phinnemore, 2002:341), the provision has been rather underused

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<sup>127</sup> See footnote no. 6.

<sup>128</sup> It is interesting to mention the title of a conference in Dublin, on 03/03/00: “*Making the virtual virtuous* – towards a new approach to e-Consumers”. The aim at praising virtues should be a public policy for the whole EC consumer law and not only for e-consumers. It seems a good opportunity to unify EC consumer law and policy under the aim of virtue and of a justice informed by the ethics of care or the ethics of virtue. In the same way, one could use the title of another conference (in Nijenrode, Breukelen, on 27/3/00) “Is Europe ready for a new economy?” to ask instead whether Europe is ready for a new justice.



since subsidiarity became really a hurdle to EC consumer protection -not to protect national interests but those of national traders. While national consumers must be converted into EC consumers, national traders keep fighting for their own national markets without renouncing access facilities to their neighbours.

Restrictions which any EC consumer protection might impose are indeed problems for traders seeking profits both domestically and in the common market. The *caput* of the article does not leave any doubt regarding the Community's duty to promote consumer protection although the following words try to restrict the ways the Community shall comply with it.

*...the Community shall contribute to protecting the health, safety and economic interests of consumers...*

The verb "contribute" reinstalls EC consumer protection as subjugated to national jealousy. The words elect three areas of consumer protection for the entrenchment of Community's duty regarding the promotion of consumer interests and high level of protection. Constitutional norms must be interpreted as widely as possible in order to protect public interests and as narrowly as possible when they restrict individual rights. Consumer law has increasingly imposed its public nature as it abandons the principles of contractual law given the relevance of health, safety and economic interests of consumers for public policies and public budgets. In fact, the weaker condition of consumers plays a secondary role when one considers the impact of health problems caused by BSE in public deficit of countries such as Germany.

Another relevant point is to include access to justice for EC consumers in the context of soft law initiatives of EC consumer policy, which will be analysed in the next chapter.

*...as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*

The selective focus on information, education and organisation as areas of EC action harks back to early consumer policies and the positions of the ECJ, which praised the informed and educated consumer and overlooked the need to protect consumers. "Well-informed and educated consumers will dispense with protection" was then the basic principle that guided EC consumer law and policy and ECJ decisions. Information and education were then behind the necessity of labelling products, for example. Consumer associations were deemed to speak with the silenced voice of weak consumers in an environment of soft law and judicial decisions unable to protect. The

last chapter will describe the action of effective access to justice for EC consumers as a way to educate traders through dialogue and relational concerns vis-à-vis needs and human quality present in consumer claims. The action of public authorities as the Danish Consumer Ombudsman will be analysed as a way of achieving EC consumer protection and approximating satisfaction. Access to justice is then characterised as the most important tool to fulfil both the aspirations of the market and the Union expressed by Jean Monet words in 1952: “We are not bringing together states, we are uniting people”<sup>129</sup>:

*2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.*

Paragraph 2 heeds the classical requirements of constitutional legal theory. It is pitched at a general level while giving a precise direction. The EC market should no longer be implemented at the expense of human needs and quality expressed more urgently through the Otherness of consumers and their pleadings. In fact, Paragraph 2 should be the first paragraph and should be the *caput* of Article 153. The restrictions that will follow in paragraph 3 would be more appropriate when read after paragraph 1 since it is mentioned in the *caput* of paragraph 3. Paragraph 2 is the general rule since it informs and expresses the background of EC consumer policy and law.

*3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:*

*(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;*

The apparent restrictions the above words might entail reflect the contention of the ever-growing Community actions in favour of national jealousy. EC consumer protection must be entrenched into the limits of Community policies and activities. The market, which normally was growing to become the irrevocable Union, found itself in need of deterrence. Subsidiarity-as-hurdle to contain the Union and adjust it to traders’ specific abilities. Weatherill’s clairvoyance may be recalled to support the argument this chapter has defended: consumer protection is a necessity for the market to grow and it is intrinsically connected with access to justice for consumers. This thesis, especially the two last chapters, attempts to show how justice as care through public European authorities is not beyond the context of the completion of the internal market. Quite the contrary, justice as care is both a moral duty of the market and the irrevocable aspiration

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<sup>129</sup> See [http://europa.eu/abc/12lessons/index9\\_en.htm](http://europa.eu/abc/12lessons/index9_en.htm)

of its founding fathers. In truth, justice as care for EU consumers could foster consumer protection within the limits imposed by paragraph 3(a) of Article. 153.

The above section V has analysed Article 95 to identify one added facilitator of EC consumer protection through Article 153 and the subsidiarity principle as a duty to act.

*(b) measures which support, supplement and monitor the policy pursued by the Member States.*

In truth, the comments of item (a) could be generally applied to item (b). Nonetheless, it seems helpful to look at the breadth of its specification of the cooperative nature of Community measures as supporting, supplementing and monitoring domestic actions. It is remarkable how these verbs express a commitment of political will towards consumer protection and entail a great deal of action. These verbs oblige Community measures to surpass the politics of the informed and educated consumers in order to pursue the politics of bringing into line all commercial communications in the way the last chapter shows. It is about overcoming the liberal modernist faith in the autonomous self to accept responsibility in relationships in the way justice as care suggests.

*4-The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measure referred in paragraph 3(b).*

Paragraph 4 specifies the Council as the European institution to adopt the measures referred in paragraph 3(b). On the one hand, it pulls back again towards subsidiarity-as-hurdle. The Commission would give more dynamism to the process. On the other, it mentions the Article 251 which endows the policy with more democratic features in comparison to Commission interventions. The role of the European and Social Committee as a bridge between Europe and organised civil society is beyond dispute and shows how consumer protection dwells public fields of law. Nevertheless, the urgency of the dictate placed on the Community to support, supplement, monitor, and above all, intervene is seriously compromised as showed by the analysis of next chapter.

*5-Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.*

Paragraph 5 encourages more stringent national consumer protection insofar as it is not incompatible with the attainments of the market and its founding Treaty. It was done in order to safeguard Danish remarkable tradition of protecting consumers, citizens and individuals. The Commission must be notified of potentially more stringent measures of national consumer protection in order to exercise its duty of supervision of national respect of the rules of the Treaty regarding market implementation.

## **VI- Article 153 and Articles 2, 10, 94, 95 and 308, as Legal Availability**

The last sections demonstrated the potential availability that would be created if Article 153 were implemented with positive law, hard law, the positive edge of subsidiarity and a European approach and involvement in the implementation of the out-of-court project. Now it is necessary to verify to which extent Articles 2, 10, 94, 95 and 308 would increase the readiness of Article 153, as the EC legal-constitutional base, for EC consumer law and policy in general and access to justice for consumers in particular.

*Article 2* establishes, *inter alia*, the raising of the standard of living and quality of life, as a task of the European Community, which is usually related to the aims of any consumer policy, in a quite direct way, since the condition of being a consumer in a market society marks a great majority of the population. Policies directed to the protection of consumers certainly affect both living standard and quality of life. Article 2, before the introduction of Article 153 by Maastricht, was used as a legal basis for Community consumer policy. Thus, Article 2 and Article 153 are closely related in the sense that the former functions as the moral-constitutional background for the latter. Article 153 is, from the substantive point of view, the specialisation of Article 2 in the general framework of the social compromise of the EU.

*Article 10* sets out the founding principle of solidarity that governs the application of Community law. Moreover, it codifies a set of moral or ethical values that informs the life of the Community as a whole (Lang, 1990). In addition, it lends soul to the body of the European Community. It commits Member States to “take all appropriate measures (...) to ensure fulfilment of the obligations arising out of this Treaty (...). They shall facilitate the achievement of the Community’s tasks [and] abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.” This wording creates for Member States a special set of duties regarding co-operation with the Union and its institutions. “These include, *inter alia*, duties to give full effect to Community law and clarify national position, to comply with fundamental rights rules and general principles developed by the European Court as well as to

enforce Community law and implement Community objectives, and consequently has the effect to strengthening Community control” (Cass, 1992:1131). What Article 10 entails for all Member States in respect of Article 153 is their duty to ensure the achievement of Community consumer policy for the realisation of the highest level of consumer protection. In this sense, Article 10 is a promising lever for the expansion of EC consumer law and policy based on Article 153 (Micklitz&Weatherill, 1993:303). Furthermore, it entails that national institutions and legal frameworks are, truly, committed to the implementation of Community policies.

*Article 94* enabled the Community to develop its consumer policy as its legal base, although not without lengthy discussion about its lawfulness. In truth, Article 94 was used as the legal basis for harmonisation regarding consumer protection through Directives whose essential aim was to communitarise protective policies, with the understanding that nationally isolated policies could hamper market integration. It establishes that the Council, when acting unanimously, can issue Directives to harmonise or to approximate national provisions that directly affect the internal market in any respect.

The contention around Article 94 concerns its appropriateness solely for the establishment of the internal market. The main argument was that consumer policy and environment measures alike do not possess any link to the finality of the Article. The discussion ended with the realisation that in fact consumer and environment measures do influence the market. However, as the Article is exclusively dedicated to the establishment and functioning of the internal market, prior to Maastricht and Article 153, the development of Community consumer policy and law had to bear the limitations of the priorities of the establishment of the market, by having Article 94 as the only legal basis possible for consumer protection in Community law. Consumer policy and law under Article 94 did not have a life of its own. Article 153 offers a legal basis for changing this situation whilst Article 94 complements Article 153, thereby functioning as authorisation for harmonisation of national legal systems through proposals of Directives by the Commission to the Council. Article 153 gives substantive authorisation for the adoption of measures on consumer protection and Article 94 acts at two levels: firstly as a political mechanism that allows legislation for harmonisation, and secondly at an instrumental level determining the procedures to be observed. In this respect, Article 94 is an essential source of availability of EC legal framework for the work of Article 153 to the benefit of EC consumer law and policy.

*Article 95*, introduced by the Single European Act, is known as the great breakthrough for the development of the European Community by the adoption of the qualified majority vote in the Council under the so called “co-operation procedure” with the European Parliament and the Social and Economic Committee. The legal base for

Community consumer policy has changed somewhat since the Single European Act. Because Article 153 was introduced only at Maastricht, Article 95 “must be interpreted parallel to the paradigm shift in consumer policy from rights rhetoric to consumer choice” (Reich, 1995:290). Article 153 with Article 95 -especially under its paragraph 3- created a real possibility for the involution of the latter in favour of the former and consequently the establishment of an independent Community consumer policy of its own.

Whereas Article 94 is limited to the enactment of Directives for the approximation of laws of Member States, Article 95 refers to “measures”, and so widens the scope of its provisions and improves the potential availability of Article 153. Article 95, like Article 94, provides the necessary procedural tools for the enactment of measures concerning consumer protection. In terms of procedure, Article 95 allows for legislation to be enacted by a qualified majority, whilst Article 94 demands unanimity for the adoption of Council Directives. Article 94 adopts the procedure of Article 251, which establishes greater involvement by the European Parliament, while endowing the process with more democratic requirements.

As Weatherill points out, Article 95 cannot be confined to merely removing barriers to trade. It has the vital challenge “of breeding confidence among both consumers and traders in the viability of the integrated market” (1999:718). In this way, Article 95 is an essential buttress to Article 153 without taking away its coherence and autonomy. Thus “besides cooperation between enforcement agencies, access to justice seemed an ideal candidate for elaboration under Article 153” (Stuyck, 2000:380).

*Article 308* has been understood as a gap-filling provision (Toth, 1992:1082). Nonetheless, it can only be used when specific powers for determined action are absent, because the Treaty has not provided the necessary powers. This is not the case for Article 94, with which Article 308 is reputed to be twinned. “[W]hilst Article 100 [94now] may well overlap with a more specific power, Article 235 [308now] by definition can only be used where there is no specific power” (Usher, 1992:147).

Article 308 requires, like Article 94, the Council to act unanimously. However, by contrast with the latter, it allows for the adoption of any legally appropriate measure, rather than being limited to Directives.

Furthermore, Article 308 cannot be used to enlarge the scope of the Treaty and provides the Community with the power to act beyond its provisions, since it would then function as a Treaty amendment by unauthorised procedure (Usher, 1998:97-98). It is meant to be an exceptional measure, although practice has shown that “the exception may have become the rule” (Ibid., 82).

Regarding Community consumer policy or Article 153, it may be wondered whether the creation of subsidiary powers under Article 308 is possible. A first tentative

answer would be that “subsidiary powers would only be created under Article 235 [now 308] in respect of matters directly connected with the policy that lies at the very core of the Community” (Dashwood, 1996:123). Thus, most probably consumer policy will not be considered. Nonetheless, the centrality of consumer issues in general and specifically of access to justice for consumers is fundamental for the functioning of the internal market.<sup>130</sup> Furthermore, since the Treaty has obliged the Union to improve working conditions, to raise living standards, and to provide European consumers with a high level of protection. Article 308 can be used to supply the powers otherwise still absent for the undertaking of such tasks. So, Article 308 may well be the necessary legal basis for creating a new body under Community Law, without needing any Treaty amendment, and responsible for the implementation of justice out-of-court for consumers in cross-border disputes. It follows the examples of the creation of the European Drug Agency (Usher, 1998) and the European Environment Agency (Lenaerts, 1993:27), to name a few.

It has been said that Article 153 only states the need for a Community consumer policy and, in this sense, it “does not define an objective, but rather an area of competence” (Bernard, 1996:650). It may be posited that, especially concerning the creation of a new body, the substantive limits of Article 308 must be observed. One may also argue that, in this case, Article 308 would not extend the Community’s competence but instead just specify competence or duties already generally imposed on the Community by Articles 153 and 95. This general duty could also be expressed by the fundamental aim of developing both the internal market, through building consumer confidence, and the Union for its citizens, by considering their needs as consumers. Furthermore, this body would not alter the institutional structure of the Union. The central idea behind this section is the understanding that the legal basis for action is to a great extent essentially an institutional problem, mainly because the principle of subsidiarity has been politically understood through formulas like the British understanding of “minimum interference”. However, subsidiarity has an institutional side which stresses the “how” rather than the “who” approach in deciding about concurrent competencies.

The position of the institutional in relation to the legal is that the institution is law in practice or a practice formally and legally established. Be that as it may, the institutional is closer to law than to politics but has a special challenge of instrumentalising law, in other words, to bring law to life, by making it capable of

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<sup>130</sup> Close (1983:224-5) develops a quite systematic argument to demonstrate the link between the market and the role that consumers play in it. The argument recalls the argument about the moral compromise of the Community with consumers considered as an equally essential element of any market relationship. Reich says that “[c]ommunity consumer law, including its private law components, has now become a legitimate heir, not only an illegitimate offspring, of economic law” (1995:305):

overcoming difficulties and able to find solutions for problems that may arise. In this sense, to keep institutions alive, one needs some plasticity in the application of law, by forcing specific relationship between law and politics and law and morals. Access to justice, especially for consumers, recalls these themes and this thesis, especially in its first part, had the specific task of considering this view and discussing a different paradigm for justice for consumers, one that adopts a feminine moral framework.

Reich concludes that “the Community enjoys an almost unlimited jurisdiction [and power] in order to protect [*inter alia*] the economic interest of European consumers” (1992a:30)<sup>131</sup>. Weatherill states that the Maastricht Treaty was, legally, “a breakthrough for consumer policy” (1994:57), and corroborates this conclusion with the official position recently expressed by Commissioner Byrne who affirmed the “quasi-constitutional” nature of Article 153.<sup>132</sup> Such words unveil the lack of political and institutional will.

Further support for this claim is provided by an information sheet issued by the DG-XXIV upon the use of consumer complaint forms, prepared by the “services of the European Commission”, in order “to improve communication between consumers and professionals, with a view to helping them reach amicable solutions to problems which they may encounter in their various transactions”<sup>133</sup>: The Commission says: “if you decide to use the form, please do not send it to the European Commission. The Commission has no powers to intervene in the settlement of disputes between consumers and professionals and cannot be held responsible for the consequences of using the form” (Ibid., page 1).

The question which immediately arises is: what is the legal basis for the Commission action on very helpful services it provides for citizens to sort out problems they encounter in the exercise of their Community rights? The services involve direct action by the Commission such as entering into contact with governmental bodies to search for quick solutions in cases frequently connected with one of the four freedoms enshrined by the Treaty. What prevents the Commission from handling the complaint form to one of the bodies responsible for settling the dispute, and choosing the most appropriate in cross-border disputes? It is a lack of legal basis or of institutional flexibility and “moral will” to intervene?

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<sup>131</sup> Dehousse (1994a:108) links the growth of the negative side of subsidiarity to the indiscriminate use of Article 308, which has steadily increased “incursions into fields where the Community had not been granted an explicit competence”, thereby expanding the activities of the Community.

<sup>132</sup> See footnote no. 6.

<sup>133</sup> Information available on the Commission’s Internet site: <http://europa.eu.int/comm/dg24>.



## CHAPTER VI

### Looking at Evolution

This chapter aims to describe the patchy evolution of access to justice for consumers in cross-border disputes in EC consumer law and policy, in order to qualify the gap defined in the fourth chapter and fleshed out in the last one.

Since its earliest undertakings, EC consumer policy and law for access to justice has been mainly conceived around out-of-court solutions. Nonetheless, the European approach on the matter does not respond to the true nature of the problem and its centrality for the market to flourish. It will be emphasised that, throughout more than twenty-five years of discussion, the gap is still the product of a lack of political will rather than a lack of legal or institutional bases for further developments of effective solutions at the market level where problems are ultimately created. It will be demonstrated that access to justice for consumers in the European internal market has been promoted almost entirely through documents like programmes, action plans, resolutions and recommendations. This can be explained by the legal-constitutional vacuum present until Maastricht and by the lack of political will to establish more concrete measures placed at the market level. Furthermore, one may observe “a thematic insistence that the EC shall possess a consumer policy, but that its elaboration shall occur in the context of more constitutionally favoured activities, permeates the string of soft-law instruments that mark the EC’s continuing political commitment to the inclusion of consumer policy within its sphere of activities” (Weatherill, 1999:694).

The analysis of the evolution of access to justice for consumers in the EC context can reveal a remarkable continuity in the sense of avoiding as much as possible EU responsibility for the establishment of a framework to tackle the gap identified<sup>134</sup>.

This chapter will be developed in five sections which, while following a chronological criterion until 2001, will not obey the political and constitutional watersheds of the Treaty of Rome, SEA and subsequent treaties. This is so due to the conclusions so far reached in previous chapters, which show two quite general and common truths regarding EC consumer policy and law: firstly, its development despite the constitutional vacuum existing until Maastricht; secondly, the sufficient legal basis currently supplied by the European legal order for action on consumer protection and access to justice at the European level. One must consider, nevertheless, that law in

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<sup>134</sup> “The evolution of the integration theory in the last 40 years in part mirrors that of the European Union. Neo-functional theories in the late 1950s and early 1960s predicted the gradual transfer of functional responsibilities from the nation state to supranational bodies (...)” (Monar et al.: 1996: 145). EC consumer policy, nonetheless, reflects more “the resilience of the nation state, (...) the continued defence of national interests, (...) the Gaullist vision of a *Europe des patries* and 1970s Euro-sclerosis.” (Ibidem)

consumer affairs seems to influence very little the way things are resolved at both micro and macro levels. This is the already mentioned “symbolic legislation”. The following sections will describe relevant legal instruments enacted within the period of the four Three-Year Action Plans, which will be the watersheds for each section.

### **I- Until the First Three-Year Action Plan for Consumer Policy in the EC**

The Maastricht Treaty is traditionally quoted as the most important watershed in the evolution of EC consumer policy and law since it introduced in the constitutional armoury of the Union one title dedicated to the protection of consumers in the internal market. Maastricht did not inaugurate the theme in the European context and it must be seen as a conquest or an imposition (Sola&Jeuniaux, 1992).

Until Maastricht, consumer protection is the product of a “politique d’accompagnement” of the implementation and completion of the internal market and reveals, nevertheless, a major emphasis on consumer education and information. By contrast, one can perceive that dispositions regarding the protection of consumer economic interests were rather rare. Access to justice policies aim to protect consumer economic interests, and they were outside the scope of the declarations made at the Paris Summit in 1972 concerning the necessity to lend a human dimension to the European Community (Ibid., 68). This is probably a common phenomenon of affluent societies where economic interests seem to be hypocritically denied. A consumer charter will not mobilise as much effort as the discussion on a Convention on human rights for the European Union. Therefore, this first stage of EC consumer policy will be marked by very soft references to the theme of access to justice.

The earliest embryonic stage can be perceived in the *First Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy*.<sup>135</sup>

Article 2 of the Treaty was the legal basis of this Programme, which was founded on the conclusions of the Paris Summit/1972 and adopted the five basic rights of consumers, among which was enshrined the right of redress, the closest one to access to justice.

The right of redress is generally taken to mean one of the “objectives of community policy towards consumers”. “Advice” and “help” were then added. The resolution states that “to secure adequate facilities for advice, help and redress is one of the aims of the policy proposed therein. The resolution establishes the entitlement of consumers to “advice and help (...) [and] proper redress for (...) injury or damage

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<sup>135</sup> OJ C 92/1, 1975.

[resulting from purchase or use of defective goods or unsatisfactory services] by means of swift, effective and inexpensive procedures” (page 8).

The Commission should “submit (...) appropriate proposals for improving the existing systems” to put “them to better use”. Among the actions proposed for the Commission is the study of “systems of redress, arbitration and the amicable settlement of disputes existing in the Member States” (page 8).

So the possibility of justice out-of-court for consumers was stated as early as the first preliminary programme on consumer protection in EC consumer policy. Nonetheless, the action to be taken at European level did not indicate European responsibility for the implementation of such a purpose. The action has been mostly concerned with studies, analysis of the situation and proposals to put the system already in force to better use. The gap has its origins in this starting point, in which the political will to create a body or a European agency responsible for co-ordinating and implementing a practice of dispute resolution able to produce confident consumers at the outset of the formation of EC consumer policy was absent. At that point, it was difficult to embody “new problems and values scarcely mentioned by the Treaties.”<sup>136</sup>

The first programme intended to widen the understanding of what a consumer is, thereby refusing to qualify him as merely a “purchaser or user of goods and services (...) but also as a person concerned with the various facets of society which affect him either directly or indirectly as a consumer” (page 2). On the one hand, this vague statement endows the consumer with a position in social and economic life with importance beyond the simple action of buying goods and contracting services. On the other hand, the importance of certain aspects of social life (buying and contracting) are elevated to a very high level in a market that aims at becoming one before a wide range of diversity.

The next document where access to justice is mentioned as a priority of EC consumer policy is the *Second Programme of the European Economic Community for a Consumer Protection and Information Policy*.<sup>137</sup> This document reaffirms the five basic rights conferred to consumers by the First Programme, including the right of redress. Once again one can notice that “access to justice” is not in the language of the Programme. Nevertheless, among the aims planned in its implementation is the “improvement of the consumer’s legal position (help, advice, the right to seek legal remedy)” (page 3). The Second Programme repeats the principles that support the action towards the improvement of consumer’s legal position, and it informed a symposium held after the First Programme, where the various actions proposed therein were discussed.

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<sup>136</sup> Bulletin of the European Communities, Supplement 1/76. Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council, page 1.

<sup>137</sup> OJ C 133/1, 1981.

From that discussion, a number of proposals were submitted and the Second Programme mentions them: “1-the need to improve consumer information and education; 2- the need to set up conciliation bodies either to take preventive action to put an end to certain reprehensible practices by amicable arrangement, or settle by mutual agreement disputes between consumers and tradesmen or suppliers of services; 3- the setting of arbitration bodies; 4- the simplification of legal procedures for settling disputes over small sums of money; 5-assigning responsibility for consumer protection to consumer groups, public authorities or institutions like the ombudsman.” (page 10)

The Programme assigns the Commission to the task of studying the measures proposed by the symposium and encouraging national and local schemes. No concrete action in the ambit of the Community where asserted.

The Programme does mention the priority of seeking “out-of-court justice” for consumers, through the involvement of public authorities or institutions like the ombudsman. However, practical consequences did not follow the rhetoric and it became a dead letter in terms of market realities, and left untouched its inability to nourish consumer confidence.

In 1984, the Commission enacted the *Green Paper on Consumer Redress*.<sup>138</sup> The language of this document aims at embracing alternative solutions to the problem of handling disputes involving unhappy consumers. With regard to the Community dimension of the problem in its political and legal diversity, the Green Paper states that “[d]uring recent years there has been widespread concern about the inadequacy of traditional legal systems to deal with minor claims” (page v). This wording supports remarkably this thesis, since it mentions the nature of disputes involving consumers and recognises the necessity of a very special sort of justice, one which is able to respond sympathetically to both consumer disputes of low economic significance and needs, satisfaction and happiness that characterize every consumer dispute. From the market perspective, one has to acknowledge the relational aspect of consumer contracts without which business cannot survive and prosper. Traders who do not care for their clients are ultimately doomed to bankruptcy. The market cannot concretise its full potential if it forgets any of these special characteristics while pursuing justice for consumers.

The Green Paper mentions the discussion on consumer access to justice as access to courts that took place at the Ghent Colloquium in 1982. The necessity of a Directive on consumer injunctions is firmly asserted, and it was enacted in 1998. In this context of very low responsiveness, the Green Paper calls attention to the possibility for action and refuses the introduction of a “Community wide small claims procedure”, thereby arguing that, despite the international nature of the principles of access to justice, they are seeds to be planted in national soils, “the way in which they [the

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<sup>138</sup> COM (84) 692 final, 12/12/84.

principles or seeds] develop (...) is strongly influenced by the local soil and climate” (page xv). Consumer redress is not tackled as a Community problem, which prevented the development of effective solutions at the market level. National systems were not brought together under a unique and European co-ordination until the Recommendation on settlement of disputes by out-of-court bodies of 30/3/98.<sup>139</sup>

*The third programme*<sup>140</sup> was enacted on the basis of a *Communication from the Commission to the Council*, from 1985.<sup>141</sup> The Communication recognises the failure of the Community in effectively achieving consumer protection because it sees this as the “business of individual governments” (page 4). Nonetheless, the document states that “the promotion of consumer protection must (...) be seen as an integral part of Community policy for citizens’ welfare” (page 8). This is justified by the general aim of the Community, enshrined in the Treaty, to constantly improve citizens’ living standards, while developing the “People’s Europe” for the Peoples of Europe. Moreover, consumer policy has a role to play in the establishment and operation of the “Common Market”, says the document (page 9).

The Communication, for the first time since the First Programme, uses the term “access to justice”, apart from the programme for advice and help. Redress now is directly connected with access to justice and it is clearly stated that “traditional legal procedures are slow and often very expensive in relation to the amounts at issue in consumer cases” (page 20). Nonetheless, the action proposed is still in the field of co-operation with national pilot projects on “simplified access to justice” (page 20). Access to justice is mentioned in a very inspiring and rhetorical way. Firstly, the theme is identified with redress and advice and its implementation affirmed to be attempted through “a fuller and more coherent policy which is commensurate with consumers’ needs” (page 20). Unfortunately, this is, indeed, a road to nowhere due to the lack of both understanding of the peculiarities of access to justice for consumers and of the political will to pursue such understanding and its concretisation.

The *European Parliament* issued a Resolution<sup>142</sup> on consumer redress regarding the Green Paper on the same theme. The remarkable point in this document is the reference to a “motion for a Resolution (...) on the need for a European Legal Clearing House System for small claims and exchanges of information”. The Commission in another Supplementary Communication on Consumer Redress welcomed this point<sup>143</sup>. The Commission embraces “a new and enlarged Community dimension to the problem of consumer redress (...). Consequently, the Commission is about to engage a

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<sup>139</sup> OJ L 115/31, 17/4/98.

<sup>140</sup> OJ C 167/1, 1986.

<sup>141</sup> COM (85) 3114 final.

<sup>142</sup> OJ C 99/203, 1987.

<sup>143</sup> COM (87) 210 final, 7.5.87.

feasibility study on the establishment of such an agency as wished for by Parliament. Even if the idea of setting up a genuine ‘Community agency’ would seem, for the time being, rather ambitious, it should be possible, (...) to establish a flexible network of cooperation on a permanent basis of existing organisations (...).” The idea of a Community body changed into a system for the exchange of information to promote access to legal systems between Member States involved in minor cross-border disputes, in the Council Resolution of 9/11/89<sup>144</sup>. This was the definitive death of the proposal for a European agency responsible on promoting access to justice for consumers.

Firstly, the Council *Resolution on Consumer Redress*<sup>145</sup> considered consumer redress as “an integral part of the European Community’s programmes to help consumers” (page 2). Secondly, the Resolution clearly mentions the growing importance in the Community of “activities across frontiers” as sources of complaints from consumers, which requires special attention from EC consumer policy. By the same token, the Council invited the Commission to supplement its efforts for the enlargement of the Community by implementing the policy regarding consumer redress, whilst examining whether a European initiative would be recommendable in this area.

*The Council Resolution on Future Priorities for Relaunching Consumer Protection Policy*<sup>146</sup> encourages of Member States to promote access to legal redress for consumers. The Council establishes three actions to be performed at the Community level, by the Commission: the completion of the studies to identify consumer organisations and public bodies responsible for acting in consumer redress at the national level; encouraging Member States to establish judicial and extra-judicial means for minor disputes involving consumers which are swift, inexpensive and effective; and the study “together with Member States, [on] the feasibility of a system for the exchange of information to promote access to the legal system of another Member State in minor disputes involving more than one country” (page 3).

The constitutional background -changed by the Single European Act- came into force on 1st of July 1987. The SEA was conceived with the important aim of preventing the internal market from the stagnation of the previous decade. Article 100a introduced a qualified majority vote for the harmonisation of dispositions regarding the completion of the internal market. Paragraph 3 of Article 100a established the market’s obligation of to promote a high level of protection concerning health, security, environment and consumer. At this point, one may affirm the lifting of consumer matters to the level of internal market’s responsibilities, despite the absence of action in accordance with this understanding. In this context, the First Three-Year Action Plan came about.

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<sup>144</sup> OJ C 294/01, 1989.

<sup>145</sup> OJ C 176/02, 1987.

<sup>146</sup> OJ C 294/1, 1989.

## II – Under the Aegis of the First Three-Year Action Plan

Consumer policy at this point has clearly abandoned access to justice as a priority and embraced another avenue of development, which consisted of regulating the market to prevent unfair trading and subsequent complaints. This attitude was profoundly determined by the subsidiarity principle, which was lauded in the introduction of the *First Three-Year Action Plan of Consumer Policy in the EC (1990-1992)*.<sup>147</sup>

“With the imminence of 1992 there is pressure for accelerated activity on consumer issues. In preparing this action plan therefore, the Commission has *restricted its proposals to those areas where its involvement is essential to the success of the Internal Market*. (...) Practical consumer policy must be *effectively managed in the Member States* on an ongoing basis with the management and control of safety, information and *redress being adapted in each instance to local needs*. It would be *unrealistic to undertake such tasks continuously at a Community level*” (page 3) (My emphasis).

Consequently, the space lent to “access to justice and redress” was minimum, not more than a paragraph on page 15 and two lines on page 19. The document recognised, in very general terms, the inadequacy of national schemes of access to justice and redress for consumers, due to their cost, complexity and time-consuming character. In addition, it asserted the negative influence this has over the market, “inhibiting consumer purchasing” (page 15). Furthermore, the paragraph dedicated to the theme reproduced the new tendency in consumer protection by emphasising the regulatory armoury of the Community to prevent complaints.

On page 19, the Plan mentions the “consideration of means of improving consumer access to justice and redress”, but fails to offer a more concrete set of measures, in accordance with the current understanding of the subsidiarity principle. The opinion of the *Economic and Social Committee on Consumer Protection and Completion of the Internal Market*<sup>148</sup> upon access to justice stresses the diversity of judicial-legal systems for hearing a consumer dispute, while urging unification at the Community level. “More fundamentally, the problems of access to the courts which the creation of a European area will pose are far from having been resolved. If there is a dispute, the single market will be replaced by twelve -or even more- legal systems, all jealous of their independence and sovereignty. European political leaders will have to address the problem of the settlement of cross-frontier disputes if they are not to produce an imperfect, inconsistent economic system” (item 5.4.2). The grounds for that

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<sup>147</sup> COM (90), 98 final.

<sup>148</sup> OJ C 339/8, 1991.

opinion lie in item 2.1.3, which is in harmony with this thesis. It says that “it is unrealistic to want to construct an internal market and, beyond that, a European Social Area without a specific policy to take account of the legitimate expectations of one of the partners necessary to its success: the consumer.”

In item 5.4.3, the Opinion “regrets the failure to turn to good account the pilot schemes launched by the Commission with a view to fostering the introduction of simplified settlement and arbitration procedures for consumer disputes.”

The *Council Resolution on Future Priorities for the Development of Consumer Protection Policy*<sup>149</sup> praises the subsidiarity principle and therefore simply encourages Member States to facilitate legal redress by simplifying the procedures for settlement of consumer complaints and offering legal aid for consumers in courts. The Resolution confines the implementation of access to justice for cross-border disputes to the development of transfrontier information centres, while limiting Community responsibilities on the matter thereto.

A group chaired by Peter Sutherland produced *the Sutherland Report* for The European Commission. It was concluded on 26<sup>th</sup> October 1992 and its central aim was to analyse “the problems that the Community will face in managing an area without frontiers” (page 2). The Commission issued a Communication<sup>150</sup> to the Council and the European Parliament entitled *The Operation of the Community’s Internal Market*, and this was based on the 38 recommendations set out in the report. Among those recommendations is one that mentions the necessity to overcome “doubts about the effective protection of consumers’ rights”, through “rapid consideration by the Community” (Recommendation 22, page 10). Recommendation 23 points out the limitation of the Brussels Convention with regard to the plurality and diversity of legal orders especially in the case of execution, in one jurisdiction, of judgements enacted in another (page 11). The response of the Commission regarding access to justice was very limited and shaped by the constraints of the subsidiarity principle. About the removal of uncertainties regarding consumer rights, there was no more than a wide compromise to “proceed to the analyses which such recommendation requires” (page 11). On judicial co-operation, the Commission asserted the utility of the Brussels Convention to consumers especially concerning the execution of civil orders in cross-border disputes. But it also agreed to undertake analysis with Member States to see “to what extent it would be possible to improve its operation further” (page 12). However, EC consumer protection, especially regarding access to justice, has the challenge of overcoming not only the “insuffisances des mécanismes du droit international privé pour régler les conflits de lois et des juridictions dans un marché qui ne connaît pas de frontières”

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<sup>149</sup> OJ C 186/1, 1992.

<sup>150</sup> SEC (92) 2277 final, 2/12/92.



(Kohler, 1999:11) but also the problems of a morality of rights in courts of justice, in the task of dispensing justice as required by consumer disputes, marked by their needs and aspiration to satisfaction and happiness.

Therefore, the position of the Commission concerning the Sutherland Report's recommendations left unfulfilled the goal of the First Three-Year Action Plan regarding the improvement of access to justice for consumers in the internal market.

### **III– Under the Aegis of the Second Three-Year Action Plan**

The *Second Commission Three-Year Action Plan*<sup>151</sup> was formulated under the spirit of Maastricht, which presented the Community with a new title in the Treaty and raised “consumer protection to the rank of a genuine Community policy” (page 6). The Plan acknowledges that “in numerous specific domains, such as access to justice, notably in the case of ‘minor disputes’ involving consumers, (...) Europe of the consumer has not yet been realised” (page 5).

The Plan admits that a number of measures need to be implemented in order to comply with the new constitutional order established by Maastricht. The Plan seems to express only the positive gains brought by Maastricht to EC consumer policy and law, without reflecting that the subsidiarity principle plays the role as “the word that would save Maastricht” and prevents the implementation of consumer protection as a Community responsibility.

The Second Action Plan acknowledged that the Commission “has encouraged the creation of pilot projects (...), at national level, of simplified procedures for settling consumer disputes” (page 11).

However, access to justice was clearly stated as a selective priority for raising the level of consumer protection, while highlighting two priorities: “consumer information and improved concertation” (page 15). Informed consumers would then be in the spotlight. Besides, the Plan added more areas of consumer protection in position of receiving attention: “access to justice and financial services”. This was clearly a very inspiring combination, especially in times of a single currency and diminished consumer confidence. The Plan mentioned the Sutherland Report and its recommendation regarding action toward the dissipation of consumer uncertainty (page 16) and affirmed “the importance of access to justice for the operation of an internal market that is responsive to consumers’ and producers’ needs” (page 22). The Plan mentions the Report recommendation regarding an examination of the conditions for the establishment of access to justice in the Community, through out-of-court conciliation procedures, without engaging Community power.

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<sup>151</sup> COM (93) 378 final.

The Second Plan, unfortunately, disrespected the spirit of the Report, while offering no concrete action for the adoption of the Report's conclusions, despite referring in the Annex to the subsidiarity principle in its positive configuration. However, regarding access to justice, it timidly affirmed that the Commission would explore the avenues of out-of-court system for handling consumers' disputes, and announced a Green Paper on consumer access to justice for 1993.

The Commission enacted another *Communication on reinforcing the effectiveness of the internal market*<sup>152</sup>. Access to justice was one of the items discussed, but without considering it as a consumer problem. Consumers were considered differently from earlier EC consumer policy after the 1972 Paris Summit and reaffirmed by the Sutherland Report: they were very central figures in an internal market that seeks completion. The theme was treated as a problem of individuals in general and their difficulties regarding the Community legal order. The emphasis was strongly on the role of national courts, of the Rome and Brussels Conventions and legal professionals, especially officers applying Community law in national context. The Communication established the necessity of promoting training courses for judges and other law officers.

The announced *Green Paper on Access to Justice*<sup>153</sup> came to life in due course and aimed, firstly, "to start a discussion which, without prejudicing competences (national, intergovernmental, Community), could give all interested parties food for thought" (page 6).

The Green Paper is a long detailed document formulated in five parts. The first part offers an approach to the problem, summarises the evolution of the theme in EC consumer policy, highlights the dimension of the problem with the completion of the "Single Market", and offers to a great extent the conclusions and strategy of the Sutherland Report. The second part of the document is dedicated to the situation in each 12 Member States. The third part explores the Community dimension of the problem while the fourth part suggests themes for discussion. Finally, the fifth part is dedicated to conclusions in six areas but without any concrete measure to offer access to justice for consumers in any kind of dispute within Community legal and institutional orders.

The introductory paragraph of the Green Paper is the formulation, in very basic and general terms, of the positivist criteria of justice in accordance to law. It is said that to "render justice" is a necessity created by the breach of one of the norms which recognises or creates rights and duties. In the first footnote, it is added that this leads to the difference between "legal" and "moral" norms which "lies precisely in the coercive force of the former: the penalty for infringement is just an (coercive) application of the

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<sup>152</sup> COM (93) 256 final.

<sup>153</sup> COM (93) 576 final.

general norm to the concrete case” (page 5). The Paper is at odds with the understanding that any special sort of justice would necessarily be founded upon a different approach to the separation of law from morals.

The rhetoric of the Paper moves toward the identification of access to justice with the application of principles especially the principle of equality (page 5). This thesis has argued for the necessity that any legal order, especially regarding consumer matters, considers needs, satisfaction and happiness from the perspective of the ethics of care, against the Green Paper’s argument on the principle of equality but in accordance with the Paper when it affirms: “making access to justice work poses very particular and unprecedented problems.” Access to justice as consumer protection is wisely understood as the way to fill in “the gap between law and reality” (page 5).

The Paper asserts the national responsibility to offer effective access to justice also through the application of Community law while recognising that the Community level is put in jeopardy when national orders fail. Moreover, one does note a Community failure and the development of the theme increasingly indicates the necessity of a truly European involvement, as asserted by the Sutherland Report.

The second part of the Paper describes five different possibilities for access to justice for consumers: simplified court procedures, out-of-court procedures, administrative authorities, representative actions and pilot projects. It considers the particular situation of each of them in the 12 Member States without the purpose of discovering a unifying factor in this great range of diversity -the only reason that could possibly justify this kind of work. Consequently, the articulation of the various national systems under a unique European agency is not attempted; neither does it propose a unified system for handling cross-border disputes proposed that could be adopted throughout the Union and adapted to local particularities, in order to equalise the many disparities among different systems.

The most common characteristic among the various national systems is that the body responsible is private, unlike what is stated in the European Parliament Resolution of 1987.<sup>154</sup> Furthermore, the Paper wonders how, whether, and to what extent “the guarantees of independence (or at least impartiality), which in rule-of-law states are invested in the judiciary, can be assured by the new ‘judges’ who are increasingly being called on to settle disputes outside the framework of the courts proper” (page 58). Access to justice informed by the ethics of care equalises differently the problem of legitimacy of the system, raised by the Paper, since it aims at responding to the needs of the parties to a dispute in their own terms with care while promoting responsibility for the Other in a relationship, which is ultimately its criteria of legitimacy.

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<sup>154</sup>OJ C 99/203, 1987.

The Paper disqualifies small claims tribunals or procedures as a promising avenue to resolve the problem, since this will demand that one of the parties agrees to engage in a dispute far from home. The conclusion is clear and states that “[t]he complexity of the treatment of intra-Community disputes is partly due to the (legal and judicial) frontiers which still exist” (page 63). Although this seems to propose that harmonisation would be the solution, the argument progresses in the opposite direction, namely towards ensuring national responsibility for consumer justice. The remedies of the Community law lie at the level of substantive rights and conventions to resolve conflicts of law and jurisdiction, whilst leaving to Member States the responsibility of easy access to justice.

The fourth part proposes themes for discussion and acknowledges that the Community is in a good position to offer substantive remedies so that the gap would be at the procedural level. To this end, EC consumer law requires “a Community regulator” (page 77). Three solutions are listed: “either there is a Community ‘regulator’, who applies a Community procedure, (...) [after] [t]he Sutherland Report considered a similar solution by proposing the establishment of an ‘ombudsman responsible for examining problems raised by consumers’;- or a Community procedure is made available to the national regulators (harmonisation of actions for an injunction); -or one simply allows the existing national procedures (without harmonising them) to exercise the effects for which they were designed (mutual recognition of the ‘*locus standi*’)” (pages 78/79). This solution seems to sit between the second and the third possibility, due to the subsidiarity principle. Indeed, the first position was refused in few words and the analysis of the second and the third ones proceeded exactly against the moral demand for a European system to respond to consumer needs in cases of cross-border disputes. The idea of training legal professionals in Member States is again defended and there is reference to the creation of “a European judicial space” (page 82).

The Paper considers self-regulation and codes of conduct as having a very important role to play in providing justice in consumer disputes, while acknowledging, however, that “consumers still place little trust in ‘self-regulatory’ bodies and schemes” (pages 82-83).

Six points were offered as conclusions that should be implemented by “taking into account the principle of subsidiarity” (page 86). These were quite generic and included studies, allocation of recourses for legal aid, follow-up mechanisms in transfrontier complaints, closer contacts between different consumer arbitration bodies, the consolidation of existing transfrontier co-operation, private ombudsman schemes and codes of conduct.

Despite the abstract character of the Green Paper, especially regarding its conclusions, it was very well received. In the summary of the results of the

consultations on the Green Paper, one reads interesting positions for the involvement of the Community on the equalisation of the problem regarding access to justice for consumers, especially when it has a transfrontier dimension.

The *European Parliament* enacted a Resolution on the Green Paper<sup>155</sup> and called on the Commission to take into consideration the possibility of the three following measures: -harmonisation “to a certain extent [of] the rules governing legal proceedings in the Member States, in order to establish a Community procedure for claims up to a certain amount, for the rapid settlement of individual transfrontier consumer disputes in the internal market (...)” (item 9); –“establishment of a European Union arbitration board to settle transfrontier legal disputes” (item 16); –“establishment of a network of regional bodies, including transfrontier bodies, which should be as accessible as possible to the public and which should comprise independent, competent and responsible professional lawyers (...)” (item 18).

*The Economic and Social Committee* offered its opinion<sup>156</sup> in a section called “the principles and their limitations”, thereby suggesting a criticism similar to that which this thesis puts forth. Unfortunately, the argument loses force and the conclusion does not do justice to its title, as with other occasions when the conclusion of an argument seems to deny its own grounds (page 9). Secondly, the Opinion regretted “that the Commission ha[d] not (...) used [that] opportunity to submit concrete proposals for action within the scope of its specific powers, particularly for exploring the potential offered by Article 129a [now 153] of the Treaty of Rome” (page 3). Thirdly, the Opinion affirmed the inability of PIL “to achieve the effective, swift settlement of international consumer disputes”, while arguing for a progressive harmonisation and the up-grading of the Conventions to the level of Community law independent of national procedure to integrate it into its legal order, which came to reality recently through the adoption of the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>157</sup> (page 13).

The Commission assessed of the achievement of the targets set by the second action plan and the result was positive<sup>158</sup>. The emphasis was on the substantive harmonisation of consumer rights. Nonetheless, progress in securing access to justice is limited to the discussion in the Paper. No concrete action was taken except the proposal made on January 1996 on injunctions for the protection of consumer interests<sup>159</sup> and, the enactment of an action plan.<sup>160</sup>

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<sup>155</sup> OJ C 128/459, 1994.

<sup>156</sup> OJ C 295/1, 1994.

<sup>157</sup> OJ L 12/1, 2001.

<sup>158</sup> Background Report ISEC/B12/96, October 1996.

<sup>159</sup> COM (95) 712 final. Directive 98/27/EC, 19/4/98.

<sup>160</sup> COM (93) 13.

The conclusions, presented in 1994, of the study requested by the Commission in 1990 to a group of experts chaired by Professor Marcel Storme, on “the approximation of the laws of procedure in the twelve Member States”, integrate the Second Action Plan. The most important conclusion is that “[t]he idea of a single ‘internal market’ requires for its complete realisation a single system for the judicial resolution of disputes” (in Himsworth, 1997:303). Indeed, this thesis defends the harmonisation of access to justice for consumers under a single European agency which could co-ordinate the activity of its national branches while respecting national peculiarities.

Professor Storme diagnosed what he called the “negative attitude” to procedural law in EC law (Ibidem). This thesis reads things from a different perspective. The problem appears to consist of an excessive and misconceived appraisal of principles and rules, to the detriment of needs, satisfaction, happiness and care in relational contracts in the configuration of a more suitable access to justice that realises those targets. This thesis places the problem within the framework of the morality of rights that understands principles and rules as ways to secure justice and to legitimate its dispensation as expressions of the rule of law. This thesis has argued that such a view needs to be reconsidered vis-à-vis the values of the ethics of care and the conception of consumer contracts as relational entities on whose continuity depends the implementation of the market. The problem with Storme’s position is his view of justice as legal proceedings in courts of law. He claims that citizens confidence cannot be canvassed without an equal, analogous and/or equivalent system of EC procedural law or judicial procedures (in Ibid, 304). This thesis agrees with the call for harmonisation, but disagrees about the judicial or procedural nature of the enterprise regarding consumer disputes.

#### **IV – Under the Aegis of the Third Three-Year Action Plan**

The third three-year action plan was named *Priorities for Consumer Policy*<sup>161</sup>, and was to be implemented between 1996-1998. The Plan just enumerated priorities vis-à-vis both the wide range of concerns in EC consumer policy and law which Maastricht brought about and limited resources available. The Commission Work Programmes should decide which action might be undertaken due to the novelty of some problems which demanded a change in priorities.

These priorities were classified in three areas of the internal market thought to influence consumer rights: -public services, financial services and food safety in respect to which the policy to be adopted would be about improving consumer information to

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<sup>161</sup> COM (95), 519 final.

enhance consumers ability to “self protection”; -Information Society; -and the achievement of the European Monetary Union. The ten priorities for action selected with respect to these three areas did not mention access to justice.

Despite this omission, the theme was considered in the terms established by the Green Paper of 1993 and the Sutherland Report of 1994. Thus, in January 1996, the Commission sent to the Council and the European Parliament a proposal on injunctions for the protection of consumer interests.<sup>162</sup> The intention was to facilitate access to justice for consumers in the internal market through legal proceedings and courts of law. However, the question of consumer associations standing for judicial claims refers more to collective and diffuse interests than individual ones since the framework of justice as care is more suitable for the settlement of individual disputes, without excluding collective ones. The judicial proceedings fall outside the frames of the redefined justice in accordance to the ethics of care and the parameters of relational contract theory. The point is to know to what extent a consumer organisation can compromise and decide about the needs of individuals. The ethics of care and the relational contract parameters demand personal involvement in handling a dispute. This fact implies problems for legitimation involving representation by impersonal agents even before administrative authorities (page 8).

Another interesting provision is about “a pre-litigation procedure” which requires notification of the defendant to spontaneously terminate the infringement in order to avoid judicial proceedings.

In February 1996, the Commission launched an *Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market*<sup>163</sup> as a follow-up to the Green Paper on access to justice for consumers. The foreword of the Action Plan clearly states that “in view of the cross-border dimension of the problem, certain objectives can only be realised at Community level” (page 3). The paper also affirms respect for the subsidiarity principle; thereby limiting action to what is strictly necessary for the achievement of “the objectives set out in Article 129a of the Treaty” (page 3). In addition, it says that “they are not of an exhaustive nature” and demands, consequently, a concerted action between Community and national orders (page 3).

The constitutional background of the third Consumer Action Plan was the Amsterdam Treaty. Nevertheless, one can observe a great asymmetry between the emphasis on consumer protection in order to approximate the Union to the citizen and the low-profile rhetoric of the Plan, which is notable by its negative approach to subsidiarity.

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<sup>162</sup> Directive 98/27, 19/4/98.

<sup>163</sup> COM (96) 13 final.

The Action Plan is structured in three parts. The first part states the problem about consumer disputes in general, out-of-court procedures in Member States, and national initiatives concerning access to court procedures.

In the second part, the problem is looked at from the Community perspective, while analysing the costs of judicial frontiers and the results of the consultation on the Green Paper on access to justice for consumers.

The third part analyses the initiatives proposed, whilst considering the promotion of out-of-court procedures and simplified access to court procedures. There are then three annexes. The first one concerns the timetable regarding measures to be taken by the end of May 2000 for the promotion of out-of-court schemes and until September 2000 for access to court procedures.

Annex II outlines six criteria of the out-of-court procedures applicable to consumer disputes as the following: impartiality, effectiveness, transparency, language of the country of residence of parties, supremacy of the law of the country over any code of conduct in conformity with the Rome Convention, and prohibition of terms not individually negotiated to prevent consumers from bringing an action before the competent court to hear and decide the dispute.

The last annex contains two forms for claiming and its reply. The use of these forms was surveyed by the Commission between May and June 1999 in Austria, Spain, Finland, France, Italy, Luxembourg, The Netherlands, Portugal and Sweden. It demonstrated that the form was rarely used for cross-border disputes (around 0,5%)<sup>164</sup>, which supports two conclusions: either no dispute was requiring it, which shows that the market was not working to its full potential; or that EC consumers are lumping their complaints as a sign of a denial of justice. This corroborates the necessity to assure consumers that a suitable system awaits them in cases of transfrontier disputes.

In general, the action plan on consumer justice repeats the general assumptions described in the Green Paper. Basically, access to justice is understood as access to law despite the reference to differences between them without showing practical consequence. The specificity of consumer claims is asserted as their low economic significance and by the fact that consumers tend to be remarkably weaker than traders or professionals. The Action Plan acknowledges the gap in access to justice for consumers in the EU as a legal gap (not as a justice deficit) and so it urges the establishment of appropriate procedures (page 8). The interdependence between justice for consumers and the smooth functioning of the internal market is recognised. This interdependence supports “the necessity for as well as the urgency of a Community initiative” (page 11). It mentions a document called “Memorandum for an Active Consumer Policy”, dated

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<sup>164</sup> Result offered by the partial conclusion reached by the call for tender no. XXIV/98/C2/002, gently sent to the author by the Commission-DG24.



22 December 1994 from the French government to the Council, “in which it emphasised that the problems of access to justice have not been resolved and jeopardise the creation of a genuine European area” (page 12).

The Action Plan enumerates the three most important objectives of the Community initiative regarding the consultation process carried out after the Green Paper. Among them, is “the promotion of an environment favourable to the out-of-court settlement of consumer disputes”, which came from the Resolution of the European Parliament<sup>165</sup>. Another objective was drawn from the same source but was slightly and prejudicially changed. It regards the creation of a Community network of regional bodies (Parliament’s suggestion) or mechanism (the language of the Action Plan) for assisting or promoting (Parliament) or for monitoring and co-ordinating cross-border proceedings (Action Plan). A footnote clearly states that the European Parliament Resolution is “a lot more far-reaching than the perspectives described in this Communication” (page 12).

The *European Parliament* enacted a Resolution<sup>166</sup> on the Commission action plan on consumer access to justice. Two points are worthy of consideration. First, there is the suggestion that national bodies should be set up and operate under official supervision (item 10). Second, the European Parliament recognizes the restricted utility of PIL for handling transfrontier consumer disputes, especially the Rome and Brussels Conventions (page 11), which supports the discussion in chapter four.

On 30.03.1998, the Commission adopted another *Communication on the out-of-court settlement of consumer disputes and on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes*.<sup>167</sup> This Communication followed the Green Paper adopted in 1993 and the Action Plan on consumer access to justice of 1996.

The Communication establishes that “for the purpose of this communication ‘consumer access to justice’ means the opportunity to exercise one’s rights in practice, not access to justice in the stricter sense, i.e. to the courts” (page 1). The inspiring point in the Communication is precisely on the opposition between “justice in practice” and “justice in courts”. This thesis opposes justice and law and aims at reconciling “justice in practice” (using the Communication language) with law, because the former encounters insurmountable difficulties to realise itself through justice in courts where legal proceedings take place.

The Communication mentions that Member States are primarily responsible for consumer protection and reveals once more the difficulty in accepting this as a basic

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<sup>165</sup>OJ C 128/459, 1994.

<sup>166</sup> OJ C 362/275, 1996.

<sup>167</sup> COM (1998) 198 final. The pages of the quotations refer to the version found in the Europa site at the following address: [http://www.europa.eu.int/comm/consumers/p.../acce\\_just01\\_en.htm](http://www.europa.eu.int/comm/consumers/p.../acce_just01_en.htm).

market responsibility, the achievement of which requires unlimited national co-operation.

The Communication repeats the arguments used in previous official documents, recognises that the judicial protection of rights for consumers in the EC is a very troublesome avenue and offers three “fully complementary approaches” to tackle the gap in this area: “simplification and improvement of legal procedures, improvement of communication between professionals and consumers, and out-of-court procedures” (page 6). The intention of improving a “conciliation culture” in the internal market is underscored also because it is of interest for professionals who might avoid court proceedings and work to keep and please their clients even in the event of problems. It is the relational character of the market that is recognised. In this sense, law as an institution that regulates discrete transactions is challenged to adapt itself in order to serve the aspiration of relational contracts.

The Communication sees no responsibility for overcoming linguistic and other cultural barriers which are common in the internal market. Language diversity is of immense importance for consumers who try to overcome their problems without help in cases of cross-border disputes. So is cultural diversity. To sue abroad entails dealing with ways of thinking, habits, and costumes with which one might not be familiar. Subsidiarity is again used in order to justify the Commission’s omission in acting accordingly in order to set up a European system of access to justice discussed in so many earlier documents.

The Commission says: “In order to ensure a level of transparency and dissemination of information on out-of-court procedures in line with the principles set out in the Recommendation, (...) the Commission intends to create a database of the out-of-court bodies responsible for resolving consumer disputes that offer these safeguards. In keeping with the principle of subsidiarity, the database will contain particulars communicated to the Commission by the Member States that wish to participate in this initiative”<sup>168</sup> (page 11).

The Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes is a soft law instrument and, as affirmed above, will suffer from the constraints of the subsidiarity principle or, as concluded in the last chapter, from a lack of institutional and political will. In its introduction, the Recommendation repeats known arguments used in earlier documents and reaffirms the responsibility of Member States to provide consumer protection, the role of the Community in co-operating with national institutions in this respect, and the necessity to act under the restraints of the subsidiarity principle understood in its negative aspect.

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<sup>168</sup> OJ L 115/31, 1998. The pagination referred to in the Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes is the one adopted by the internet version available at: [http://europa.eu.int/eur-lex/en/lif/dat/1998/en\\_398X0257.html](http://europa.eu.int/eur-lex/en/lif/dat/1998/en_398X0257.html).

The Recommendation endorses 7 principles: independence, transparency, adversarial principle, effectiveness, legality, liberty and representation.

In 1997 the Commission adopted a Communication “towards greater efficiency in obtaining and enforcing judgments in the European Union”<sup>169</sup>, in order to improve the role of courts in the EU and to communitarise the Brussels Convention, based on the Amsterdam Treaty, which was analysed in the fourth chapter of the thesis.

## **V – Under the Aegis of the Fourth Three-Year Action Plan<sup>170</sup>**

The introduction of the document claims that consumer policy will be coming of age during the three years of validity of the Fourth Action Plan. It also states the need for “a new maturity on the part of consumers and their representatives” in order to acknowledge their rights and also their responsibilities. The uneven terms quoted are blind to the incomplete development of consumer policy in the EU in general and specifically to access to justice for consumers. Consequently, the aforementioned rhetoric cannot be imposed since the gap is immense and its resolution must be achieved before one can speak a language of reciprocity in a market that prioritises the growth of business and turns its back to consumers.

The plan considers the effects of the EMU, the growth in the movement of services in the internal market and especially the benefits and drawbacks of the information society in EU consumer policy and law. These effects, says the plan, have to be understood in view of the fact that “whilst consumers have a responsibility to promote their own interests, they heavily depend on public authorities to promote their health and safety, on their behalf” (page 4). Is there any contradiction here? The plan rests upon the tension between a liberal-individualistic approach to the problem of consumer protection and its own imposition as a public social policy in the EU political, legal and institutional arenas. The plan asserts that policies cannot be based only upon consumer rights or consumer protection but also on the interaction between consumer and stakeholder interests. A few lines further on, the plan argues for the importance of “a closer, more cooperative relationship between consumers and business, acting as equal partners (...). The goal is a balanced partnership between successful businesses and satisfied consumers. (...) Consumer confidence is vital for successful businesses” (page 4). This argument is very interesting because it reproduces in broad terms the arguments of relational contract theory. However, it is fallacious since it argues for the exclusion of something that does not exist yet, namely, a coherent and fully-fledged EC consumer rights policy and/or law. Furthermore, given the power imbalance between

<sup>169</sup> COM (97) 609 final. OJ C 33/03, 1998.

<sup>170</sup> COM (98) 696. The pagination used for quotation refers to the website version available at: <http://europa.eu.int/comm/dg24/en/policy/cons/general/action.html>

consumers and traders, a free, spontaneous and voluntarist inter-relationship is not recommended. This surely requires leadership and supervision by public bodies.

Such rhetoric becomes stronger as the plan progresses and its discourse claims for “a more powerful voice for the consumer throughout the EU” through a sort of “self-help strategy” (page 8). On the one hand, a strong consumer voice is related to independent and mature consumers. On the other hand, a background for de-regulatory policies that negative law, soft law and self-regulatory scheme propose is needed. The idea of a powerful voice for consumers is very welcome but it should be placed in a public European agency composed of powerful national political agents (public prosecutors) responsible for promoting out-of-court justice for EU consumers, especially regarding financial services and e-commerce. This would re-shape the following assertion: “The Commission will create a network of expertise in Europe on consumer affairs, for its own use and that of consumer associations. Finally, the Commission will launch a feasibility study on how such a network might also act as a think-tank and clearing house for ideas for the Commission, Member States and consumer associations” (page 9). This thesis has a lot to offer to the mentioned “think-tank and clearing house for ideas” towards overcoming the armoury of the contested morality of rights.

The plan establishes the necessity of “better enforcement and monitoring” (pages 15/17) in order to tackle the priority of “full respect for the economic interests of EU consumers”. Nevertheless, the primary responsibility is left at the national level, while EU authority only has to “add value to national efforts (...) through facilitating and encouraging administrative cooperation within and between the Member States, the Commission and consumer associations (...) [and] encouraging the coordination of enforcement by national agencies” (page 17). The gap is recognised but the action proposed does not work for the improvement of the level of confidence of EU consumers.

The *Council Resolution*<sup>171</sup> on the Action Plan reiterates the necessity to respect the principles of subsidiarity and proportionality and defends more stringent national provisions on consumer protection. It is based on the Community duty to support and supplement national policies given the emphasis a high level of consumer protection enshrined in the Treaty. This sounds as a cautious alert against the somewhat consumer unfriendly terms of the Action Plan. The Resolution is nevertheless excessively economic about access to justice for consumers. It calls on the Commission to “continue (...) to work on the protection of the legal interests of consumers including in particular their easy access to redress procedures” (item II).

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<sup>171</sup> OJ C 206/01, 1999.

The *Economic and Social Committee* offered an opinion<sup>172</sup> about the Action Plan and applauded the exclusion of the term “protection” from the title of the Action Plan since this “suggests a rather patronising approach and does not do sufficient justice to the consumers’ position as a full and equal member of our socio-economic order and to the active role which consumers themselves may play” (item 2.4). The opinion claims for a policy with a “global instead of a national or purely EU approach” (item 2.5). These two items sound slightly out of focus because they deprive European consumers of something that they do not enjoy yet, namely: protection and European consumer policy especially on access to justice. The Committee lends support to the de-regulatory policy of the Plan in item 3.3 based on “dialogue/self-regulation”. Nonetheless, it requires a mechanism that could ensure sanctions vis-à-vis non-satisfactory agreements or failure to comply with such agreements, or a third party able to conduct the handling of disputes in order to smooth away the power imbalance between consumers and traders. The conclusion is toward the necessity of “the ‘big stick’ to bring the parties into line” (item 3.3.2).

The *European Parliament adopted a Resolution*<sup>173</sup> on the Action Plan based on the understanding that the Amsterdam Treaty had brought additional emphasis and scope for EC consumer policy in dissonance with the general background on which the Action Plan seems to have been elaborated. The Parliament requested the Commission to promote respect for the basic consumer rights adopted by the World Trade Organisation. These are: safety, information, choice, representation, redress, education, satisfaction and clean environment (item 4). The Parliament also called on EU institutions to “implement the Treaty obligation for a high level of consumer protection (...) and to employ Article 153 (...) more consistently as legal basis in the development of the policy in the European Union” (items 8/10). The Parliament then called on the Commission to ensure the development of consumer confidence through access to redress and implement the Communication on the out-of-court settlement of consumer disputes. Unfortunately, the European Parliament Resolution is timid and does not advance any critique or more sophisticated idea to implement a more responsive consumer policy on access to justice.

The Commission adopted on 28.7.99, a *Green Paper on liability for defective products*<sup>174</sup> with the aim of discussing Directive 85/374/EEC<sup>175</sup> as amended by Directive 99/34/EC<sup>176</sup>. The section on access to justice investigates the suitability of the out-of-court justice scheme in cases of liability for defective products. The Green Paper asserts

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<sup>172</sup> OJ C 209/01, 1999.

<sup>173</sup> OJ C 279/84, 1999.

<sup>174</sup> COM (1999) 396 final).

<sup>175</sup> OJ L 21/29, 1985.

<sup>176</sup> OJ L 141/20, 1999.

the necessity of “class action suits” for cases involving diffuse and collective rights, thereby suggesting the necessity of a powerful body for protecting consumers in a Europe endeavouring to become “a global civil power at the service of sustainable global development”<sup>177</sup> (page 2).

The conclusions of the *Tampere Council*<sup>178</sup> about a genuine European area of justice as an area where “individuals and business should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative system in the Member States” constitute a very inspiring background for access to justice for consumers (page 5). Nevertheless, the primacy of national responsibility on the matter is reaffirmed and the Council of Europe invited the European Council to establish minimum standards for Members States.

The *Communication on a Council and European Parliament Directive on certain legal aspects of electronic commerce in the Internal Market*<sup>179</sup> establishes the need to improve consumer confidence in e-commerce through improving access to justice. A legal framework is requested and the solution proposed is based upon self-regulatory codes of conduct. This approach and access to justice based on soft law were criticised in the previous chapter.

The *Directive on certain aspects of electronic commerce in the internal market*<sup>180</sup> was adopted using the 1999-2001 Action Plan as a support for its strong emphasis on soft law. There was no advance regarding access to justice.

On 5 May 2000 in Lisbon, the European Commission launched the *European Extra-Judicial Network for Out-of-Court Settlement of Consumer Disputes (EEJ-net)*<sup>181</sup>. The network aimed to function “without heavy regulatory procedures” but with the help of clearing houses. The project was based on the Communication on out-of-court settlement of disputes<sup>182</sup> and on the Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes<sup>183</sup>.

The Commission Working Document re-affirms national competence for implementing the network, and to set up clearing houses. It enumerates a number of problems which are mostly related to the fact that the network has to rely upon national bodies and schemes already functioning without any co-ordination. The problems consist of differences between national bodies which can be so characterized: structural

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<sup>177</sup> President Romano Prodi. <http://www.europa.eu.int/rapid/start/cgi/guest>

<sup>178</sup> <http://presidency.finland.fi/netcomm>.

<sup>179</sup> COM (1999) 427 final. First proposal published in the OJ C 30/5, 1999.

<sup>180</sup> OJ L 178/1, 2000.

<sup>181</sup> [http://europa.eu.int/rapid/cgi/rapcgi.ksh?p\\_action.gettxt](http://europa.eu.int/rapid/cgi/rapcgi.ksh?p_action.gettxt). The Commission Working Document on the Creation of a European Extra-Judicial Network is the SEC (2000) 405 final.

<sup>182</sup> See footnote no. 39.

<sup>183</sup> OJ L 115/31, 1998. The pagination used on the Recommendation on principles applicable to the bodies that are responsible for out-of-court settlement of consumer disputes refers to the internet version available at: [http://europa.eu.int/eur-lex/en/lif/dat/1998/en\\_398X0257.html](http://europa.eu.int/eur-lex/en/lif/dat/1998/en_398X0257.html).

(each national order has its own geographical and sectoral organisation; status (some are public, others private, some can only give information, others can handle the dispute straight away); inexperience (the great majority deals only with national or local complaints); resources (the bodies usually do not have the resources to expand their operational capacity, such as computers, fax, telephones, more specialised staff). These problems are serious but another serious problem includes the question about the quality of justice such bodies can offer regardless of the observance of established principles. Clearly, a European agency to harmonise the wide range of national bodies is required. Instead of this, the decision was to create “central contact points in each Member State” or “clearing houses”<sup>184</sup>.

Consumers in need of help to settle a dispute have four options: 1- direct contact with the extra-judicial body in the foreign country; 2- contact the clearing house in the foreign country; 3- contact an extra-judicial body in his own country; or 4-contact the clearing house in his own country (page 8). The Commission has a list<sup>185</sup> of the notified bodies, including merely arbitration and ombudsman schemes, in each Member State. The difficulties with harmonising them are overwhelming when one notes that Germany has 203 notified bodies whilst Sweden has only one. The previous chapter discussed how inconvenient and time-consuming the role of clearing houses could be vis-à-vis a simpler solution of a European agency for settling cross-border consumer disputes.

The network would be initially set up only with bodies prepared to “impose or propose a solution”, thereby excluding any conciliation bodies, despite the fact that out-of-court bodies, as in Portugal and Spain, promote conciliation before the arbitration. The Working Document proposes the widening of the network in order to include this type of out-of-court body. Another *Recommendation on the principles for out-of-bodies involved in the consensual resolution of consumer disputes*<sup>186</sup>, which is based on the Commission *Communication on widening consumer access to alternative dispute resolution*<sup>187</sup>, has been enacted.

The Communication establishes the difference between disputes settled by means of consensus or imposed outcomes and calls for principles in the former in order to foster consumer confidence and turn “national consumers into active cross border consumers”, in times of a single currency and e-commerce (pages 1/3). The intention is to widen the range of more flexible possibilities for consumers to settle cross-border disputes. The Communication mentions the creation of the FIN-NET to settle complaints in the financial services sector.

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<sup>184</sup> The pages quoted refer to the internet version (footnote no. 48)

<sup>185</sup> [http://europa.eu.int/comm/dg24/policy/.../acce\\_just07\\_over\\_en.htm](http://europa.eu.int/comm/dg24/policy/.../acce_just07_over_en.htm). For further information on the notified bodies: [http://europa.eu.int/comm/dg24/policy/developments/acce\\_just/acce\\_jus](http://europa.eu.int/comm/dg24/policy/developments/acce_just/acce_jus).

<sup>186</sup> OJ L 109/56, 19/4/2001.

<sup>187</sup> COM (2001) 161 final, 4.4.2001.

In turn, the Recommendation 2001/310 identifies four principles to be observed by national bodies that are responsible for settling consumer disputes in a consensual way: impartiality, transparency, effectiveness and fairness.

Among them, fairness is of great interest for this thesis and the framework it develops. The Recommendation outlines four criteria that fairness should meet and two of them recall the discussion about fairness in Gilligan's findings upon a feminine moral reasoning.

The Recommendation says that the fairness of the procedure should guarantee that: -"both parties should be able to freely and easily submit any argument, information or evidence relevant to their case" (page 60).

Gilligan, through interviewing girls, discovered that for them fairness is the ability to hear and the chance to be heard. This understanding entails that parties should be able to argue freely and to be answered in their own terms. Unfortunately, the Recommendation betrays that logic by limiting argumentation to its relevancy to the dispute, because it follows very much the judge's position in adjudication procedures. This recalls the relational character of consumer disputes and the difficulty for relational litigants to come through with their story in legal proceedings.

The Recommendation also characterises "fairness" by saying: "both parties should be encouraged to fully cooperate with the procedure, in particular by providing any information necessary for a fair resolution of the dispute" (page 60).

In another study, Gilligan relates the doubts of a female lawyer who had found a document that would help the counter-party and prejudice her own client. Fairness for this lawyer turns into her own capacity to be true to herself and to respond with care in relation to the Other. The Recommendation touches then on troubles that fairness, in a feminine conception, amounts to legal proceedings.

In 1/2/2001, the Commission launched the FIN-NET<sup>188</sup>, an out-of-court complaints network for financial services, in order to further the development of a single market in retail financial services vis-à-vis the improvements brought about by the growth of e-commerce. The basis of the project can be seen in a Memorandum<sup>189</sup> on the theme. The bodies should be accredited nationally for being able to meet the requirements of the 1998 and 2001 Recommendations on the principles for settlement of consumer complaints. The system for financial services intends to explore national private and sectorised Ombudsman schemes connected to clearing houses. Once more, one does not see any European involvement in the implementation of the NET.

Recently, the Commission enacted a Communication on e-commerce and financial services<sup>190</sup> and established consumer confidence in redress and Internet

<sup>188</sup> [http://europa.eu.int/comm/internal\\_market/en/finances/consumer/index.htm](http://europa.eu.int/comm/internal_market/en/finances/consumer/index.htm).

<sup>189</sup> [http://europa.eu.int/comm/internal\\_market/en/finances/consumer/mou-en.pdf](http://europa.eu.int/comm/internal_market/en/finances/consumer/mou-en.pdf).

<sup>190</sup> [http://europa.eu.int/comm/internal\\_market/en/finances/genaral/ecom.htm](http://europa.eu.int/comm/internal_market/en/finances/genaral/ecom.htm).



payment systems as a policy area to be tackled. The system proposed relies on the EEJ-NET and FIN-NET.

Finally, a *Council Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters*<sup>191</sup> was also adopted under the guidance of the 1999-2001 Action Plan. The discussion of this Regulation is in chapter four of the thesis.

To sum up, this chapter has basically shown the dominant position of soft law in EC consumer policy and law regarding access to justice. Furthermore, the patchy and fragmentary evolution of the theme is clear; the early appearance of out-of-court solutions for access to justice for consumers in EU; the inadequacy of both out-of-court and simplified court procedures in providing the special sort of justice consumers require in a common market such as the European one, that counts, at the same time, with diversity of legal and judicial systems and single currency; the lack or gap in the consideration of satisfaction, happiness and needs of and care for individuals entrapped by the facilities of the market; and how law has, indeed, very little influence on the field of consumer protection since the constitutional and political background of both Maastricht and Amsterdam Treaty hardly changed the situation of effective and proper access to justice for consumers in the European internal market; the presence of a language that could support justice as care.

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<sup>191</sup> OJ L 12/1, 2001.

## Chapter VII

### Translating Legal Justice as Care into the EU Context

This chapter is a re-collection of the thoughts and arguments advanced so far and whose brief recall may help the reader.

The European part of the thesis intended to characterise the EU market as the environment for the adoption of a re-defined justice in order to bridge the gap in access to justice for consumers in cross border disputes. The fourth chapter described this gap through four general ideas: the centrality of the consumer charter for European integration, which happens basically through the ideology of market economy; the symbolic character of legislation in the consumer field; the inappropriateness of national environment to promote consumer protection concerning access to justice in an integrated market, and finally the role of courts or of adjudication in providing justice for consumers. The gap was characterised as twofold: firstly, the adoption of the morality of rights, rules and principles for a framework for adversarial justice; secondly, the fact that access to justice for consumers in the EU is a national responsibility, based on courts or private out-of-court bodies and PIL. The EJJ-NET project was then criticised for failing to tackle the two fundamental features of the gap in access to justice for consumers.

The fifth chapter analysed the possibility of European legal and institutional orders to embrace the sort of justice delineated as a market responsibility in the first part of the thesis. Negative law and soft law were described as hurdles to and subsidiarity as a facilitator of a European project of justice for consumers. Article 153 EC was characterised as a strong legal provision, in conjunction with Articles 2, 10, 94, 95 and 308, to encourage the market to comply with its moral duty regarding consumer protection. The EJJ-NET project launched by the European Commission was described as a valuable opportunity to group together national bodies under a European umbrella or agency which would have to equip the system with an institutional framework able to bridge the twofold gap.

The sixth chapter discussed the evolution of access to justice for EU consumers and re-approached the gap to show *inter alia* that out-of-court solutions have permeated the earliest policies suggested on the problem, without however their being able to bridge the gap.

The current chapter will work upon a practice of justice as a feminine virtue defended to be the framework for a solution of the European gap in access to justice for EU consumers.

The first chapter dealt with the post-modern pitfalls of justice and law in modernist legal theory and defended the new paradigm found in the writings of Carol Gilligan as discussed in chapter two.

Chapter III concluded the first part of the thesis by exploring a practice to settle consumer disputes according to the ethics of care. Justice as care was shown as the practice of promoting justice in the parties' terms for their needs, satisfaction, happiness and consequently confidence in the mechanisms of the market that invite them to act. The process seemed to require a strong institutional engagement, which was called love as institutional will or *interesse*. Moreover, the body responsible for advancing such practice needs to be public and to undertake the challenge of bringing the private, nature, the domestic, the personal, the "kitchen", where dwells the silenced feminine voice, into the public, reason, the social, the political, the "living room", wherein the male voice rules and speaks.

The present chapter aims at translating the experience reported and analysed in the third chapter into the European scene where the gap was identified. The chapter will be developed in two sections. The first will discuss the theme of "transferability" in view of the immense cultural, political, social and economic gap between Brazilian and European societies and markets. This will be done in four subsections on European diversity; need-oriented theory; the demands of legitimacy; and the so-called German problem. The second section will discuss the elements of the framework, in five different sub-sections: the guidelines of the body (a European agency or a European Consumer Ombudsman); the practice, its tools and legitimacy; legality as safety net; the case of financial services and e-commerce; and the role of criminalising of certain marketing practices.

## **I- The Challenge of Transferability as "Translation"**

The question of transferability has two basic aspects. The negative one is the incommensurability between Brazilian and European societies at various levels. Nevertheless, the practice of justice as care may be able to overcome the apparent non-transferability of the Brazilian experience to the European market context. The "punctual"<sup>192</sup> character of the practice warrants the possibility of translation of the Brazilian practice into European context. In principle, a practice of dispute resolution, which elects the parties as sources of its reflexiveness, substantive elements, legitimacy and effectiveness, may generate a wide range of possible adaptations. The argument is not that care is a universal human faculty, general enough to be applied everywhere, for this would betray the post-modernist character or the punctuality of the practice. On the

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<sup>192</sup> See footnote 1 in Chapter III for clarification on the use of this word.

contrary, it suggests a radicalisation of post-modernism in two directions. Firstly, it values the *petit récits*. Secondly, it calls the Otherness of the South into question as a source of inspiration (Santos, 1995a: 580), geographically (Brazil) and sexually (the feminine) alike, since “the South was feminised” (Coombe, 1995:605). To refuse the feminine is to refuse the South, and thus the Otherness of both.

Friedman, while discussing the theme, speculates how much harder it would be to transfer a new family law code elaborated upon culturally diverse practices compared to the imposition of a banking code elaborated under the same conditions. He attributes this to the fact that the banking code would not influence personal lives (1978:30). Nevertheless, banking codes, in an integrated market unified by a common currency, will certainly influence personal lives. Furthermore, this thesis aspires to influence personal lives through defending consumer confidence in and relationships with the market since this fulfils market’s moral responsibilities for satisfaction and happiness. The ease of the transferability of a practice of justice as care has precisely this explanation.

Furthermore, the challenge of the translation here proposed is to go beyond a recasting of the South in Northern terms, or the conformation of the feminine with male patterns in order to attempt displaying the logic of the South, of the feminine, in and into locations and locutions of the North, of the male. This translation proposes the reshaping of male and Northern categories in order to locate the feminine and the South through a process of recognition of affinities and differences (Geertz, 1983:10/12).

### **I.1- Diversity as the European Peculiarity**

The first point to be considered is European legal and cultural diversity as one of the main concerns of the discussion upon the harmonisation of private law in EU legal order. Harmonisation in private law threatens cultural identity since it bears deep moral values and social practices that are legalised by rules and principles thereof (Colins, 1995). Harmonisation is also reputedly problematic for it seems to be forged at the expense of national integrity (Wilhelmsson, 1995b). Furthermore, diversity is also a point of concern for consumers needing access to justice in the EU.

In this sense, one of the first advantages of justice as care for consumers, as a European project, is the requirement to hear and respond in the terms of the Other as a practice that entails care and responsibility in relationships. This framework is basically against the Weberian process of rationalisation (formalisation, abstraction, precise definitions and proceduralisation) of the legal system that lies behind any effort of harmonisation. The European challenge has a deeply post-modern character which consists of: hearing

all voices and giving them particular answers in their own terms, broadening and securing the effectiveness of local practices, personal moral intuition and preferences.

Moreover, it is crucial to understand that consumer law, as argued in the fourth chapter, is no longer private law. Nevertheless, its consideration in public policies and in public realms requires the equalisation of the public and the private, in the sense that even mandatory rules of consumer protection must allow the effective consideration of particularities whilst strengthening the unity of the market. The harmony and unity that the practice seeks is not based upon the rationalisation process that the legal systematisation expressed by PIL or harmonisation requires. Furthermore, the punctuality of harmony in the practice of justice as care is against bureaucracy that can alienate the administrative activity from the person in need of it. The Tinderman Report<sup>193</sup> says that nobody wants a technocratic Europe, since Europe must be experienced by the citizen in his daily life.

The European patterns of communication adopted will not foster consensus but will preserve diversity in the pursuit of particular satisfaction and happiness by responding to Other's needs in his own terms. The goal is to furnish confidence for the market to function as one: a peculiar European aim. Moreover, the practice of justice as care will not be proceduralised by a harmonisation that has been described as "practically inconceivable and normatively unsound", de-humanised and which rationalises differences regarding cultural and moral personal intuitions, as a think-tank of abstract ideas and general formulas (Joerges, 1995:190).

## I.2- Need-Oriented Theory: a Framework to Inform Translation?

Wilhelmsson has elaborated need-rational theory in modern private law. One must hint at this theme in order to gather support for the argument upon the feasibility of the translation of a feminine experience of justice into the European locus. The framework of need-rational principles aims to comprehend the entire field of private law and it is formulated to attend to the demands of less privileged people, thereby tempering the blind application of law. The theory is formulated upon the Finnish/Norwegian experience of contract law, and its transferability to the whole of Europe is deemed to be problematic precisely because the theory has a strong material character and is meant to be applied in adjudication. The question of transferability here is equated with the constraints that a Civil Code or a *Bürgerliches Gesetzbuch* imposes upon a judge who has to decide a court case, since none of these codes would be able to confidently rule upon every single particular human necessity. These codes select and generalise a set of precise necessities and recognise that satisfaction is accidental and

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<sup>193</sup> Bulletin of the European Communities-Supplement 1/76.

law must be certain. Problems of transferability of a practice of adjudication, which takes into consideration the particular needs of a specific party in order to ease the commands of law, reside in the modernist feature of law and its principles (generality, universality, equality). They entail problems because they cannot encompass the particular needs of particular persons since they cannot be generalised. The justice of courts and principles of law derogates the justice of needs, since the former demands general and previous law for security and certainty while the latter stresses the particular, contextual, and punctual. Wilhelmsson does not offer a convincing solution for this problem, whose discussion is beyond the scope of this thesis.

Needs, in Wilhelmsson's formulation, represent an avenue for the socialisation or publicisation of modern contract law in general, including consumer law. Nonetheless, the publicisation of consumer law would require a more daring ground in both poor and affluent societies. The needs-rational approach responds to social demands upon contract law and creates a promising framework for the conclusion that a theory and practice of justice as care is indeed transferable and necessary in underdeveloped and sophisticated markets alike. A practice of justice as care in dispute resolution would dispense with the claim, also postulated by Reich (1995), for the elaboration of needs concepts in Community law for consumer protection. The consideration of consumers as economic subjects who need help and protection, or as subjects of love and institutional will could temper the language of market and enable it to encompass the integration of consumers as persons, as Others. Needs concepts are already present in the reality of the market, and the ethics of care, while shaping a feminine practice of law, translates them into satisfaction and happiness. The example here is consumers and language barriers in a multi-cultural market that work as one, especially for financial services through the technological facilities of e-commerce, for instance. The challenge is the translation of a practice of justice implied or required by the needs approach in socialised private law which must recognise not only social needs of a specific class of persons but also the generalised fragility of consumers as Others in a market characterised by diversity and particular demands of happiness and satisfaction. Need-oriented private law changes radically the force of the *pacta sunt servanta* and delineates another profile for the theory of contract law, which may help advance justice as care.

Need-oriented private law calls itself person-oriented and criticises European private law for its static approach which could be changed by the Nordic view of contract law: "more flexible and dynamic –one is tempted to say post-modern- (...)" (Wilhelmsson, 1995a: 212). Furthermore, together with consumer law, it opens the possibility for a humanisation of contract law which is the one really most adequate for expressing human necessities. This expression does not happen in a general way in the

context of welfare states, but in a particular and contextual approach which supports the therapeutic culture of the self as the Other which cannot be socialised, for it is acutely particular. The realm of the therapeutic is at the same time at odds with the market society and the welfare state because it is associated with the particular necessities of the self, especially when it becomes the Other. These necessities might be identified with patterns of hedonism and self-centredness not in the hands of welfare states and normally falsely promised by the market (Rose, 1992:149). Justice as care demands a particular therapeutic approach when it goes beyond the consideration of local, national or social needs, customs or habits, to furnish the consideration and public care of individual needs, satisfaction, and happiness in a market society driven by the confidence of consumers.

Need-oriented theory widens the field of access to justice in a different way from the one proposed once by Cappelletti's project to take from the hands of psychologists, anthropologists and sociologist the theme in order to place it in the legal arena of lawyers, courts and judges. The affluent society, which is required to respond to needs in its consideration of private relationships, especially the ones generated by market impulses, must provide the institutional means for a psychological approach as a therapeutic market, here understood as a market re-installed and rethought again and again against moral boundaries. The therapeutic market considers the person as a more vigorous concept than the idea of individuals, citizens or even consumers. Consequently, lawyers alone cannot give a full account of the challenge of needs in private law or satisfaction, happiness and confidence in consumer law which puts forth the protection of particularities as public policy. Lawyers can be however retrained to think relationally and along the lines of the morality of care and legal officials in the practice of love and *interesse* as institutional will. Need approach requires that.

The understanding of consumer needs as consumerism and/or superfluous can be overcome by a care-reading and care-practice of the need-oriented theory or by its translation into the realm of the moral consideration of the Other in access to justice for consumers.

Another effect of need-oriented theory, which consumer law welcomes, is the disintegration of private law through its publicisation since consumer law, through the care approach, demands the public context of its practice and installs the private into the public, the feminine into the male. Finally, that theory paves the way beyond the social towards the personal, the insertion of the private and domestic ways into the public.

### I.3- The Legitimacy of the Market as a Facilitator for Translation

The transferability discussion finds another facilitator in the question of the necessity of the legitimacy of the market. This deficit of legitimacy is one expression of the major political legitimacy deficit of the EU as a whole and is, ultimately, a deficit of justice in the consumer's eyes. Nevertheless, one must concentrate on the problem of the market in view of its moral duty to offer protection and support not only to its business side but also to its consumer dimension. The question of legitimacy develops into a question of the survival and further development of the European market as one, since it foresees its own stagnation as it reaches levels of productivity, inflation and unemployment which cannot be substantially improved anymore. The growth of the market is re-asserted as the way to overcome such problems. Furthermore, the moral responsibility and legitimacy of the internal market is based on the "awareness that the consumer can make or break" it (Weatherill, 1994:45).

The legitimacy deficit of the EU market is expressed in the persistent gap concerning access to justice for consumers in cross-border disputes which is increasingly asking for the abandonment of traditional discourses supported by the force of subsidiarity and the rule of law, especially when identified with the due process of law in courts of law. Consumer law as *l'enfant terrible* is also forcing the revision of those discourses. The moral responsibility of the market regarding access to justice for consumers requires a revision of subsidiarity for the involvement of the Union in the equation of the problem and the consideration of mechanisms of out-of-court justice.

People do not claim rights, they claim satisfaction, argues Heller (1992). This seems to support the argument that the discourse of courts and rights requires improvement in order to encompass peoples' claims of satisfaction. Satisfaction and happiness appear to be promising ways of legitimising the market and the justice it could offer its subjects, in contrast with the limited scope of good faith, reasonableness and legitimate expectations as normative patterns of European consumer law. Satisfaction is said to furnish a weak criterion for legitimacy especially when compared to normative criteria, in the same way that the feminine is considered the weaker sex compared to the force of the male. This tug of war was already mentioned and it will, as in the case of the legitimacy of the market, offer the tension upon which the question of a legitimate translation of justice as a feminine virtue will rest.

The normative criteria for justice as care suffers the same problems pointed out by Wilhelmsson about the legitimacy of the Nordic adjudication of private problems when it attends to needs. However, the tension in the market requires a different



solution from the Scandinavian legal realism, which legitimates the aforementioned adjudication through the judicial construction of general principles. The legitimacy of the market, based on satisfaction and happiness of confident consumers, requires the punctuality of justice as care at odds with general principles of legal proceedings that overlook particularities. The tension will require an external normative safety net for the practice of justice as care expressed by hard law that will protect consumers if the softness of the care approach fails. Hard law requires a more coherent policy to encompass a general regulation of consumer relationships in the market at the European level, and offers the safety net of clearly identified principles for consumer protection. The intention, however, is to make care effective through avoiding the application of any hard law which will have the aim of pushing forth care. Hard law will only be a safety net rather than the routine in the settlement of consumer disputes. Good faith, reasonableness and legitimate expectation<sup>194</sup> are too abstract and not punctual enough for justice as care, which needs a tougher legal apparatus in the EU in order to compose the safety net to strengthen the legitimacy of the market that embraces a care approach of justice for both consumers and business. On the one hand, legitimate expectation and reasonableness are related to established positive law.<sup>195</sup> On the other hand, care demands the construction of a different rationality in legal theory.

The cultural background of the principles stated, especially of good faith, could be overcome by the punctuality of a process of dispute resolution that aims at particular satisfaction and happiness in the terms of the parties involved. It might resolve the problem of market legitimacy because through justice as care the market promotes the closest interests of consumers in a very particular level and in a public way. Another problem for legitimacy based on a normative criterion is the troublesome national transposition of Directives and “the Court’s insistence that unimplemented (...) [Directives] are incapable of horizontal direct effect” (Weatherill, 1999:717).

The legitimacy of the market is also dependent on the breakdown of the odd distinction between active and passive consumers, in order to embrace all of them in a purposive institutional practice of care, moved by will, *interesse* and love. This differentiation reduces the problem of justice in the EU to problems of freedom of

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<sup>194</sup> A line must be drawn here to avoid a dogmatic explanation of the principles mentioned and also the principles elected by the Commission Recommendations 98/257/EC, (principle of independence, transparency, effectiveness, legality and adversarial principle) and 2001/310/EC (impartiality, transparency, effectiveness and fairness) which are all very much related to traditional principles of law and adjudication. They are also refused as criteria for legitimacy, as much as the ones elected by Lord Woolf’s Report, especially the demands of being the system just, fair and certain, because they are non-discussed assumptions as characteristics of any system of civil adjudication. They express principles of a high level of abstraction, which neither attend the demand of punctuality of justice as care nor respond to particularities. The Report elected also more pragmatic values to be fulfilled by civil adjudication that one must surely embrace: cost and speed reasonability, understandableness, responsiveness and effectiveness (Lord Woolf’s Report, 1995:3).

<sup>195</sup> See Weatherill, 1995:324 upon the problematic English understanding of good faith.

movement. Moreover, the current discussion on justice in the EU is restricted to the discussion on rights, duties and rules for the exercise of the freedoms enshrined by the Treaty. In this sense, market legitimacy depends (especially regarding justice for consumers) on spaces for competing or joint conceptions and practices of justice<sup>196</sup> (Graver, 1995:198). Nevertheless, their co-existence would create a tension necessary for the recognition and operationalisation of a different morality, rationality and practice of justice.

The adoption of a European agency to promote justice as care for consumers through such a practice would also tackle the exclusion of the citizens' voice in European inter-institutional dialogue/communication.

#### **I.4- Gibt es ein deutsches Problem damit?**

So far, the question of transferability has been discussed, firstly, through the necessity of respect for the most valuable European characteristic of "diversity"; secondly, in terms of the publicisation of private law, especially consumer law, as promoted by the considerations of need-oriented theory. This was done in order to defend the idea that the transferability of justice as care is indeed less problematic than the aforementioned theory in view of its legitimacy requirements in close intimacy with the ones of the market itself, as discussed above. Nevertheless, the transferability of justice as care must respond to the German voice, which is already known for its vigour in the shaping of Europe.

The consideration of possible German resistance to justice as care in the EU sounds acutely important for at least two basic reasons: firstly, because this voice has claimed relentlessly the unmistakable "German's (...) 'mistaken' but unshakeable faith in Teutonic *ordo-liberal* thought" (Everson, 1998:391). This voice has been heard in many small areas of economic, political and monetary European integration, which reached a very delicate position in "the *Bundesverfassungsgericht's* by now infamous *Brunner* judgement" (Ibid., 390); secondly, precisely because of the mentioned 'mistaken' faith and its connection to the traumatic German and international Nazi experience.

The *Brunner* judgement is mentioned only to assert that the German voice behind it is, to a certain extent, the same one hears in the Teutonic resistance to welcoming alternative ways to promote legal justice especially if they come to dwell in the public domains of the German *Länder*.<sup>197</sup>

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<sup>196</sup> They are not related to the dimensions of justice as social, formal and technical principles, which lack the punctuality of justice as care (Reifner, 1995:389).

<sup>197</sup> Plett (1988) had concluded that German lawyers negotiate less than Americans do in public spaces, especially in courts. The former try to reach settlement in private conversations before suing and do not

In addition, one must consider that German consumer law is much closer to traditional private law and its *pacta sunt servanda* principle than, for instance, the similar French law, whose approach is clearly more publicist.<sup>198</sup> Udo Reifner (1981), while analysing the conditions of transferability of American innovations in the field of ADR, calls West Germany “the conservative case”.

Apart from the known effectiveness of German courts, the resistance to ADR systems finds a stronger and more convincing reason therefore in the German trauma with the Nazi appropriation of the “peace-under-the-law” movement, which was set up at the end of the nineteenth century in order to settle disputes caused by the industrialisation process. Reifner calls this model of settlement the “legalization of social disputes by free legal advice” (1981: 228). This model, in the words of Radbruch, did not have “the task of applying the law but to make peace (...)” (In *ibid.*, 236). The Nazi take over is called “National socialist legal care” and led, about 1934, to the practice “of special courts for particular types of people and the exclusion of ordinary courts and attorneys, and even of the law, for certain social groups (...) [such as] Jews, communists, and socialists” (*Ibid.*, 237-8). In order to prevent avoidable disputes, the client’s rights (*seine Rechte*) were substituted by the law (*das Recht*) (*Ibid.*, 239). These practices are seen as strong components of the horror of Nazi Germany.

Gessner and Plett have developed the analysis further and succeeded in explaining the difficulties for the growth of informal justice in the German legal order. They add that the Nazi take over led to “a deprivation of parties’ rights in civil proceedings in favor of a judge independent of the petitions of the parties and (from 1941) even of the possibility of intervention by the public prosecutor (...)” (1991:150). The role of public prosecutors in special proceedings in special courts to apply the “law” of the *Führer* against special groups of people can lead to a great deal of resistance against the experience of justice as care as explored in the third chapter of the thesis.

Informal Nazi justice was based on “deformalization of substantive law, a deprofessionalization of the judicial profession and the setting-up of non-judicial procedures for conflict-solving and social control” most often against Jews, communists and socialists. The attack against the formalism of civil proceedings was defended by academics (Carl Schmidt, Karl Larenz and Wolfgang Siebert) and the object of the indoctrination of judges and officials and constant matter of Nazi legal journals because

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consider doing so before a Judge as much as Americans do. German resistance to accept alternative ways to settle disputes is attributable to the relatively high degree of trust of the population in courts due to their reasonable cost (due to the *Armenrecht*), speed and effectiveness. See Blackenburg (1994).

<sup>198</sup> See Stuyck, 2000, Hondius, 1997, Collins, 1997, and Wilhelmsson, 1993a: 30-34.

old formal law was impeding “the ‘welfare and future of the German racial community’ and the application of the Führer’s orders” (Ibid., 151)<sup>199</sup>.

“In view of this inheritance, it can easily be assumed that (...) Germany is not a place where informal justice can flourish” (Ibid., 155). Nonetheless, the authors see a possibility of informal justice in Germany if the agencies responsible for that ultimately do not aim at replacing formal law or at excluding of the possibility of the judicialization of the dispute (Ibid., 158). The German problem can also be understood as resistance to the fragmentation of law which threatens the most important principle of universal law as the rational-legitimate model of legality upon which every legal order should rest. It obviously excludes the value of particularities and rejects the punctual character of justice as care.

Nevertheless, the authors appropriately argue that Germans again get it wrong when they base their resistance against particularities, the fragmentation of law and its punctual practice upon the regrettable Nazi legal theory and practice, since it cannot be called legal particularism nor fragmentation nor punctuality. It was rather “the ideologically organized centralism [that] cannot be equated with universalism either, without doing violence to the intentions of the universalist legal concept which aims at individual freedom” (Ibid., 165). The justice of care praises individual freedom but cannot be equated with universality in its practice. However, it puts forth the search for satisfaction and happiness in relationships forged in encounters among strangers. Official intervention, based on love or *interesse* as institutional will, is the moral duty of the market not to enforce orders or law but to help people to find their ways towards satisfaction and happiness, through a caring practice which fosters care and responsibility in relationships.

## II- The Framework

*“...as a feminist trusting (...) I (...) learn to love myself  
well enough to love you (whoever you are),  
well enough so that you will love me  
well enough so that we will know,  
exactly, where is the love.”<sup>200</sup>*

The framework to provide access to justice for consumers in cross-border disputes in the EU can finally be systematised in five subsections. Three of them will deal with the components and substance of the framework: -its institutional body;

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<sup>199</sup>See Wilhelmsson 1993:346.

<sup>9</sup>Lugones, 1991:37.

institutional practice; and institutional legitimacy. The fourth subsection will discuss financial services and e-commerce as the two areas where the framework has the greatest relevance. The last subsection proposes a further discussion on the need for the criminalisation of certain conducts to strengthen the safety net for both the practice of justice as care and for consumers.

## II.1- A European Agency

The idea of having a centralised European agency for handling consumer disputes is not at all new. This idea, as mentioned in chapter six, was the object of proposals from the European Parliament. It was never seriously discussed in formal documents of the Commission on consumer protection or on access to justice for consumers. The idea has been hinted at by some authors but never exhaustively discussed. On the contrary, it has almost invariably been quickly dismissed as politically unsound and unfeasible in practice, since it would be more than a formal co-ordination of national bodies like the current EEJ-NET and FIN-NET<sup>201</sup>.

Nevertheless, the creation of a European body as an umbrella to pull together and to co-ordinate national bodies is a requirement of this framework. This requirement arises from the deficit of legitimacy and justice of the market and its unattended moral duty to promote happiness and satisfaction for parties involved in cross-border disputes. A market that crosses frontiers should be able to accept trans-frontiers responsibilities. Consequently, the framework for justice as care demands a more purposive role of a centralised agency that would have to unify attitudes, purposes and promote moral enthusiasm for a practice of justice as a feminine virtue. The publicisation of national initiatives such as the Portuguese Centre of Arbitration for Consumers of Lisbon, to quote the most famous one, seems to be the first feature of national bodies being embraced by the European umbrella. This is vitally important for disputes in cross-border financial services.

The current FIN-NET, which is based on national independent third party as private Ombudsmen or in-house procedures to handle consumer complaints, will not fulfil the task of generating consumer confidence. Suffice it to say that the demand that consumers exhaust all national possibilities of resolving their complaints, before referring it to an Ombudsman, sounds neither impartial nor caring.

Financial stakeholders have contested the publicisation of out-of-court bodies to settle consumer disputes<sup>202</sup> and it is common sense that in financial services the main strategy of business is to buy time<sup>203</sup>.

<sup>201</sup> Goyens & Vos, 1991:202 & Goyens, 1995:39.

<sup>202</sup> See <http://econfidence.jcr.it>.

<sup>203</sup> See [http://europa.eu.int/comm/dg24/library/speeches/speech08\\_en.html](http://europa.eu.int/comm/dg24/library/speeches/speech08_en.html).

The publicisation of a net of national bodies under European co-ordination is necessary because the framework needs the presence of enforcement authorities as such the British Office of Fair Trading (OFT), which is responsible not only for the settlement of individual disputes but also for mechanisms of deterrence and prevention. The body would need to have power to investigate, apply administrative fines, constrain business and professionals to adjust their behaviour, take action in judicial forums, both nationally and abroad, in civil and criminal matters, “the ability to make recommendations and the moral if not the legal authority to secure redress” (Seneviratne, 1994:6). The body should also have a very proactive role. This wide range of competences should be concentrated on only one public enforcement authority which is essential to lend to the practice of justice as care credibility, respect and accountability. In this sense, a European Agency, as suggested by Thomas and Weatherill, should be a permanent body composed of public national enforcement authorities (1992:281).

Worthington and Mitchell (1993) have suggested the creation of a European independent Ombudsman, especially for financial services. The European Ombudsman is a promising model for the framework proposed here. “The European Ombudsman as a novel source of soft law in the European Union”, as described recently by Peter G. Bonnor (2000), offers, for this project, a model of a public authority with power and legitimacy to undertake a survey of acts of bad administration. The interesting points stressed by the aforementioned author are: 1-“the Ombudsman goes significantly beyond mere redress and mediation” (page 39). 2-He acts not only “as mere ‘protector of the little man in the street’ in individual disputes” but also as rule-maker, through producing the law of the parties and with a strong pedagogic sense in his interference (Ibidem). 3- His action is legitimated by the presence of parties before him while the pedagogical sense of his action does not mean that he rules from his own understanding but from the understanding of the parties. (Page 40). 4- In this sense, he does not judge but uses the law as guidance rather than as constraint. 5- “Thus, in the Ombudsman’s practice there is not only a deliberate division between legality and non-legality review; there is seemingly also a deliberate confusion between the two” (page 43). This space of “confusion” or “grey area” is the site for the Ombudsman as rule maker to produce soft law in the language of the parties. 6-His soft law discourse and methods could be characterised as “a step-by-step processes and a shield against legalistic feedback” (page 45). This means that the Ombudsman would not approach any party straightforwardly but step-by-step, while adopting a soft-law discourse to avoid legalistic contra-arguments. 7-In the same vein, the Ombudsman works towards “a ‘crystallisation’ of the soft norms into hard law (which may happen via legislation or judicial case law, or even be attempted in the ombudsman’s practice itself)” (page 45).

7- The Ombudsman “can be said to attempt ‘relational contracting’, (...) [thereby having] the mission ‘to improve (...) relationship[s]’” (page 46, my emphasis).

This confluence of characteristics is very meaningful for this framework since the sort of justice detailed in the third chapter has many points of similarity with it. It also seems promising that a board of public Ombudsmen in a centralised European body could align national bodies in terms of the daily practice of justice as care. A European Consumer Ombudsman would act as a market watchdog, guided by individual complaints. An authority like this would need independence and public power as much as flexibility for a punctual approach to cases following the Nordic Consumer Ombudsmen for instance (Wilhelmsson, 1993:335/38). Furthermore, the study on soft law done for the Commission<sup>204</sup> stresses the necessity of creating *une autorité régulatrice à travers l’Europe* (page 400). The example of the European Ombudsman sounds promising and inspiring for delineating the role of public bodies in the implementation of justice for consumers in the EC.

A centralised European body would dispense with clearing-houses<sup>205</sup> since any complaint would be welcome from any part of the Union in order to be object of the institutional will of the body towards the resolution of the problem, thereby considering the satisfaction, happiness of the parties and the preservation of their relationships, which calls for responsibility from everyone involved in the dispute. The body would obviously find the most convenient way to address the other party and reach a solution, while avoiding the waste of time of a preliminary search for a clearing-house. This means that the body will function as a clearing-house, but not only this. It would also endow the process with more effectiveness, warrant quicker outcomes, promote a network of co-operation between national and European authorities and perform a model of shared regulatory, pacification and enforcement responsibilities.

According to the example of the creation of the Consumer Consultative Committee by the Commission, the European Agency (here defended) does not need to be a Community institution (Maier, 1993:364). It is sufficient that the body be endowed with the power and competence to seek nationally or at the Union level, wherever more effective, enforcement measures if necessary. Another option is the creation by another Treaty of a body like the European Central Bank -a model for “executive agencies (...) for carrying out particular Community tasks”<sup>206</sup> of enforcement nature; or like the EUROJUST<sup>207</sup> created by the Nice Treaty. One could also stay in the middle and

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<sup>204</sup> See footnote no. 6 in the fifth chapter.

<sup>205</sup> This idea is at odds with recent developments of the theme in Commission and Council documents. See for example: OJ C 155/1, 2000.

<sup>206</sup> Editorial comments of CMLR 33:623-31, 1996.

<sup>207</sup> The EUROJUST is indeed a good example of a European “unit of seconded magistrates whose task it will be, within the framework of judicial cooperation in criminal matters, to contribute to proper coordination of national authorities responsible for criminal proceedings.” In consumer protection, it

propose the creation by Member States or the EU, through Article 308, of agencies which operate outside the hierarchical guidance and control by the central administration like, just to quote one example, the European Environmental Agency which would have the power, ability and moral authority described above.

## II.2- The Practice, its Tools and Legitimacy

This whole thesis is indeed about the practice of justice as care or a feminine virtue, summarised by Gilligan as care and responsibility in relationships. This subsection, related to the practice described in the third chapter, aims at explaining its translation into an institutional operationalisation that could handle cross-border consumer disputes in the EU.

This proposed framework seeks to establish an avenue for the consideration of particularities in the context of the dispute itself, independently of whether the law acknowledges these as rights or not. The understanding is that, irrespective of what the law says regarding rights, the forces of the market can easily hamper them. In this respect, only access to a special justice for consumers can rescue the recognition of rights hindered by the process of implementing the market. The recognition of rights in an abstract way or through formal-legal instruments does not remedy the growing “enhancement of the impersonality of distribution systems, (...) contract standardization [and] (...) reduc[tion] [of] the negotiability of trading terms” (Ibid., 302). To fight these negative aspects of market expansion, one needs a special sort of justice for consumers, which could be characterised as personal, contextual and able to equate protection with care and responsibility in relationships.

The body above characterised would deal with complaints from parties in different Member States. This means that the physical encounter of the parties would most probably not be possible and that the parties would have linguistic, cultural and legal differences. These circumstances would require, indeed, what is called “*love or interesse* as institutional will”. The authority would have to take the complaint in his own hands and deal with it as if it were his own cause or the market’s own problem, viewed from both points of view: consumer’s and business’. The practice of love and care would hear and respond to needs with reasons of their own.

The capacity of hearing and responding is a very important feature of the practice of care and it is worth giving at least two examples of failure regarding such abilities.

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would be proposed a European agency composed of National Public Prosecutors or National Public Ombudsmen.



“[O]ne woman complained to a company that made diapers that disintegrated in use. She asked that the company do something to guard against the risk that a child might swallow a piece of diaper and choke to death; she received in response a new box of diapers” (in Nader, 1979:998).

First and foreign buyers entered into a contract of mortgage. Simultaneously they contracted home insurance with the same Building Society. Three months later, the insurance contract was due for renewal but was refused by the buyers because they had found a better deal. The lender accepted the option and charged the buyers £25 for the change to cover administrative costs. The buyers did not accept the charge on the grounds of hidden costs not clearly negotiated. A first letter was written and the answer was a long explanation of the legal and practical rationale of the charge without responding to the basic and sole argument used by dissatisfied costumers. They wrote another two letters and the replies were more of the same, failing to respond to what was first said. The relationship that just started was obviously ill-fated and only the high redemption fees sustained it.

Authorities would have to conduct negotiations between the parties and use a rationality that privileges relationships and seeks outcomes in which satisfaction, happiness and confidence are nourished and nobody gets hurt. The practice of care aims to preserve and mend the web already broken by the dispute, which demands a high level of understanding of all elements of the web, its structure and function. The outcome would have to respect those elements in a practice that would praise the particularities involved and be highly punctual<sup>208</sup>.

No law would be the ideal position for this practice. Instead of soft law, the practice is about soft dialogue, soft negotiation. Nonetheless, when limits for negotiation are necessary soft or hard law would inform them rather than impose them. Law should shape not the outcome but the parties’ happiness and satisfaction, which demands punctuality. Law would only inform possible horizons for the parties. This means that the parties should “retain control over the outcome of their dispute but there must be care that the integrity of the office is not compromised, and that settlements are not reached at the expense of a thorough investigation into procedures that are faulty” (Seneviratne, 1994:15). This could be done, if punctuality is observed, without preventing an agreement that could guarantee satisfaction and happiness for the parties. This would depend on the ability of the authority responsible to conduct the settlement process and to further any supplementary procedure to constrain illegal practices. Law would inform the parties of the limits to their efforts to reach agreement and mutual satisfaction. Law would help the authority in the process of settlement to overcome the inherent deficit of information upon the parties in order to forge a truer picture of them,

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<sup>208</sup> To be punctual means to let people say what they need and do the best to satisfy them.

their needs and the dispute they are involved in. Nevertheless, law as a language that claims rights and is adversarial should be avoided. The authority would avoid hard law in order to prevent legalistic arguments able to frustrate settlement to the parties' satisfaction. Care breaks the abstract character of law, especially private law with public elements for its realisation.

The practice should also be simple, informal, without bureaucracy, free of charge and speedy. The body should be easy to access by letter or Internet, and present in big economic centres. The European presence in national bodies would be required for the concrete realisation of the settlement process.

Justice as care would dissolve the tension between the market and consumer protection characterised by market mechanisms, legal, cultural and linguistic differences and "jungle of legal procedures" (Reifner, 1992:286). Furthermore, it would install an "integrated market nanny", necessary in view of the sophistication of the market and its infinite capacity to hurt. Care therapeutises the autonomous and choosing self and the market, heals the tension, which is a function of separation expressed by market's denial of responsibility concerning consumer disputes, installed by the negative reading of subsidiarity.

The feminine practice of law would foster the transformation of the market and its subjects from being eminently transactional into relational entities for whom the encounters are more than mere economic transactions; they comprehend the integrality of the subjects and the market. The encounters are relations that intend to be extended into the future, considering the present a preparation for it (Lindenberg&Vos, 1985:561).

Thus, the European Consumer Ombudsman through justice as care would be an emancipatory and creative public body responsible for combining individualism when fostering satisfaction and happiness with communitarism (solidarity), or when stressing that one's satisfaction and happiness should not be at the expense of Others (Campbell, 1990). The practice of care should inspire trust expectations in the market as institution, ease the adversarial language of rights, promote effective protection through love and *interesse* as institutional will and foster care and responsibility in relationships.

To rephrase Lahey, one might say that without care one will continue to practise life and law for the sake of power, rather than for the sake of love (1985:541). Due to the punctuality of justice as care, the triviality and invisibility of women's experience in the social world, training<sup>209</sup> for the skills requirements of imaginative thinking is of paramount importance (Hutchinson, 1988 & Arrigo, 1992). The training is also about learning how to love, not as feeling but as will, as a human ability that can be taught,

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<sup>209</sup> The framework should use the institutional efforts already established in the EU for training legal officials and lawyers for the feminine practice of law. About training necessities regarding access to justice for consumers see Parliament Resolution OJ C 128/461, 1994, item 15, among many others.

learned the object of a purposive training which would include a feminine practice of law (justice as care), love as institutional will and imaginative thinking as the heuristics of the process.

### II.3- Legality as Safety Net

*“Thus, I begin to live with questions.*

*With uncertainty.*

*With an unknowingness”<sup>210</sup>*

This section will explain how legality in the European environment would complete the necessity of legitimising the feminine practice of law, which demands male support as safety net.

The practice characterised above would remedy the lack of institutional will or *interesse* in the Other. Its legitimacy will not be warranted by principles that have the aim of equalising cultural differences, or through imposing abstract and universal solutions for disputes in terms of substance and procedure. This is the normative approach to disputes by law. Therefore, the legitimacy of handling cross-border disputes by out-of-court procedures by bodies which work without official supervision based on general principles and/or criteria applicable to them and to procedure is unsound for this framework. It would be the same mechanism of dispensation of justice by courts of law.

Nonetheless, justice as care is only possible as an institutional fact if it happens through some sort of relationship with law. The image, as stated in the third chapter, is of the trapeze artists “flying high in the air” with a safety net to ensure that they can go as high and beautifully as possible. In case of a fall, the net, despite being neither comfortable nor aesthetically-pleasing, will protect and save them from being hurt. The image appears apposite since it explains the position of law for justice as care. Law, as already said, must not be installed between the parties themselves or between them and authority. Law should not regulate the process of finding a solution that brings satisfaction and happiness. Law should show the limits whereabouts the parties and authority can, with care and responsibility, deal with the dispute but should not prevent them from a feasible win-win solution.

The insertion of a feminine practice of law into legality seems to be out of the reach of the various explanations for the legal building of Europe. Apart from ‘beyond sovereignty’, European legality, says Arnaud, could be understood as vague and uncertain or as a woolly legal order, a porous legality or legal porousness that imposes interlegality between the diverse legal orders, or the so-called *ebb and flow* of legal

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<sup>210</sup> Lahey, 1985:541.

regulation (1995:160/161). The feminine, by contrast, does not fit in any of these frames yet maybe has a bit of all of them. It also cannot be called deviationist since feminine practice does not oppose fairness to contract or communitarian principles to freedom of contract (Wilhelmsson, 1992:32). Clearly, its difficult configuration demands further effort.

One might ask: is justice as care law? “Law is about institutional normative relations (...), about rights (...)” (MacCormick, 1993:11). Law is about rules, not about happiness and satisfaction. So, justice as care is not law in its modernist conception, since it is not about rules or rights; it does not comply with the exigencies of universality, generality, equality and fairness. Nonetheless, justice as care can be a feminine institutional practice of law for disputes’ settlement. It can be institutionalised and legitimised by law. Justice as care is committed to post-modern law. It is law ‘beyond’ sovereignty and ‘beyond’ modernism. With this profile, it “can liberate jurisprudence and the law of European integration” (Ward, 1996a: 165). Besides, modernist law in this framework would create, beyond its modernist aporias, the institutional framework for the pursuit of satisfaction and happiness under or above - using the image of the net- the distant and protective eyes of law. This is another task for the legal imagination.

That special conviviality between the two practices of law lends legitimacy to the feminine model and also offers an opportunity for overcoming the modernist separation that marks legal theory. It is a way to insert morality into the institutional life of law without having, necessarily, to open the rule of recognition through inserting a moral principle, which would certainly betray the feminine, by quoting it in the preamble to legislation, or in judicial decisions (Sebok, 1998:288), or even worse in self-regulation and soft-law.

Law and courts are ultimately necessary regardless of their being welcome or not, says Galanter (In Plett, 1988:4). Furthermore, the advice of Marcel Storme regarding the strict necessity of hard law for the establishment of consumer protection in the market in order to boost consumer confidence should also be remembered (1992:206). The necessary tension between the two paradigms, male modernist legal theory and feminine justice as care cannot be created without hard law. Soft litigation or soft law is necessary for justice as care as practice but does not give enough support as a net in case of failure and as a limit to persuade the parties to negotiate with a minimum of reference when happiness and satisfaction, for any reason, lies beyond reasonable patterns. The safety net needs to have binding power since the authority will not hold adjudicatorial power. Hard law and public authority are necessary for the tension between the paradigms. This tension furnishes legitimacy to the practice of justice as a feminine virtue or as care.

The safety net could be a European Consumer Code or Regulation, following the example of the communitarisation of the Brussels Convention of 1968. A General Code would, in good time, resolve the patchy, erratic development of EC consumer law. It could enshrine a whole set of rules applicable by national courts in response to actions taken by the European agency through national bodies placed under its co-ordination and supervision. Such a net of legality, which would guarantee institutional practices of justice as care, could support the understanding that access to justice for consumers in the EC internal market is a very inspiring environment. It would introduce the paradigmatic revolution discussed in the second chapter and also provoke a tension between the new and the old paradigm. Furthermore, through this tension one could articulate a feasible solution as punctually as possible.

Finally, after the communitarisation of the Brussels Convention, the harmonisation of consumer substantive law, without prejudice of more protective national mandatory measures in harmony with the Treaties, would be a necessary undertaking. The suggested codification should follow the trend adopted for financial services and work only in the communitarisation of core-marketing rules in order to avoid excessive and troublesome details of Directives involving consumer protection<sup>211</sup>. However, it is also possible to foresee justice as care, functioning with non-harmonised national safety nets. The harmonisation of European consumer law would be the ideal solution for a more solid and reliable protection for justice as care. Furthermore, this legal apparatus would furnish the legal imagination or the imaginative thinking required for the feminine practice of law with instructive parameters for possible solutions to warrant a pursuit of satisfaction and happiness based on the demands of justice as care.

#### **II.4- A Glance at the Suitability of the Framework for Financial Services and E-Commerce**

Financial services and e-commerce are today the two most promising areas for the growth and development of the market. They are also the most sensitive areas with regard to consumer trust and confidence. They both have an international character and can involve a large number of serious problems for consumers and authorities alike. In this sense, both can involve, for instance, behaviour that should be typified as crime in order to have better protection of private and public interests. E-commerce is a larger sector than financial services but its influence on the latter is of great importance given the well-known volatility character of money in general. They are so intimate that, following the Commission's approach, one could talk of e-commerce in financial services. The number of cross-border disputes in an integrated financial market through

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<sup>211</sup> See Directive 1999/44/EC, OJ C 171/12, 1999.

e-commerce justifies a more purposive European public policy as suggested by practices of justice as care.

The 1998 Green Paper on financial services of 1996<sup>212</sup> based this sector of the market on the principle of home country control and mutual recognition, resting upon the implementation of agreed minimum standards of prudential supervision. It reaffirms the national responsibility of providing means of redress to consumers. Moreover, the commitment of the industry to set up or complete scheme for handling consumer grievances was established. In 1997, a communication<sup>213</sup> from the Commission on boosting consumer confidence in electronic payments dedicated two lines to the theme of access to justice and it was to invite MS to act in this direction. This is the rule today in areas such as financial services and e-commerce. Furthermore, the tendency is to base regulation on codes of conduct and private bodies for out-of-court dispute resolution, including the recently launched FIN-NET project. The analysis of this tendency, given the framework discussed here, would press for urgent and more responsive measures to ensure confidence and trust in the financial services market, which are both to be nourished in consumers and fundamental for the progress of e-commerce and the single currency.

The Financial Services Action Plan of 1999 on implementing the framework for financial market<sup>214</sup> recognises that it does not exist in the EU; that it is the foremost sector for EU market growth; that consumers have decisive power to implement this market, and that it is necessary to work towards increasing their confidence. Nevertheless, the Plan highlights five imperatives for action without mentioning consumer protection as a way to improve the cross-border financial market. Moreover, while approaching consumer redress, it defends the adoption of the principles of the EEJ-NET and the necessity of paving the way to e-commerce.

The e-Directive established the country of origin clause and this alone will demand change and derogation of the host-country control clause, adopted for some areas of financial services like investment funds (UCITS) and insurance.

The project is to harmonise core-marketing rules, to ensure the convergence of sector/service-specific rules and to minimise differences in national rules applying to financial services. This rationalisation is surely important to reduce costs and improve legal certainty. Nonetheless, one may wonder whether it will ensure confidence and trust in consumers.

Access to justice for consumers in e-commerce shows the same fragility since it is based on codes of conduct and private bodies for dispute settlement. The principles adopted and the accreditation bodies (which can be public or private) do not seem to

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<sup>212</sup> COM (1996) 209.

<sup>213</sup> COM (1997) 353 final.

<sup>214</sup> COM (1999) 232 final.

lend the necessary legitimacy to improve consumer confidence in such problematic areas as financial services and e-commerce.

A more purposive scheme of dispute settlement towards satisfaction and happiness appears necessary in these areas of market activity in order to remedy the insecurity inherent in them and the fragmentation of regulations on financial services. A European Agency to co-ordinate and implement access to justice for consumers especially in financial services, e-commerce and e-commerce on financial services is of utmost urgency and necessity. The national approach and the private responsibility for offering dispute settlement; especially in these areas, are of great moral fragility, unjust, political and strategically unsound for the goal of establishing by 2005 the most integrated and developed financial market in the world. The aim was set by the Lisbon European Council. The national private Ombudsman schemes in the case of financial services and the private bodies for ADR in e-commerce must be Europeanised and publicised for the effectiveness of a justice of care committed to the nourishment of consumer confidence and trust in a market which is morally engaged in the pursuit of satisfaction and happiness. Furthermore, as said above and mentioned in the Lord Woolf's Report (1995:146), "the relationship between ombudsmen and the courts should be broadened, enabling issues to be referred by the ombudsman to the courts" and vice-versa, thereby strengthening also the safety net for justice as care. This will demand the endowment of the Ombudsman with public power.

## **II.5- Is There any Necessity for Criminalisation?**

This topic is wide but is relevant here in order to justify the development of a European Consumer Agency with enforcement powers in sensitive areas of consumer protection like defective products, financial services and e-commerce. The Agency would be a body composed of public prosecutors with power to refer issues, to sue and prosecute in national, European and international courts. It would promote the local practice of justice as care, performing a formal and material European co-ordination. The Nordic Consumer Ombudsman could be mentioned as a model because of his legal power to conduct a moral conversation with business and consumers alike, since he would be endowed with legal force to sue, prosecute and apply fines. The moral power of such authority to establish an ethical dialogue that calls for responsibility and care needs a strong material rationality, or safety net given by power to prosecute criminals, and to stop behaviours deemed dangerous or inconvenient by application of such measure as fines. This should not be done by national authorities who do not hold the necessary knowledge of and feeling for the market and the role of consumers.

To sum up: 1- The European Agency should be a public body formed by national public authorities to promote the feminine practice of law or justice as care. The authorities should be present in courts and have power to prosecute, to sue in case of public, diffuse, collective and individual homogenous (with social relevance) rights and to assist consumers in purely individual/private ones.

2-The practice of dispute settlement in particular and of consumer protection in general should be conducted with the aim of promoting care and responsibility in relationships and informed by love and *interesse* as institutional will. Soft law should be transformed into soft negotiation with the main goal of achieving satisfaction and happiness. In case of failure, the courts should be close at hand of the authority to pursue justice as rights, through hard litigation, in the name of consumers, public legal orders or to assist individual consumers.

3- A safety net based on material rationality or hard law should strengthen the weak legitimacy of the practice. The communitarisation of the Brussels Convention would be already a step towards establishing certainty about the national order which is competent to sue. The next step would be a European Code for the europeanisation of the core marketing rules regarding consumer protection without harming more protective national provisions in harmony with the purpose of the integrated market. This code would ban both other codes of conduct and a consumer policy of “laborious accumulation of ‘add-on’ rights” (Gibson, 1993:329). Moreover, justice as a feminine practice through public authorities supported by hard law promises the re-conciliation of law and morals without opening the rule of recognition, and through a feminine morality that has the ambition to reconcile human separation by mending the web of damaged relationships.



## Chapter VIII

### Two European Experiences of Out-of-Court Justice in the EU: A Brief Description

*„Strangers are friends we have not yet met“<sup>215</sup>*

The theoretical arguments of part I of this thesis were carefully woven in order to articulate the practical conditions for the ethics of care to become reality in legal institutional spaces. A gap in EU consumer policy was diagnosed and a solution was conceived in accordance with a special theoretical background which was unfolded in three interconnected steps, namely: the challenged male, patriarchal and modernist faith in general rules and principles vis-à-vis the punctual<sup>216</sup> necessities of the Other; feminine moral reasoning as the bridge between male institutional violence and the Other, and finally the empirical and concrete possibility of the ethics of care. The ethics of care is, in truth, the core of this thesis and since chapter II it has been reiterated in every possible ways. The policy material, especially in the two last chapters, is an emphatic defence of the appropriation of the ethics of care by EU consumer policy in regard to access to justice.

Nevertheless, it would certainly be good to explore another two European empirical examples of possible practices to be adapted in order to work informed by the ethics of care. Then this last chapter will describe more closely two different European experiences of consumer out-of-court justice, thereby responding to legitimate criticisms to which this thesis might give rise.

The Lisbon Arbitration Centre (LAC) and the Danish Consumer Ombudsman (DCO) were both mentioned throughout the second part of the thesis, especially in the last chapter, as two promising national experiences which are good examples for and parts of the defended European Network of national authorities. However, a closer look here will examine whether and how certain practices of dispensing out-of-court justice for consumers in Europe really entail reflexive law and/or justice as care.

The practice described in chapter III is essential for this thesis in general and its two last chapters in particular because it corroborates the central argument of part I about the difficulties for female virtues to be established as valid parameters of both policies and political, legal and moral practices in male environments. No political reasons made justice as care fail in Brazil, rather the overwhelming masculine voice of law as principles and general rules as tools of the modern autonomous self. Thus, the material of Chapter III has its value for the whole argument of this thesis, especially because it represents the seed of imagination which was defended in chapter I as a cognitive tool to forge the conditions for justice as care. One starts by imagining and soon one can make it come through. Feminine moral reasoning is not simply the postconventional stage of human general moral development as suggested by Habermas. It is also the hidden part of human development that must be recovered and reconciled with conventional male patterns in order to help humanity towards postconventional human conviviality.

The present analysis of legitimate European long-term experiences takes the Brazilian experience as a model against which they will be compared.

<sup>215</sup> From a BENETON advert on a hoarding at Frankfurt's airport.

<sup>216</sup> Please see footnote 1 of chapter III.

## **I-The Lisbon Arbitration Centre (LAC)**

This section will be developed throughout five subsections about the LAC's history, its characteristics and structure, its procedures and principles, some analysis and criticisms and, finally the presentation of a few interesting and more representative cases.

### **I.1-The Centre's History**

The LAC was inaugurated in 1989 and it has joined the list of very successful initiatives financed by the EU Commission with a view to improving the resolution of national and cross border consumer conflicts. David Byrne, European Commissioner responsible for Health and Consumer Protection, on the celebration of the 10<sup>th</sup> anniversary of the Centre, stated that the success of the Centre was ideal "to reflect on promoting such procedures on a European wide basis".<sup>217</sup>

The Centre functioned firstly as a pilot project based on the Portuguese Arbitration Act no. 31/86, as a joint initiative of the Lisbon Parliament, the Portuguese Association for Consumer Protection, the Consumer Institute and the Union of Traders' Associations.

Consumer protection has had constitutional status in Portugal since 1989 and the institutionalisation of the LAC responds to this.

### **I.2- Characteristics and Structure of the Centre**

The Centre provides consumers with simplified access to justice through information, mediation, conciliation and arbitration for claims less than 3.500 Euros. The Portuguese authorities have chosen a model based on procedures of extra-judicial conflict resolution, especially the ones identified with arbitration.

The LAC has two sectors: the juridical service and the Arbitral Tribunal. The former acts before arbitration by informing the parties, receiving the claims, examining and classifying the latter and collecting the necessary information for conciliation and arbitration. The Tribunal has one arbiter nominated from among the judges of Lisbon, in order to endow its activities with trust and credibility. The judge listens to the parties and their witnesses, offers another opportunity for conciliation, examines all documents and evidence brought before him and then passes a verdict which normally follows his professional background of judge. Normally, he accesses his own background as judge, since such judgments tend to preferentially address the legal exigencies applicable to judicial cases. The arbiter trusts the law and will overlook relational claims of justice as care as noted through the analysis of few sentences and, especially, during the observation of one session of the Arbitral Tribunal. The law regulates the matter in its procedural aspects and, somehow, it frustrates any opportunity for reflexivity and rematerialisation which demand legal self-restraint and the legal incorporation of moral imperatives, which represents the requirement that no one gets hurt and that the Other may be heard and answered in his own terms in order to perform justice as care.

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<sup>217</sup>Speech/99/186 by David Byrne (<http://europa.eu.int>).

### **I.3- Procedures and Principles of the Centre**

The Tribunal respects equality, representation, the adversarial principle, impartiality, transparency, independence, and above all legality.<sup>218</sup> Its decisions are enforceable in any competent court of justice of Lisbon. The aim of the LAC is to offer a quick, simple, efficient, cost-free conflict resolution for consumers and traders alike. Public authorities and private staff work together to solve consumer claims while adjusting the behaviour of the parties and educating both consumers and traders.

The Centre has in practice derogated the problems around international competence regulated by PIL, especially in regard to active and passive consumers. The position of the LAC is to help as much as possible when Lisbon was the place of purchase regardless of the consumer's domicile and/or the circumstances and nature of the contract. The rule is to help and find the quickest and cheapest way to solve the problem. At that point one could identify the withdrawal of procedural elements of law in favour of substantive goals which could be feasibly equate with the demands of justice as care. The LAC would surely fulfil more effectively its vocation if it incorporates those elements outlined in chapter VII, especially a more consistent presence of Europe and proper training of all ways of handling a case in order to exercise justice as a feminine virtue. The LAC has the vocation to integrate as a model and even to start a network of European cooperation for resolving consumer conflicts across European borders (EEB-NET: "The European Extra-Judicial Bodies Network")<sup>219</sup>.

The literature available is almost unanimous on LAC's success in helping consumers through quick, efficient and free services. The data collected through visiting the Centre, talking to its staff (especially the judge who functions as arbiter and Director, a very activity and enthusiastic lady), reading about a few cases, attending to one session of the Arbitral Tribunal and interviewing its Director show the effort to ground the Centre's activities on hard law. It is very difficult to identify substantial elements of reflexivity and/or rematerialisation of law in procedures of the Centre through helping consumers. Basically, the Centre does not properly explore its potential to be a powerful educative institution for relational consumers and traders. The faith in the autonomous modernist self can still be observed. The LAC is defined by its natural vocation to be informative, conciliatory and arbitral, but not educative or protective. The strategy is to avoid patronizing discourse and/or attitudes as much as possible in order to sound attractive to traders. The greatest advantage here is to solve conflicts to which judicial forums are normally denied because of their nature or value. Moreover, the LAC has been offering "innovative juridical solutions" for the totality of Portuguese legal order. At that point one could see a possibility for reflexivity, rematerialisation and the derogation of PIL.

### **I.4- Analysis and Criticism about the Centre**

Despite the meritorious good reputation of the LAC, one can see both the vocation of the practice of settling consumer conflicts to justice as care and the difficulties of making it happen.

The brochure which aims to sell the LAC to both consumers and traders visually explores very well the motto of "justice through peace", but fails when it uses words which are not appropriate in terms of justice as care. The front page shows two

<sup>218</sup> Principles recommended by the European Commission. See footnote 2.

<sup>219</sup> Mentioned by David Byrne. See footnote 2.

gentlemen holding behind them a big knife and an enormous hammer. The words are: “Do not lose your “reason” (in the sense of rights, moral standpoint and also clear thinking) or do justice with your own hands, come to us”. Peace obviously belongs to the background of the defended feminine morality as Gilligan has described it but is not the aim. The privileged goal in feminine moral reasoning is to avoid pain, and it changes completely the way one promotes or “sells” out-of-court justice. Justice for peace is surely the goal of any form of moral and legal reasoning. But through masculine and patriarchal moral standards of law, peace is unique and justifies all means, especially when law has legalised them. This position has driven humanity into many painful wars because peace is the only goal one “fights” for. The words suggest giving up weapons, while hiding them back, in order to keep reason or rights, to fight with different tools. This represents the old modernist rhetoric of the autonomous self. The monist and symmetric Kantian morality of the Enlightenment certainly established the basis of better and more democratic societies. However, it could not help much the community of friends to flourish. The human aspiration to live in peace is now equalized as the aspiration to live as friends. This way has found its philosophical soil in post-modernity which aims to overcome modernist pitfalls, for example, the works of Levinas and his ethics of alterity around asymmetrical moral reasoning and the displacement of the autonomous self. The moral self is moral only insofar as he is able to forget himself to serve and hear the Other and to respond to the Other’s needs in the Other’s terms. The philosophy of alterity certainly has its consistency but its practice would find its conditions of realization only in feminine moral reasoning. A brochure presenting justice as care would indeed suggest or offer the same as the LAC does (namely justice through peace), but in the name of keeping or even nourishing friendship. The language of rights or even reasons would need to be equalised with the practice of hearing and responding through learning how to act without hurting anyone, through responsibility in relationship and towards friendship. This language cannot be installed within modernist rhetoric which established the ruled adversarial language of law (criticised in this thesis). The different voice heard by Gilligan, mostly through interviewing women, supports both the asymmetrical parameters of post-modernity and the practice of the justice as care.

The Director of the LAC has responded gently to the questions in the Annex of this thesis. The interview has showed basically the difficulty of reconciling a language of consumer protection with a more legalist approach which both serves traders better and facilitates their submission to the Arbitral Tribunal. How can consumers be helped to come through with their aspirations of respect, satisfaction and even love and happiness and at the same time to show a face of impartiality and legality to traders? The question was not formulated in this way to the Director, but her answers throughout the interview indicated the tendency to be legalist without being formalist: “claims without legal basis are not accepted” but “claims out of the value and territorial competence can be accepted but only for mediation”. “Documents can be initially brought to the Centre in copies and/or fax”. Thus, one can notice the evolution from protection and anti-formalism towards a more legalist way of handling cases and settling conflicts.

The analysis of LAC practice is also based on one session of the Arbitral Tribunal, which had a professional judge as its arbiter. The session did not show, as dramatically as did the interview, the dilemma above described. The arbiter as a good judge tried to educate the parties but he was absolutely clear about the law to apply and in which direction he should conduct the session. The parties were in conflict when the session began and they were even more distant with each other at the end. The verdict

brought silence (understood as peace) and lost the opportunity to help people to hear and respond towards friendship: this means being nice to each other.

Few phone calls were also observed and, despite the willingness of the assistant, it was clear the legal syntaxes of stabilising expectations to a point that unsure consumers/clients would be quickly discouraged to pursue a solution to their claims.

The legitimacy of the LAC, apart from its legal foundation, is based on the respect of the principles and the presence of a Judge as the Arbiter.

The interview and the audience in the Arbitral Tribunal showed a very different practice from the one described in Chapter III.

### **I.5- Two Cases Revisited**

The data was issued by the LAC and the method of analysis used is not sociological through which one wants to prove the existence of a pattern through a large empirical data. Anthropological analysis is more appropriate since its evidence is not based on numbers; rather tendencies or vocations are suggested by the analysis of specific cases. While quantity is not important, specific elements in at least one case can challenge established beliefs as defended by Gilligan. “No data is independent of theory and no observation not made form a perspective. Data alone do not tell us anything; they do not speak but are interpreted by people.” (1986, 328)

So, among 61 cross-border cases handled by the LAC between 1991 and 2001, 41 was resolved by mediation, 10 by arbitration and 10 by different methods.

Mediation, in terms of cross border conflicts, mostly meant intervention. The LAC was acting on behalf of foreign consumers. This aspect certainly suggests the foundations of justice as care because institutional will is necessary for the efficacy of care. Nevertheless, the average time to resolve a case is over a year precisely because institutional will has failed. The practice described in chapter three made it possible to resolve many conflicts with a phone call, precisely due to institutional will which is really difficult to be developed in a private out-of-court body guided by modernist principles and without enough power to bring things to a conclusion that might guarantee happiness and satisfaction.

Two cases are important to corroborate the necessity of justice as care (endowed with institutional will) for consumers in conflicts across frontiers because of the unnecessary anguish of someone abroad who has to overcome language and cultural barriers in order to be heard in his own terms.

Case 1: On 1/8/1998, a Spanish consumer in Portugal bought a card with credit to be spent in Portugal. She returned to Spain without having spent all the credit and tried to have her money back for almost two years. On 19/6/2000 she contacted the LAC. On 8/8/2000 the Centre contacted the bank who on the same day informed the LAC that the consumer has been called to go to the bank in order to receive her money.

Case 2: On September 1998, a French consumer in Lisbon bought an airplane ticket which she could not use for health reasons. She asked for a refund without success. On 30/6/2000, she contacted the Centre who one month later contacted the trader, who replied the next day that the amount had been already paid into the consumer’s bank account.

The LAC has been very important in helping consumers both locally and in cross border conflicts and is ready to join the European EEB-NET<sup>220</sup>. What remains necessary is to understand the demands of justice as care and lend the characteristics described in chapter seven to the NET.

## II- The Danish Consumer Ombudsman (DCO)<sup>221</sup>

The experience in Brazil, described in Chapter III, remains invaluable for the arguments this thesis defends. It represents a model of justice as care which has been silenced in favour of modernist, male and patriarchal principles. It was not abandoned for essentially political reasons. As already said the practice could not resist the force and violence of patriarchal law.

The use of European data is not necessary to inform the framework suggested but only to corroborate its feasibility in the EU, since justice as care demands a complete change in handling human relationships and conflicts. This change is necessary not only in Brazil or Europe but in any place where patriarchal law still has the last voice.

So, the Danish Consumer Ombudsman (DCO) deserves consideration for being a public authority who works similarly to the Brazilian MP in terms of *institution will* to protect consumers. It is also a very good example because on the one hand, its practice establishes clear patterns of rematerialisation of law through the absorption of ethics and morals in the application of law. On the other, the absorption happens much more in the daily practice of an Ombudsman informed by ethical/moral aspirations than by Acts of Parliament or of Government in general. Certainly law plays its role but reflexivity is undoubtedly the strongest characteristic of the DCO, which works to bring “commercial communications in the broadest sense” into line, and to adjust commercial communications’ behaviour in regard to the interests of consumers, society and traders. The law is not the central element of adjustments or of actions by the DCO. He knows very well that the law does not say everything that society and consumers need and that he needs to go beyond law to reach justice. He acts based on “an average law”. In fact, he considers the law as a horizon and calls much more to ethical patterns to bring “business affairs” into line.

The DCO does not settle consumer conflicts but, as a watchdog, he uses them to find situations in need of behaviour adjustment through close cooperation with The Danish Consumer Complaint Board. The DCO acts without powers to make binding decisions but can go to courts against companies or public bodies that violate the law; can also intervene in civil actions to support individual consumers, like Brazilian MP. Brazilian MP could settle individual conflicts before the victory of the male modernist principles of law and did it through justice as care. By contrast, the DCO can only claim restitution for individual consumers or for many with equal claims by means of a trial on illegal marketing practices, which is, nevertheless, an advantage against Brazilian MP who sues only public and homogeneous diffuse private rights.

In a speech for the European Commission in 1998<sup>222</sup> the DCO criticised the hindrances of PIL while defending the establishment of European ethical guidelines. He attacked self-regulation or soft law as tools for consumer protection, as well as minimum directives. Moreover, he argued that subsidiarity should not justify the view

<sup>220</sup> The European Extra-Judicial Bodies Network. See footnote 2.

<sup>221</sup> The present section uses the information available at the following sites: [www.forburg.dk](http://www.forburg.dk) and [europa.eu.int/comm/dg24/library/speeches/speech08\\_en.html](http://europa.eu.int/comm/dg24/library/speeches/speech08_en.html).

<sup>222</sup> See footnote 5.

that harmonization of consumer protection is unnecessary because, in fact, harmonization has been applied in favour of commercial interests, with traders only obliged to comply with the law of the country of origin. The harmonization defended is not procedural, through PIL, but substantial or material. Here are the marks of reflexivity and re-materialization. The Nordic Ombudsmen, especially the DCO, are very good examples of how certain institutional practices can lend to law more efficacy and efficiency while endowing it with substantial elements which allow it a larger moral reach. The analysis of the Ombudsman presented in chapter seven explains this movement.

Moreover, he considers private Bank Ombudsmen to be a problem for consumers firstly because they basically respond to the tendency of the financial sector to buy time and secondly because the specific public legislation is mostly about securing the solvency and liquidity of banks, insurance companies, and so on and not about the fairness of consumer contract terms and practices. Financial e-commerce, as already noted, is the most important sector of EU market and also the most suitable for practices of justice as care or ready to be under the supervision of a public authority such as a European Consumer Ombudsman. The latter would also have the qualities of the DCO and the peculiarities of justice as care, which, as developed throughout the thesis (especially in Chapter III) differs from an office of ombudsmen more generally. The DCO defends that consumers need an independent public ombudsman, like that which exists in Denmark for nearly 30 years: a real person rather than an anonymous bureaucrat usually associate with legislation. He stresses the necessity of a practice of justice that encompasses the different and regional traditions, cultures and perceptions of justice, especially after the entry of the Eastern European countries in the EU. The DCO is a real person ready to understand human needs, relationships and problems; he can overcome conflicts and make law reach moral/ethical standards. He can certainly lead negotiation to a win-win situation where no one gets hurt: the highest aim of feminine moral reasoning. He knows that courts have the final say but he will avoid them if ethical standards are observed and will suit traders in court only if negotiation fails. Transparency, confidence, dialogue, efficiency and efficacy are his goals and principles. This is why he establishes the existence of efficient law enforcement, as the background of his actions towards the call for ethical/moral standards, in the same way that this thesis defends hard law as the safety net of justice as care.

Finally, the DCO's office suggests a promising experience in Europe to enforce love and to establish conflict resolution beyond the rather narrow trends of the law as condition for differentials to deal to trade. He works towards changing the fact that "we are completely indifferent to one another. Except insofar as we have obligations and duties to each other under the rules, *we do not have to care*" (Bankowski, 1996e:19). His actions push forth *interesse* and love in commercial communications. He is absolutely aware that whether disputants "ignore their differences, negotiate, submit to mediation or arbitration, or retain lawyers to litigate is a matter of significant choice. How people dispute is, after all, a function of how (and whether) they relate" (Auerbach, 1983:7). Furthermore, his action anticipates the spirit of Nice towards transforming consumers into citizens and it is even ahead Nice when it calls on business communications to recognise the human in consumers and their needs within any conflict to be settled in an environment where all is deemed to be taken as commodities and equated in a simple relation between price and offer. Two last important points to be stressed are the long Nordic tradition of protecting citizens and the remarkable increase of transparency and democracy of EU institutions after the accession of the Nordic countries. These points certainly colour the background of the DCO's actions

and strengths his position as a paradigm for the creation of an EC consumer ombudsman who as a person and not as an institution would become possible justice as care to be performed. Any office of any ombudsman as an institution to seek strictly the application of law is unworthy. The ethics of care would make the difference in any place and makes the difference in the actions of the DCO and of a possible European Consumer Ombudsman.



## CONCLUSION

*“Seeing others*

*Keeping your mind in the light you will all be a source of refreshment  
to one another, both individually and together.*

So may the God of power

*and love maintain you all in power and love so that,  
instead of finding fault with one another,  
you will refresh one another  
in the unlimited love of God.*

*For it is this love that enables you to be truly aware of one another,  
to read one another’s hearts.*

*So being held together in this love you  
cannot be  
separated from it, or divided among yourselves”*

*George Fox*

*(300 years ago)<sup>223</sup>*

This thesis started by arguing against male, modernist legal theory and its connected practice of law. The argument then was not against law but against “the mouths of law” (Gessner et alli, 1996:95) and their exclusiveness in imposing law through their verdicts, as unilateral decisions and restrictions to voluntary, punctual and particular initiatives. The conclusion was built on a framework to support a more emancipatory practice of law, especially for cross-border consumer disputes in the EU. This emancipatory practice would rest upon a post-modern and feminine ethics of alterity and of care which are instrumentalised by legal practises. These practises were founded on rematerialisation and reflexiveness. So, emancipatory legal justice could be possible in a caring environment informed by love and *interesse* as institutional practices. Rematerialisation and reflexiveness were the concluding suggestions for easing the reductive features of law which informs regulatory problems, stabilises expectations, overlooks needs and the human of the Other and are the sole reason for justice deficit. Substantive and reflexive elements in law were advanced as the way to operationalise the exigencies of both post-modern and feminine ethics, in terms of the

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<sup>223</sup> On the notice board of Quakers meeting house of Edinburgh.

reality of Otherness, especially given European diversity, and the overcoming of separation as a legal, moral, institutional and social problem.

This thesis, despite its main theoretical character, did not overlook or dismiss legal dogmatics. However, the character of this thesis appears to dispense with any further consideration of EU's legal apparatus since the exercise of Chapter V is suffice to the point one can state: *habemus lex*. Firstly, Chapter I challenged the established and dominant male legal rationality based on legal certainty and security while proposing a discussion about dispensing justice as care informed by a feminine moral reasoning. Secondly, Chapter VII awaited Chapter V's discussion in depth of the two faces of EU readiness to welcome justice as care, namely, the substance or implicit commands of Art. 153 and the political principle of subsidiarity concerning its positive aspect. Furthermore, this thesis is a feminine analysis and so aspires to change one's consciousness thereby responding to Mary Frug's feminist criterion (1992:53) while disregarding male voices in law.

The tendency of EU consumer access to justice policy towards the ethics of care was identified as undoubtedly due to its earlier decision for an out-of-court system. This has nothing to do with the position of Art. 153 in the EU legal apparatus but to the incompatibility or difficult dialogue between justice as care and modernist legal principles which are articulated as guidelines for proceedings of law in courts of justice. Nevertheless, recent EU Commission documents have established the adoption of modernist principles in order to legitimate the out-of-court system for serving EU consumers. The said tendency can be understood as the only way to provide EU consumers with a suitable access to justice in view of the extreme difficulties to apply rules of PIL and to harmonise European civil and consumer laws.

If one considers the existence of legal constraints, one must understand that Art. 153 is a programmatic constitutional rule which does not have any substance. It is a wide rule and expresses a program. That is why it can be used as a "joker" in the pack, that can cover almost any situation if the case demands a constitutional basis for acting or policy elaboration. This programmatic character of Art. 153 justifies its consideration vis-à-vis other constitutional norms (Articles 2,10, 94, 95 and 308) and EU policies regarding the gestation of its consumer legal framework (negative and soft law) as done extensively in Chapter V, which also analysed Art. 153 in itself.

The use of subsidiarity to deny EU obligation to act in favour of consumer protection was challenged strongly in Chapter V because, in sum, as showed by Weatherill, it serves only traders' interests in hampering the market to protect national privileges.

This thesis should not be taken as naïve or destructive. Its possible weakness is to argue for the retention of the adjudication of disputes by the application of legal rules

in courts of law as a safety net if the ethics of care fails. Nevertheless, this weakness has to be understood against two facts. On the one hand, feminine “weakness” is inherent to the very nature of the feminine, which reveals its inability<sup>224</sup> to impose itself, to reduce and “still” things. The feminine embraces the complexity deficit of law and tries to overcome it and to remedy it punctually, contextually, by acknowledging particularities and avoiding grand metanarratives and normative commands. On the other hand, feminine “weakness” is due to patriarchal social-human organization which demands a level of security and certainty more easily achieved by the reductiveness of law<sup>225</sup>.

Harmonization was obviously criticized as the only tool to serve EU consumers since, on the one hand, the basic male confidence in proceedings of law in courts of justice cannot praise the Other and his exigencies of being heard and answered in his own terms. On the other, harmonization is an important way to establish hard law and it surely integrates, as the safety net, the whole system of justice as care. It is fundamental to understand two points: firstly that “more particularised approaches” are exigencies of punctuality of justice as care when it responds to the call of the Other, a call which can be answered only when the law suffers rematerialization and not necessarily particularisation. Secondly that justice as care is not a privilege of the resolution of cross-border disputes but they (cross-border disputes) are where the Otherness of the foreign weighs the most (here the reason why this thesis took cross-border disputes as its central problem)<sup>226</sup>.

The unequal position of consumers in disputes was tackled throughout Chapter IV, especially in its introduction. The latter argued for the strategic importance of the plight of consumers, including their economic weakness, for a discourse that intends to characterise justice as care, as the practice which is able to install the aspirations of Otherness in legal systems. Chapter I demonstrated how substantive justice can freeze criteria by making them formal patterns of legal reasoning. Then, it becomes unable to grasp particulars and to respond to their punctual needs in their own terms. Instead of praising the weakness of consumers, the thesis has benefited by the discussion about the Brazilian MP, in chapter III, and the role of the DCO which express how powerful public authorities, through strong *institutional will* can work towards responding the call of consumers both individual and collectively weaker and, above all, different.

The example explored in Chapter III was implemented by a very powerful official body, constitutionally responsible for criminal prosecution at all levels of society, including the President of the country, and for civil suits to defend public and

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<sup>224</sup> Or maybe the force of the feminine resides in being soft and working by including as much as possible in order to avoid anyone getting hurt.

<sup>225</sup> Nowadays, as patriarchalism goes to globalization, female moral reasoning appears to be the necessary remedy to include and equate differences in narrow patterns of equality.

<sup>226</sup> See Chapter IV.

diffuse interests. The same body with the competence to settle disputes involving consumers issues could prosecute the perpetrators of related criminal aspects of the case. This practice revealed an institution eager to comply with its duty. The institutional context was conducive to the observance of the rule of law but from an institutional decision to settle disputes in a more sensible way, by helping the parties to come through with their stories to listen to each other, and to pay attention to their specificity or particularity. This kind of atmosphere allowed the special justice for consumers to flourish even though no mandatory requirements for it existed in any formal legal document.

The practice developed “standards of conduct” and called on ethical/moral patterns informed by general principles established in hard law, and these were sensibly imposed upon the parties with the aim of helping them to come through with their needs and reality and to reach agreement or justice in their own terms. The practice revealed itself to be profoundly pedagogical for both consumers and merchants or professionals called to meet in an atmosphere which would stress the necessity to rescue and improve a relationship of trust, common and shared profit and responsibility. The presence of a member of the *Ministère Public* was very helpful in lending respectability rather than imposing, as much as the presence of a judge in the Arbitration Centre of Lisbon (Cabeçadas, 1993:308).

Thus, the Brazilian experience plays a fundamental role in this thesis both as an evidence of how justice as care can inform a practice of law and of how the feminine has been silenced in legal and institutional sites.

The shortcomings of the discourse of rights in encompassing the particularity of consumer disputes are usually an argument to disregard consumer law as a valuable area of study and attention, especially for philosophers and sociologists of law. The same situation is noted at Community level where, “[g]iven (...) [a] narrow and rather short-sighted consumer perspective, ‘... consumer law and policy is marginalized (...) and plays, at best, an accessory role’” (In Kye, 1995:40). Based upon an ethical quality of consumer protection, this thesis has claimed that justice for consumers and consumer policy in general does not only mean establishing fair-trading or repairing or preventing damages, but above all, acknowledging the human and responding to needs, satisfaction and happiness in markets where all is equate through price and offer. These were the terms in which this thesis proposed the legitimacy of the practice, without forgetting the necessity of a hard legal apparatus to function as a safety net in case love and care fail. The European agency responsible for consumer protection will need to be endowed with the power to intervene before courts of law at national, international and supra-national levels, to propose or “promote” civil, administrative and criminal suits in consumer matters or assisting consumers in individual cases, just like the DCO does.

A broader definition of the consumer, like the one offered by the Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy<sup>227</sup>, seemed to be needed for a practice of justice as care. The consumer is “also a person concerned with the various facts of society which may affect him either directly or indirectly as a consumer” (Page 2). This could be broadened even further to say “as a person”, since consumption is the way through which one experiences this world and one’s happiness and satisfaction nowadays. To disregard the consumerist aspect of modern society is to forget a great range of situations worthy of attention and qualitatively peculiar mostly because they allow a more relational approach. To leave markets all alone with their own blind equation between offer and price is to overlook the long way consumerism has to call attention to needs and human quality in the Other while challenging unwarranted assumptions. In this respect, the special nature of consumer problems reveals another paradigm to inform the settlement of disputes in the first instance and, more broadly, another way of reasoning towards justice in law. More concretely, consumer disputes can be used as a pedagogical process, where a different way of solving disputes can be nourished and stimulated. This new system elects the Other not as another self or a stranger who cannot be approached, but as the object of love, *interesse* and care, attitudes (or qualities) to be instrumentalised through substantive and reflexive elements in law.

The model of justice as a feminine practice responds to the patterns of care which contextually and personally can overcome the shortcomings of the modernist, male legal theory and practice of law and push forth the process of giving “a little more soul”<sup>228</sup> to the ever closer European Community. Furthermore, as stressed in Chapter I, justice as a feminine virtue does not instrumentalise equality before the law, legal certainty or the rule of law as internal qualities of the process. This process of achieving justice by the parties in their own terms is basically a model which abolishes adjudication from its own system. This does not mean that the value of the rule of law and of its principles is not recognised, only that they do not have a role to play in the making of justice informed by the ethics of care. The external characteristics of the system should certainly comply with the rule of law but will suspend the rest in the name of a personal justice achieved through a contextual approach to the particularities at stake. This stands in the context of the sceptical position already postulated regarding the usefulness of private law and abstract legal principles to regulate consumer contractual relationships and to protect consumers (Howells & Weatherill, 1995:121). Legal rules may function as external criteria of the legitimacy of the feminine practice of justice or as a safety net when such a practice fails in handling consumer disputes.

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<sup>227</sup> OJ C 92/1, 1975.

<sup>228</sup> Jacques Delors, speaking at Strasbourg, 17 January 1989, in McGee & Weatherill, 1990:596.

The rule of law is certainly conducive to justice as a male virtue but is suspended to function as a safety net for justice as care. Male justice violates particularities but still must stay as a last resort when justice as care fails. Given the peculiarities of justice for consumers, to keep both all legal remedies dear to the rule of law as the only possibility to settle disputes and a justice responsible for delivering “common sense solutions to consumer problems” sounds a contradiction *in terminis* and makes the system dangerously inconsistent (Ibid., 555). Thus, this thesis claims that a special justice for consumers has to happen outside the framework of the Judiciary Power responsible for the application of law in respect to the principles of equality, impartiality and rule of law. In addition, the justice which can acknowledge the Other and “think things through and through” could not be delivered or adjudicated; it would have to be negotiated, discussed, tailored to needs and satisfaction. The apprehension of the Other with his needs and the attainment of his satisfaction and happiness seem to be impossible deeds for a third party regardless being partial or impartial. The justice, which thinks things through and through, is a personal conquest and in no way a feasible gift to be delivered or adjudicated by third parties. The figure of an adjudicator will inevitably imply an outer party who translates the Other’s necessities into his own system or into whichever system of law agreed for ruling the process of adjudication, whether publicly or privately codified. For justice as care, one does not need outer parties but only someone to facilitate or help parties to listen and respond to each other.

Then, the dialogue between postmodern irresolution and Gilligan’s cultural feminism were articulated. Initially, this thesis did not discuss any aspect of postmodern feminist thought since it appears difficult to reconcile it with Gilligan’s somewhat essentialist cultural feminism. Any model of the feminine is totally at odds with a postmodern refusal of meta-narratives, let alone the resistance of radical-critical feminists against any constraint upon women and their expression.

Chapter I made a postmodern reading of the pitfalls of modernist legal rationality, which is based on separation and isolation (especially regarding the Other); it identified the problem of justice and law as postmodern in view of the increasing displacement of the self in favor of the centrality of the Other. Derrida was mentioned as the talented postmodern thinker who recalled in *Force of Law* the genius of Walter Benjamin and his “Critique of Violence”. Derrida re-posed legal justice as a postmodern challenge beyond the force of law and this thesis takes this position as its own. Levinas inserted the Other and his inaccessibility without offering a feasible resolution for the moral problem of Otherness. Then the ethics of care disentangled the Other from the male fear of connection, from masculine separation and elaborated the path of accessing the Other in an ethic of relationships and responsibility. From Levinas the thesis took also asymmetric morality in opposition to Kantian unicist morality.

However, Levinas' asymmetry was identified as a masculine resolution of the aporia of justice since it leaves the Other inaccessible. Precisely at this point the feminine and alterity were articulated in order to improve postmodernism. There is no "coincidence of resolution" since this thesis has articulated Gilligan's cultural feminism as the feminine resolution of the inaccessible postmodern Other. This resolution removes the Other from the realm of hermeneutics to deal with moral claims and even some binding legal behaviors as very concrete moral responsibilities in relationships. This moral responsibility obliges one to act with care and friendliness to guarantee that no one may be hurt or left behind.

Certainly, Drucilla Cornell's "postmodern feminist thought" does not "militate towards an 'ethics of care'". The deconstructionism that Cornell espouses is indeed inspiring for reflexive law and the feminine ethics of care but it fails in accepting the Other as accessible through a moral effort and places the access of the Other in the attempts of a deconstructivist hermeneutics. The problem is that it entails separation while a cultural feminine moral effort requires connection, reversibility, method of inclusion and responsibility in a web of relationships. Moral responsibility, for Gilligan, in regard to a feminine and different voice, has to be woven in both personal (friends and family) and impersonal (social encounters) relationships.

Minow's legal criticism, which can hardly be seen as postmodern, works for the improvement of legal adjudication informed by difference and not by formal equality. Minow certainly shares with Gilligan the preoccupations of the feminism of difference but she works for legal justice informed by the ethics of rights. She is more comfortably characterized as a critical or radical feminist.

This thesis has not argued for any coincidence but it has tried to articulate the claims of both Otherness and feminine moral reasoning as an ethics of care. There is no coincidence, but proper articulation which supports a dialogue between postmodern irresolution and aspiration and traditional feminism.

This articulation strengthens the displacement of the "day in court" as the greatest modernist conquest. In truth, this conquest responds to the disintegration of traditional relationships, where the feminine could speak its truth and power, in favour of law as an institutional fact. Equality is parallel to that. Otherness deconstructs equality and consequently law as institutional fact. Gilligan helps this deconstruction while reconciling Otherness with the law thereby replacing in this male institutional locus of law in order to place the traditional value of the feminine as a different voice. The feminine voice represents a moral reasoning worth being applied in conflict resolution because it is able to consider and honor the Other in Other's own terms. The ethics of alterity is postmodern because it displaces the modernist syntax of the centered and autonomous self but it fails to rebuild the dialogue and to install the Other in

political, legal and judicial arenas. The ethics of care is itself a new syntax, which is able both to install the Other and to legitimate the claim that one may be nice all the time. It may be recalled the discussion in Chapter I (footnote 41) on Honneth's position about the necessary complementation between asymmetrical postmodern ethics and the ethics of care.

When one understands the ethics of alterity within the exigency of the ethics of care then it becomes absolutely necessary that one tries to be always nice to all Others one meets and not only to the disabled, orphans and marginals (socially-excluded groups). Only in the context of the ethics of rights and the unicist, symmetric, Kantian morality of the autonomous and enlightened self, "to be nice all the time" becomes impossible or loses its force as a moral, legal and social principle.

Can such a thing be at all institutionalised, especially in the EC context? This thesis has answered this question positively, arguing for the necessity of a European out-of-court system (European Consumer Ombudsman) to tackle the challenge of alterity and care as moral exigencies of an effective consumer justice for a unified and diverse market.

This thesis has proposed the out-of-court nature of the justice here redefined. It is still necessary to say that this justice needs a public face endowed with the respectability, accountability and power to take action in regard to setting up civil, administrative and criminal procedures. If one looks into the European institutional framework, one may ask what is missing for the Commission to react responsively to consumer complaints in the internal market with the same willingness that it deals with complaints of citizens regarding problems with, for instance, visas, passports, the recognition of degrees, through a service publicly offered? A first tentative answer is to do with the lack of institutional moral commitment. The market without consumers can no longer be morally or legally defended in view of, inter alia, what the Treaty spells out in its Articles 2, 95-para 3, and 153. The moral dimension of economic growth requires that it must be pursued as a means to enrich life, to improve the quality of life in all its respects, to responds to needs and acknowledge the human in the Other. Article 10 could easily express this Community duty as much as a Member State duty, under the co-ordination of a European authority. A possible Community involvement in the practice of justice for consumers in cross-border disputes should use the resources already in operation in each Member State. The agents of the Community could work with national organs, transformed into Community bodies, in the name of the fulfilment of a moral duty consistent with providing justice and not only market progress. After the adoption of the single currency, the growth of financial services across frontiers, facilitated by electronic means, the establishment at the Community level of a very effective system of justice will be of paramount importance for consumers in cross-



border disputes. In addition, the level of integration that the single currency entails and requires will justify a much more profound involvement of the Community regarding access to justice for consumers since it is itself a part of integration.

Institutional will as love and *interesse* adopted as public policy together with the systematic retraining of legal professionals to act under the guidance of alterity and care are the key points in tackling access to justice for consumers in the European market.

This thesis has claimed that justice is a particular or punctual practice thereby deliberately avoiding furnishing a definition of justice in the hope of justifying the title of this thesis that says “redefining justice”. The intention is to express a process through which one performs justice again and again within particular relationships or encounters. “The task of legal thought is to retrieve friendship from the ruins of litigation” (In Der Walt, 2006: 224). “(I)n the canonical texts, the allegedly universal man of public politics, with his forms of reasoning, rights, virtues, and constitutional associations, is defined in contrast to the private woman, with her contrasting qualities and associations” (In Tully, 1995:50). My own thesis has been an attempt to restore the space that has been defined away.

## ANNEX

The following questions were elaborated to guide the interviews with the Director of the Lisbon Arbitration Centre, six Public Prosecutors in Brasilia-Brazil, the representative of the body created to succeed the Office of the Public Prosecutor in charge of settling individual consumer claims in the Capital of Brazil. The questions were translated into Portuguese and delivered in advance. Nevertheless, in all interviews they were not more than guidelines, since the conversation greatly respected the different personal experiences and ways of reporting important facts and the position of law regarding official action. The great majority of the interviews were at least partially recorded, but a couple of them were not at all, for the personal convenience of the interviewee. The interviews were all in Portuguese. The questions were elaborated upon the works of Abel (1982) and Arno (1979) on informality.

- 1- Regarding the activity of the body or Office of the Public Prosecutor in charge of consumer protection, could you say that it increases state power by being purposive and proactive, while cultivating the appearance of being non-coercive?
- 2- To what extent are/were the distinctions between private and public, state and civil society, illegal and legal (what is forbidden and what is allowed) blurred by your actions, when settling individual consumer complaints?
- 3- To what extent did/does your action work extending the state control managing capital accumulation and defusing the resistance this engenders? Is the service mostly used by “the dominated categories of contemporary capitalism: workers, the poor, ethnic minorities and women”? (Abel, 1982:6)
- 4- To which extent does the service individualise conflicts and establish “control by disorganizing grievants, trivializing grievances, frustrating collective responses (...) much more directly, by instructing each party that he can, and must, resolve the controversy alone”? (Ibid., 6-7)
- 5- Does the service work with staff without much training, who operate with minimal supervision and few rules and is its effectiveness measured by the number of cases handled and levels of personal satisfaction? (Ibid., 7)
- 6- Could you say that the process of settling consumer complaints offers an opportunity for parties to re-establish a good level of personal understanding, thereby mending relationships harmed by disputes?
- 7- Is the service impartial when working for a compromise between the litigants?
- 8- On the other hand, could you say that your actions are/were partial toward overcoming the conflictive and adversarial character of disputes brought before you?
- 9- Do your actions avoid the complexity of disputes and “attempt to deal with the total relationships and the total social personalities of the parties, thereby admitting the unique nature of every case”? (Arno, 1979:44)
- 10- Are there hard law, enough constitutional protection and lack of procedural rules informing your action of settling individual consumer disputes?
- 11- How important is for your action the absence of adjudicatorial authority, lawyers but the presence of a powerful public authority competent to handle the grievances and promote the application of the law in private, administrative and criminal judicial instances?
- 12- Is it possible to identify in your actions freedom for parties to establish dialogue, using at their discretion any arguments that they judge necessary to make their point, regardless of any logical or temporal relation with the dispute and its facts?

- 13- Do the parties have the freedom to set up the terms of the agreement to settle their dispute, in view of their needs, satisfaction and happiness, irrespective of what the law says?
- 14- Could your actions be characterised as pragmatic, ad hoc and flexible enough to be adapted to every concrete case that you have to handle?
- 15- To extent is your action educational or pedagogical, instructing parties to establish between them a language of co-operation, mutual understanding and willingness to compromise in the name of the re-establishment of mutual satisfaction and happiness?
- 16- What for you legitimises your actions?
- 17- Is there any general strategy for handling the disputes brought before the Office?
- 18- Assuming a positive answer, does the strategy suffer periodical critical analysis and revision? Could you mention at least one example?
- 19- Is it possible to identify any attempt by the parties to establish a relationship with the authority responsible for handling the dispute?
- 20- Are there any other aspects not covered by the above questions worth mentioning?

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