UNIVERSITÀ DEGLI STUDI DI TRENTO

Facoltà di Giurisprudenza

CONVERGENCES AND DIVERGENCES BETWEEN THE ITALIAN AND THE BRAZILIAN LEGAL SYSTEMS

Edited by
GIUSEPPE BELLANTUONO
FEDERICO PUPPO

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FOREWORD

The contributions included in this volume were presented at the Conference held at the Faculty of Law of the University of Trento on 6 and 7 November 2014. The Conference aimed at starting a scientific collaboration between the Trento Faculty of Law and Brazilian universities. Professors from the Federal University of Minas Gerais, the State University of São Paulo (UNESP) and the Getulio Vargas Foundation in São Paulo joined us to discuss the relationship between the Italian and the Brazilian legal systems from many different perspectives. Other initiatives are already ongoing or planned with the same universities that participated to the Conference, including conferences in Belo Horizonte and São Paulo in 2016 and a book on law, development and innovation edited by G. Bellantuono and F.T. Lara. The University of Trento has started collaborations with other Brazilian universities in several different fields, so in the near future there will be opportunities to build up a broader scientific network including other Italian universities and research groups interested in exploring this Transatlantic connection.

The Trento Faculty of Law has a long tradition in comparative legal studies. Its focus on the interaction of domestic, international and supranational law is reflected in the general orientation of the five-years undergraduate program on Comparative, European and Transnational Law, as well as in its Doctoral Course on Comparative and European Legal Studies. The Faculty is also home to several interdisciplinary research groups.

Thanks to the prominence of the comparative method in legal education, the Trento Faculty of Law was able to start scientific collaborations with and research projects on all the main legal traditions of the world. Therefore, intensifying the scientific collaboration with Brazil and the Latin American legal tradition is part of the Faculty's broader scientific program.

The contributions in this book span seven different branches of law. They do not pretend to offer a complete picture of developments in the Brazilian and Italian legal systems. But they do aim to show that many theoretical and practical challenges lie ahead and, at the same time, to identify some themes for a joint reflection. It is our belief that what is happening, and is going to happen, in these two legal systems is of a much wider interest at global level. Hopefully, this book will be the starting point of an engaging and fruitful debate.

We would like to thank our Faculty, its dean prof. Giuseppe Nesi and its administrative personnel for their support to this initiative, as well as for providing the ideal working environment for comparative research. Warm thanks also to the Trentino Alto Adige Region for financial support to the Conference and to this publication.

Trento, 31 August 2015

Giuseppe Bellantuono
Federico Puppo

BRAZIL AND ITALY: MEANINGS AND PROSPECTS OF A TWO-WAY RELATIONSHIP

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Professor of Comparative Law
Faculty of Law, University of Trento

TABLE OF CONTENTS: *1. Introduction - 2. What to compare: Brazil and Italy in multilevel regulatory systems - 3. Diagnosing institutional environments: the example of international commercial relationships - 4. Conclusions.*

1. Introduction

It is commonplace to underline the close links between Italy and Brazil from a legal, economic and social point of view. Those links justify by themselves the strong interest in understanding the most recent developments in the two legal systems. However, the Conference that took place in Trento in November 2014 also aimed at exploring two additional aspects: firstly, to what extent the two legal systems share today a common approach to legal problems and how they reciprocally influence each other; secondly, to what extent the respective institutional environments create or reduce opportunities for cross-border trade between the two countries. The latter aspect is of crucial importance for Italian and Brazilian businesses wishing to increase international cooperation. At the end of the Conference, representatives of local research centres presented their point of view on how to improve the Italian-Brazilian trade relationships. While much has to be done in the political and economic domains, the Conference aimed at showing that the interactions between the two legal systems play a non-secondary role in fostering or hindering trade.

The next section discusses the broader institutional dynamics that are prompting legal changes in both systems. Section three turns to the example of trade regulation to explain how the comparative analysis

leading to identify the main components of each institutional environment is an important tool for both policymakers and the business sector. Section four proposes some concluding remarks.

2. What to compare: Brazil and Italy in multilevel regulatory systems

More than sixty years ago, Tullio Ascarelli underlined some features of the Brazilian legal system that exerted a lasting influence on its development. Firstly, the legal tradition of the seventeenth and eighteenth centuries had not completely lost its appeal and was still affecting legal practice. Secondly, the Brazilian system of sources of law did not impose barriers to the use of foreign doctrines. This institutional element fostered an anti-positivist stance and helped explain why strict adherence to legal rules played a lesser role. Thirdly, the Brazilian legal system was ideally placed to draw on both the civil law and the common law (in its American version) traditions. From this point of view, it was an interesting laboratory for mixed legal approaches[1]. But Ascarelli also warned about false or superficial assonances between the Brazilian and the Italian legal traditions. This is a common problem in any analysis of legal transplants. Even though transplants happen frequently, what matters is their extent and direction. With regard to the Italian models, measuring their actual impact in the Brazilian legal system might not be straightforward because two different levels have to be explored.

The first level relates to the influence of national legal traditions. This is the usual line of inquiry of the comparative law literature that explores the links between the Brazilian and the Italian legal systems. This literature shows an intense dialogue among scholars, the influence of Italian codifications on Brazilian codifications, and the use of Italian

[1] T. ASCARELLI, *Osservazioni di diritto comparato privato italo-brasiliano*, in ID., *Studi di diritto comparato e in tema di interpretazione*, Milan, 1952, p. 81 ff. (originally published as T. ASCARELLI, *Notas de direito comparado privado italo-brasileiro*, *Revista da Faculdade de Direito de São Paulo*, v. 44, n. 111, *maio/jun.*, 1947, p. 317); T. ASCARELLI, *Diritti dell'America Latina e dottrina italiana*, in ID., *Studi*, cit., p. 155 ff.

legal doctrine by Brazilian judges[2]. Many systemic factors explain these exchanges, including linguistic familiarity, the close links between the Brazilian academic world, the judiciary and the legal professions, as well as the high number of Brazilian scholars experiencing contacts with Italian law schools[3]. However, the real impact of the Italian legal tradition also depends on other two factors.

Firstly, several national legal traditions have an influence on the Brazilian legal system. Strong links can be detected with other civil law systems[4]. No less influential is the US legal system[5]. This means that

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[2] See, e.g., C. DE SOUSA ZANETTI, *Il modello giuridico italiano in Brasile: obbligazioni e contratti*, in S. LANNI, P. SIRENA (eds.), *Il modello giuridico – scientifico e legislativo – italiano fuori dell'Europa*, Napoli, 2013, p. 179; M.C. DE CICCO, *Una visione d'insieme sulla circolazione del modello giuridico italiano in Brasile*, *ibid.*, p. 187; A. CALDERALE, *La circolazione del modello italiano nelle codificazioni brasiliane del diritto privato*, *ibid.*, p. 199; S. LANNI, *La diffusione dell'esperienza giuridica italiana di tutela del consumatore in America Latina*, *ibid.*, p. 271; F. MOTTA, *Influência do direito administrativo italiano na construção das bases dogmáticas do direito administrativo brasileiro*, *Revista de direito administrativo contemporâneo*, v. 2, n. 6, *mar.* 2014, p. 11.

[3] According to Eurostat data, in 2013 44% of first residence permits granted to Brazilian citizens in EU-28 were for education reasons (only China, with 60%, had a higher score). In Italy Brazil is among the first ten countries receiving residence permits for education reasons, with a growing trend between 2006-2011 (see MINISTERO DELL'INTERNO (ed.), *Gli studenti internazionali nelle università italiane: indagine empirica e approfondimenti*, sixth report EMN Italia, May 2013, available at *www.emnitaly.org*). In the area of legal studies, between 2007 and 2015 Italian and Brazilian universities concluded 269 agreements, representing 35% of all agreements concluded between the university institutions of the two countries (data available at *http://accordi-internazionali.cineca.it/*).

[4] See, e.g., G. TEPEDINO, A. SCHREIBER, *Culture et droit civil – Brésil*, *Journées internationales 2008: Droit et Culture*, Association Henri Capitant, available at *http://www.henricapitant.org/node/50* (describing the influence of French and German codifications on Brazilian civil codes); M. STORCK ET AL. (eds.), *Les frontières entre liberté et interventionnisme en droit français et en droit brésilien*, Paris, 2010 (influence of French law).

[5] See, e.g., Y. DEZALAY, B.G. GARTH, *The Internationalisation of Palace Wars*, Chicago, Ill., 2010 (analysing the export strategies of US law and the domestic strategies of borrowing countries in Brazil and Latin America); J.K. KRISHNAN ET AL., *Legal Elites and the Shaping of Corporate Law Practice in Brazil: A Historical Study*, forth-

legal traditions compete among themselves, but the factors leading one of them to prevail in a specific case remain largely unexplored. As observed by Gambaro, foreign legislative solutions are usually borrowed when they are believed to be successful (according to whatever criterion), while doctrinal solutions are usually borrowed when they provide a useful theoretical framework[6]. With regard to Italy, legislative solutions are difficult to export (but see section three). Italian doctrinal ideas do travel, but to successfully compete with rivals they have to match local needs and be supported by extensive programs of scientific collaboration.

Secondly, and related to the first factor, the well-known links between the two systems do not exclude that in many cases Italian transplants stop at the surface level and do not affect the operational level. This may be true of the widely cited Mauro Cappelletti's studies on access to justice and of the widespread reference to the Italian doctrines on the constitutionalization of private law[7]. Even the frequent references to Italian doctrine in Brazilian judgments do not represent evidence of a deep impact at operational level. To identify such impact, a systematic analysis of a representative sample of Brazilian judicial opinions would be needed[8]. Of course, impact at surface level is not an

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coming *Law & Soc. Inqu.* (2015) (discussing the relationship between Brazilian and American legal elites).

[6] A. GAMBARO, *Il modello giuridico – scientifico e legislativo – italiano fuori dell'Europa. Riflessioni conclusive*, in S. LANNI, P. SIRENA, *Il modello giuridico*, cit., p. 462 f.

[7] The effectiveness of litigation in implementing social rights for the poor is hotly debated: see, e.g., V.A. DA SILVA, F.V. TERRAZAS, *Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?*, 36 *Law & Soc. Inqu.* 825 (2011); O.L.M. FERRAZ, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 *Texas L. Rev.* 1643 (2011). On whether the constitutionalization of private law rights has produced positive effects see the doubts expressed by I. DE AGUILAR VIEIRA, *Soggettivismo e oggettivismo nel diritto brasiliano dei contratti*, in S. LANNI (ed.), *Dez Anos. Contributi per il primo decennio del nuovo codice civile brasiliano*, Napoli, 2014, p. 153, 166.

[8] For discussions of methodological hurdles in identifying doctrinal influence on judicial opinions see, e.g., N. DUXBURY, *Jurists and Judges*, Oxford, 2001; B. MARKESINIS, J. FEDTKE, *Judicial Recourse to Foreign Law*, London, 2006; M. BOBEK, *Comparative Reasoning in European Supreme Courts*, Oxford, 2013.

exclusive concern of Italian transplants. It has been observed that the "Euro-Latin American Legal Space", consolidated since the nineteenth century, fosters the impression of a common language. But conversations take place at an abstract level and do not provide the technical knowledge needed to draft a contract or a lawsuit[9]. With regard to American transplants, the example of civil procedure reforms adopted in Brazil in the 2000s may be instructive. The reforms aimed at managing in a more efficient way the relationship between higher and lower courts. Even though they bear some resemblance to US doctrines, their goals and incentives are shaped by the Brazilian institutional context[10].

The second level where the transplant effects should be explored is the supranational one. The Italian and the Brazilian legal systems are embedded in regional and international regulatory systems. While the influence of national legal traditions and the influence of supranational regulatory systems are not mutually exclusive, their relative strength in driving legal change could be an important explanatory factor for recent developments. More specifically, two different supranational regulatory environments may displace or modify the influence of national legal traditions. The first regulatory environment is connected to projects of regional integration in Europe and Latin America. The second regulatory environment has to do with the participation of the two countries to international trade.

As far as regional integration is concerned, the last two decades have seen an increase of the breadth and number of initiatives in different parts of the world. Under some respects, the EU is the most advanced project. But it is not necessarily the benchmark against which other projects of regional integration should be assessed. The types of governance mechanisms chosen, or made possible, in the EU are not the only option for other regions. Studies of comparative regionalism in the political science literature show that there is no "global script" to be

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[9] See D. LÓPEZ-MEDINA, *The Latin American and Caribbean Legal Traditions*, in M. BUSSANI, U. MATTEI (eds.), *The Cambridge Companion to Comparative Law,* Cambridge, UK, 2013, p. 356.

[10] A. DE SANTA CRUZ OLIVEIRA, N. GAROUPA, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 *Emory Int. L. Rev.* 555 (2013).

used as a reference point. Each project of regional integration may choose to select different governance standards and different instruments to ensure compliance with those standards. Local conditions drive the choice and lead to divergent understandings of concepts like the rule of law and human rights[11]. The practical implication of such divergences is that each regional project may develop its own peculiar version of 'good governance'. The initiatives of regional integration will then be deemed legitimate if they aim at achieving that particular kind of governance.

Brazil is involved in all the most important regional integration projects for South America. Shaping and steering those projects became one of the main aims of Brazilian foreign policy in the last decades[12]. However, their impact on national legal systems cannot be assessed with the same approach adopted for the EU. Supranational institutions are lacking or have a limited reach. Moreover, the processes for adopting common rules entail a higher degree of discretion for the Member States than is usually the case in the EU[13]. This is not to say that regional integration has no actual impact at national level. It only means that to detect the 'Latin Americanization process' induced by regional integration may be methodologically harder than in the parallel research on the Europeanization process[14]. However, a thorough analysis of regional processes of rule-making and enforcement is worth trying for several reasons. Those processes may prove a fertile ground for experimenting with solutions that increase the external influence of the Latin American, and primarily Brazilian, legal systems. Several studies doc-

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[11] See T.A. BÖRZEL, S. STAPEL, *Mapping Governance Transfer by 12 Regional Organizations: A Global Script in Regional Colors*, in T.A. BÖRZEL, V. VAN HÜLLEN (eds.), *Governance Transfer by Regional Organizations*, Basingstoke, 2015, 22.

[12] See S. GRATIUS, M.G. SARAIVA, *Continental Regionalism: Brazil's Prominent Role in the Americas*, CEPS Working Document, No. 374, February 2013.

[13] See, with reference to Mercosur, J.S.K. AIMAR, *L'atteinte des objectifs communautaires au sein du Mercosur: un défi face à sa structure institutionnelle*, *Rev. dr. int. et dr. comparé*, 2014, 277.

[14] Examples of regional influence on national bureaucracies and the formation of policy networks are discussed by A.C. BIANCULLI, *Regionalism in Latin America: Old, New, Post or Overlapping?*, forthcoming in T.A. BÖRZEL, T. RISSE (eds.), *The Oxford Handbook of Comparative Regionalism*, Oxford, 2016.

ument the EU's attempt to use its external trade policy to export EU law. The final outcome of this export policy is highly context-dependent and regulatory convergence to EU standards can only be observed in some cases[15]. Though, by developing new visions and approaches to global issues, the regional projects in Latin America might try to perform a role similar to EU standards[16]. Furthermore, taking into account the multilevel nature of Latin American systems might be needed to assess the real impact of the European legal traditions in the area[17].

With regard to the regulatory environment of international trade, several studies have documented Brazil's ability to exploit loopholes in existing regimes, while at the same time pursuing its own goals of economic policy[18]. Though, Brazil had to adapt its legal system to allow its companies to fully integrate into the global economy. A case in point is the ratification in 2013 of the Uncitral Convention on the International Sale of Mobile Goods (CISG). At least for the simplest export-import

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[15] See, e.g., A.R. YOUNG, *The European Union as a Global Regulator? Context and Comparison*, 22 *J. Eur. Pub. Policy* 1233 (2015); M. CREMONA, *Expanding the Internal Market: An External Regulatory Policy for the EU?*, in B. VAN VOOREN ET AL. (eds.), *The Legal Dimension of Global Governance*, Oxford, 2013, p. 163; A. BRADFORD, *The Brussels Effect*, 107 *Nw. U. L. Rev.* 1 (2012).

[16] This seems already to be the case with reference to the South American vision of human rights developed in the Mercosur framework and opposed to the one proposed by the Organization of American States: see A.R. HOFFMANN, *At Last – Protection and Promotion of Human Rights by Mercosur*, in T.A. BÖRZEL, V. VAN HÜLLEN, cit., p. 192.

[17] According to F. DUINA, *Making Sense of the Legal and Judicial Architectures of Regional Trade Agreements Worldwide*, forthcoming *Reg. & Gov.* (2015), national legal traditions affect the design of regional agreements, with common law countries preferring a minimalist design and civil law countries preferring a more interventionist design. This argument assumes that legal families are good proxies of institutional influence, something I doubt. But this kind of studies shows why the relationship between the national and supranational levels is worth investigating.

[18] See, e.g., A. SANTOS, *Carving Out Policy Autonomy For Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 *Va. J. Int. L.* 551 (2012) (arguing that Brazil built up a legal capacity strategically aimed at influencing rule interpretation in WTO litigation); N.A. WELSH ET AL., *Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties*, 45 *Wash. U. J. L. & Pol'y* 105 (2014) (explaining how Brazil chose to protect foreign investors with internal legal tools while at the same time rejecting international arbitration).

transactions, the CISG is one of the legal tools most widely used in global trade. In some countries, the CISG has been the model for reforming the national rules on sales contracts. Moreover, the projects on a European contract law draw inspiration from the CISG. With the decision to ratify it, Brazil reduced the costs of access to foreign markets for national companies. However, to be really useful the CISG has to build a working relationship with national contract law. This means for traders to learn how to adapt their contractual relationships to the CISG framework, for judges to avoid interferences between the international and the national contractual regimes[19]. Of course, it cannot be excluded that Brazil's entry into the group of CISG countries leads to new interpretative approaches for some provisions of the CISG. But for this to happen, a much deeper integration of Brazilian companies into the global economy will be required.

The last observation points to the role that the mega-agreements on trade between regional blocs could play in the near future. Both the agreements that are of direct concern to South America and those that could be concluded between its most important commercial partners will imply some degree of regulatory convergence or coordination. The reference here is to the ongoing negotiations on an EU-Mercosur agreement, a Transatlantic Trade and Investment Partnership (TTIP) and a Trans-Pacific Partnership agreement (TPP). The future of each of these mega-agreements is still uncertain[20]. But all of them are going to

[19] For a discussion of the relationship between the CISG and Brazilian contract law see the contributions collected in I. SCHWENZER ET AL. (eds.), *A CISG e o Brasil*, São Paulo, 2015.

[20] The reasons that led to the stagnation of the negotiations on the EU-Mercosur agreement are discussed in P.L. KEGEL, M. AMAL, *Mercosur and its Current Relationship to the European Union*, Center for European Integration Studies, Rheinische Friedrich-Wilhelms-Universität Bonn, Discussion Paper no. 209, 2012. The new regional investment programs announced in the EU-CELAC summit of June 2015 (MEMO/15/5152) can be interpreted as an attempt to overcome the gridlock on the broader trade agreement. With regard to the TTIP, as of August 2015 the negotiations seem to be moving toward a positive conclusion. For an assessment of its regulatory implications see M. BARTL, E. FAHEY, *A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership*, in E. FAHEY, D. CURTIN (eds.), *A Transatlantic Community of Law*, Cambridge, UK, 2014, p. 210. The prospects for the TPP being

have a significant impact on Brazil's (and Italy's) trade relationships[21]. The mega-agreements imply that each regulatory choice made at national or regional level could be scrutinized for the impact it could have on international trade. Specific mechanisms could be put in place to ensure that regulatory choices are discussed at an early stage. It is easy to foresee an increasing pressure toward the adoption of legal rules and institutions thought to reduce the costs and risks borne by foreign investors. Such a pressure will not be confined to the parties to the agreements, but will be clearly felt on other regional blocs[22]. Therefore, the final outcome could well be a supranational level of international regulation much more constraining than the current WTO framework.

The foreseeable increase in the relevance of the supranational level of regulation does not mean that the traditional comparative analysis of the national legal traditions loses any relevance. But it does mean that any comparative analysis of the Brazilian and Italian legal systems has to deal with multiple external influences and use methodologies allowing to detect their real impact. Such an effort is most needed when the main purpose of the comparative analysis is to inform policymakers about the positive or negative effects of legal rules, or the business sector about the implications of legal differences for international trade. Some preliminary ideas on how to carry out such a comparative analysis are presented in the next section.

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concluded are more uncertain. On this agreement see B. MERCURIO, *The Trans-Pacific Partnership: Suddenly a 'Game Changer'*, *The World Economy*, 2014, 1558.

[21] An analysis of the positive and negative effects the TTIP could have for the Mercosur area is proposed by SELA, *Economic and Cooperation Relations Between the Latin America and the Caribbean and the European Union*, May 2015, available at *www.sela.org*. On the effects for Italy see PROMETEIA, *Stima degli impatti sull'economia italiana derivanti dall'accordo di libero scambio USA-UE*, June 2013, available at *www.sviluppoeconomico.gov.it*.

[22] Indeed, the EU is quite explicit in highlighting the benefits that the regulatory cooperation in the TTIP might have if its rules were to be extended to other countries: see EUROPEAN COMMISSION, *Detailed Explanation on the EU Proposal for a Chapter on Regulatory Cooperation*, 6 May 2015, available at *http://ec.europa.eu/trade/policy/in-focus/ttip/*.

3. Diagnosing institutional environments: the example of international commercial relationships

Both policymakers and the business sector usually look for comparative information that helps shed light on specific problems. This problem-oriented perspective calls for a diagnostic approach that, starting from the representation of the problem, identifies the role played by each component of the institutional environment and the interactions among them. Important examples of diagnostic approaches have been developed in the political science and economics literatures[23]. This section tries to describe the main steps of a comparative diagnostic approach, using the regulation of international commercial relationships in Brazil and Italy as an example. The goal is to show that this kind of analysis should be an integral part of the planning activities firms undertake before launching in international trade, as well as of the proposals made by policymakers who try to reduce barriers to trade.

The main steps of a comparative diagnostic approach can be summarized by means of a set of questions:

1) What kind of barriers to trade policymakers and firms in both legal systems do perceive? Where such perceptions come from?
2) Which institutional elements affect trade? What is the role of each element?
3) How do these institutional elements interact?
4) What is the relationship among different regulatory layers?

Let us consider each set of questions. Under 1) we find the questions related to the representation of the problem to be addressed. The comparative law literature has already pointed out that legal traditions are constantly "invented" and shaped by the selective use of ideas or insti-

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[23] See, e.g., M.D. MCGINNIS, E. OSTROM, *Social-Ecological System Framework: Initial Changes and Continuing Challenges*, *Ecology and Society* (2014), Special Feature on *A Framework for Analyzing, Comparing and Diagnosing Social-Ecological Systems* (in progress), available at *www.ecologyandsociety.org*; OECD, *Towards Green Growth*, Paris, 2011, p. 125-31. Additional references can be found in G. BELLANTUONO, *Comparative Legal Diagnostics*, Working Paper, July 2012, available at *www.ssrn.com*.

tutions. Therefore, representations, or legal 'frames', have a prescriptive force because they constrain the range of acceptable solutions[24]. The task here is to identify the dominant frame and the constraints it imposes. With regard to trading with and from Brazil, information about potential barriers can be collected from the guides drafted by the public authorities in charge of supporting and regulating export-import activities[25]. These guides can be considered at the same time a description of how the other legal system is perceived by an external observer and an attempt to make it understandable for those coming from one's own legal system. Putting together the descriptions on both sides should provide focused information on dominant frames and possible differences. The World Bank's Doing Business reports can also be used to confirm the relevance of information included in the guides[26]. Although the synthetic indicators used in those reports may overlook important contextual information, they can contribute to the identification of prevalent perceptions on barriers to trade. Testing the accuracy of those perceptions is a task to be undertaken in the next steps of the diagnostic approach.

Drawing on the above mentioned sources, the following barriers to trade can be identified:

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[24] With reference to Latin America see, e.g., G. MARINI, *La costruzione delle tradizioni giuridiche e il diritto latinoamericano*, *Riv. critica dir. privato*, 2008, p. 183 f.

[25] See, on the Brazilian side, MINISTÉRIO DAS RELAÇÕES EXTERIORES, *Como Exportar: União Europeia*, 2012 (*www.brasilexport.gov.br*); MINISTÉRIO DAS RELAÇÕES EXTERIORES, *Como Exportar: Itália*, 2014 (*www.brasilexport.gov.br*). On the EU side see MINISTERO DELLO SVILUPPO ECONOMICO, *Dossier Brasile*, 2012 (*http://www.sviluppoeconomico.gov.it/index.php/it/commercio-internazionale/osservatorio-commercio-internazionale/altre-pubblicazioni*); AMBASCIATA D'ITALIA BRASILIA, *Modello di sviluppo industriale del Sistema Italia in Brasile*, 3rd ed., June 2013 (*http://www.ambbrasilia.esteri.it/Ambasciata_Brasilia/*). Useful information can also be found in U.S. COMMERCIAL SERVICE, *Doing Business in Brazil: 2014 Country Commercial Guide for U.S. Companies*, available at *www.export.gov*.

[26] See WORLD BANK, *Doing Business 2015: Going Beyond Efficiency, Regional Profile 2015, Latin America*, 12th ed., Washington, 2014; WORLD BANK, *Doing Business in Italy 2013*, Washington, 2013.

a) On the Brazilian side:
explicit and implicit costs related to differences in the legal system and to the way the national rules are applied locally. Examples are: compulsory licenses for patents, weak enforcement of intellectual property rights, need for local subsidiaries or local partners, logistics problems due to the lack of infrastructures, licensing requirements in the utilities sector, compliance with environmental laws, complexity of the tax system.

b) On the Italian (or EU) side:
different legal regimes across the EU, different packaging requirements, complexity of the import tariffs and tax structures.

Depending on sectors and types of products, these barriers may or may not be relevant for businesses. For example, the reference to weak enforcement of intellectual property rights may simply reflect the stereotyped view about the ineffectiveness of Latin American formal law[27]. More generally, barriers to trade with and from Brazil can belong to two categories: those that are a direct consequence of commercial policies and those that depend on differences among legal systems. Both act as a constraint on trade relationships. However, their meaning is rather different. Deliberate commercial policies to block imports can be tackled with bilateral or regional trade agreements. The WTO dispute settlement mechanisms can be used as well. The latter option was chosen by the EU in 2014 to challenge Brazilian tax measures giving an unfair advantage to domestic producers[28]. Conversely, differences among legal systems are not necessarily to be understood as constraints on trade relationships. In many cases they could be exploited to plan strategies that would not be possible in the home countries of the exporters. This could be true of innovation strategies and commercial dis-

[27] See J.L. ESQUIROL, *Writing the Law of Latin America*, 40 *Geo. Wash. Int. L. Rev.* 693, 708 ff. (2009).

[28] See case WT/DS 472 – Brazil (information available at *http://trade.ec.europa.eu/wtodispute/search.cfm*). The WTO Dispute Settlement Body agreed to establish a panel in December 2014.

tribution strategies[29]. Therefore, a diagnostic approach suggests to identify those dominant frames that really constrain trade relationships. Given that the EU is Brazil's second commercial partner and the first source of foreign direct investments, there is no reason to believe that dominant frames on both sides are incompatible. However, differences between the respective institutional environments do exist. This means that firms wishing to enter into each other's markets will have to understand how to adapt to those environments.

Such an understanding can be provided by the next step in the diagnostic approach. Questions under 2) aim at identifying the role of each institutional element affecting trade relationships. An example of a specific issue helps discuss the kind of analysis required for this step. It is well known that over 90% of Brazilian and EU firms belong to the classes of micro, small and medium enterprises (MSMEs)[30]. One of the most pressing problems faced by MSMEs is to increase their presence on foreign markets. However, limited productivity, lack of human resources, low rate of innovation and exclusion from global value chains prevent them from reaping the benefits of internationalization. A diagnostic approach should identify the effects produced by each measure supporting MSMEs' internationalization plans. More specifically, such measures should be assessed from the point of view of the reduction of the costs of accessing markets, of getting relevant information, of participating to global value chains and of obtaining a fair share of profits. To pick up one example among many, Italy introduced in 2009 an in-

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[29] See G. JACKSON, R. DEEG, *Comparing Capitalisms: Understanding Institutional Diversity and Its Implications for International Business*, 39 *J. Int. Bus. Studies* 540 (2008).

[30] See ECLAC, *European Union and Latin America and the Caribbean: Investments for Growth, Social Inclusion and Environmental Sustainability*, January 2013, p. 100 (*www.eclac.org*). Note that definitions of MSMEs are different in Brazil and the EU. For the Brazilian definitions see the Brazilian Micro and Small Business Support Service (SEBRAE) (*www.sebrae.com.br*), the Brazilian Institute of Geography and Statistics (IBGE) (*www.ibge.gov.br*) and the Brazilian Development Bank (*www.bndes.gov.br*). For the EU definition see *http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition/index_en.htm*.

novative model of network contract[31]. With a lean governance structure, the network contract helps join together MSMEs which can develop projects they could not undertake individually. Besides strengthening their competitiveness in Italian markets, network contracts may represent the less costly way to participate to global value chains and enter foreign markets. A diagnostic approach should try to identify the institutional factors that foster or hamper the spread of international network contracts. The same kind of analysis should be carried out for all the other measures aimed at supporting MSMEs. Interestingly, a diagnostic approach could help understand when and how differences can be overcome and a "regulatory equivalence" be established among parties to a trade agreement[32].

The questions under 3) address the third step of the diagnostic approach. Once the main elements of the institutional environment have been identified, the theoretical challenge is to understand their interaction. More specifically, the goal is to identify complementarity relationships among the elements of the institutional environment. At the same time, the diagnostic approach should try to identify those conflicts that stem from divergent policies or pre-existing structures and legal provisions. Clearly, this kind of analysis requires methodological choices about the assessment of causal relationships between each institutional element and the outcome it produces. Several different theoretical frameworks could be usefully applied at this stage, including comparative law and economics and comparative institutional analysis. For instance, if the problem to be addressed is increasing Brazilian MSMEs' participation to global value chains, the diagnostic approach should

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[31] See the discussion of legal aspects in F. CAFAGGI ET AL. (eds.), *Il contratto di rete per la crescita delle imprese*, Milan, 2012. As of August 2015, more than 2000 network contracts, involving almost 12000 firms, have been concluded (*http://contrattidirete.registroimprese.it/reti/*). However, only 7 network contracts included foreign parties from 8 EU and non-EU countries (UNIONCAMERE, *I contratti di rete: rassegna dei principali risultati quantitativi*, update to 31.12.2014).

[32] For discussion of the meaning of regulatory equivalence in trade agreements see, e.g., P. CHASE, J. PELKMANS, *This time It's Different: Turbo-Charging Regulatory Cooperation in TTIP*, CEPS Special Report No. 110, June 2015; B. HOEKMAN, *Trade Agreement and International Regulatory Cooperation in a Supply Chain World*, EUI Working Paper RSCAS 2015/04, January 2015.

help establish whether changes in industrial policies, innovation policies and credit policies are needed and how they should be implemented[33].

The last step in the diagnostic approach refers to the analysis of relationships among different layers of regulation. As already highlighted in section two, recent developments in the Brazilian and the Italian legal systems are largely influenced by the supranational layer. A diagnostic approach should try to identify the respective role of each layer and the links among them. The goal is to understand whether the distribution of regulatory competences among different layers allows to exploit the resources available to each layer. For example, it was observed that mega-agreements on trade could greatly reduce the barriers to integration of MSMEs into global value chains[34]. This means that measures to support MSMEs at national level should be coordinated, and made compatible, with negotiations of trade agreements at supranational level.

While more demanding in terms of data collection, the value added of a comparative diagnostic approach lies in moving from the description to the explanation of differences. The main limit of the information currently made available in the export guides drafted by supporting institutions is that they list relevant information, but do not provide businesses with an understanding of the relative weight and impact of each institutional element. Once the meaning and constraining force of each element is clearly spelled out, it might become easier to design sounder and more effective policies and business plans.

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[33] On limited integration of Brazilian firms in global value chains see, e.g., ECLAC, *Latin American and the Caribbean in the World Economy: Regional Integration and Value Chains in a Challenging External Environment*, October 2014, p. 55 ff. (*www.eclac.org*); O. CANUTO ET AL., *The Curious Case of Brazil's Closedness to Trade*, World Bank Policy Research Working Paper 7228, April 2015; EU-LAC FOUNDATION, *Reinforcing Production Cooperation and Dialogue Spaces: The Role of SMEs*, 2015 (*http://eulacfoundation.org/en*).

[34] See, e.g., A. GIOVANNINI, U. MARENGO, *Boosting TTIP Negotiations: A Value Chain Approach*, Istituto Affari Internazionali, Working Paper 15/18, May 2015; B. HOEKMAN, cit., p. 6 ff.

4. Conclusions

This chapter has argued that the main challenge in understanding the relationship between the Brazilian and the Italian legal systems lies in the exploration of the complex dynamics affecting their evolution. Social, economic and cultural links between the two countries are just a starting point, but cannot replace in-depth analysis of convergences and divergences, as well as of their reasons and consequences. For such task, it has been proposed to use a comparative diagnostic approach. It is just one among many possible analytic tools. Several different methodological perspectives in different branches of law are presented by the contributions collected in this volume. They shed light on the ideas, theories and institutions being debated on the two sides of the Atlantic. Much work still lies ahead, but an enhanced scientific cooperation between Brazilian and Italian universities and the creation of a common Transatlantic space for higher education seem the only ways to transform such challenges in an exciting and fruitful journey.

LEGAL REASONING
AND THE BRAZILIAN SUPREME COURT

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TABLE OF CONTENTS: *1. Introduction - 2. Concept and application of the so-called insignificance principle - 3. Analysis of the STF's argumentation - 4. Conclusion.*

1. Introduction

In recent times, constitutional review has been playing an important role in many Latin American countries. In Brazil, after the promulgation of the new constitution in 1988, the Supreme Court, the Brazilian *Supremo Tribunal Federal* (from now on termed *Brazilian Supreme Court* or STF), has increasingly widened its role by progressively acting in areas it would not act before. If, on the one hand, many legal theorists see this wider role of the Supreme Court as an undesired "judicial activism", on the other hand, those wishing for greater protection of fundamental rights have generally approved of it. In this paper, I want to argue that the problem of the so-called "judicial activism" is not only the fact that the Supreme Court has been expanding its role, that is to say, it is not only a matter of increasing its legal competencies, but rather a lack of rational justification of its decisions. In order to show this, I will present an issue in which the Court has gone beyond the text of the constitution and created a principle that should restrict the application of penal law in some cases: those of the so-called "insignificance principle". Following upon this short (i) introduction, I will present (ii) the way the Brazilian Supreme Court has been conceiving of and applying the insignificance principle. After which, I will verify whether

(iii) the conception and application of this principle are rationally grounded before finally, as a (iv) conclusion, I present suggestions for improving the rational justification of the decisions taken by the STF.

The approach I am taking is not from the standpoint of strict legal science, especially from its part that deals with penal law, but rather from the standpoint of legal theory, specifically from a theory of legal argumentation[1]. Thus, my aim in this essay is neither to solve the scientific problems in the branch of penal law related to insignificant offenses nor to critically discuss a theory of legal argumentation, but rather, departing from the later, criticize *some* arguments developed by the former, namely, those used by the STF in its application of the insignificance principle.

2. Concept and application of the so-called insignificance principle

How does the STF conceive of the insignificance principle (a) and in which cases has this court applied it (b)? An analysis of the STF's decisions will provide an answer to these questions.

a. Concept of the so-called insignificance principle

According to the STF, the concept of the insignificance principle is connected to the idea that, as in civil law, penal law should not handle cases in which the "value" of the "legal good" is very low: *de minimis, non curat praetor*[2]. Intervention through penal law has to be minimal so

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[1] See Alexy's *Theory of Legal Argumentation*, which, as is well known, conceives of legal argumentation as a special case of general practical argumentation (R. ALEXY, *Theorie der juristischen Argumentation – Die Theorie des rationale Diskurses als Theorie der juristischen Begründung*, Frankfurt a. M., 1991, 261-272). In this work, Alexy presents some rules that should be observed in legal argumentation, which will be of use here (see R. ALEXY, *op. cit.*, 273-348).

[2] HC 84.687-4, 26/10/2004, Judge Celso de Mello; HC 94.809-0, 12/08/2008, Judge Celso de Mello. The reference to STF's decisions will be quoted in the following way: the initials of the action type – HC for *Habeas Corpus* and RE for *Recurso Especial*, that is, Special Appeal, followed by the process' number, the date the decision has been taken and the judge who formulated the opinion. The translations of STF's decisions are mine.

that it does not rule on questions that can be solved by other branches of law, such as civil law, administrative law, etc. Penal law should have a "subsidiary character", that is to say, it should be the *ultima ratio*, being used only when other branches of law fail. The majority of the STF's judges say that one should consider not only the formal elements of the crime, but also its material elements: when there is no proportion between the illegal fact and a minimal damage to a penal legal good, the elements of the crime are not present. An analysis of different STF's decisions in which the mentioned principle appears shows that different judges use expressions such as "insignificant damage", "minimal damage", "minor damage" etc.

The first thing one should note is that the STF's aforementioned arguments are unclear and mixed. But I will reserve criticism of that for later. Now I will introduce the criteria the STF offers to characterize a damage as insignificant. Some of the STF's judges have recently pointed out four criteria, supposedly more specific than the general idea of "insignificant damage". These criteria, which were presented by Judge Celso de Mello, are: (1) the action has to be only minimally offensive; (2) the action has to present no social danger; (3) the agent's behaviour has to be reproachable only to a very minor degree and (4) the juridical damage has to be irrelevant[3]. I will name these four criteria, respectively (1) the offense criterion, (2) the social danger criterion, (3) the reproach criterion and (4) the damage criterion.

The majority of the STF's judges believe that if the damage is insignificant, that is, if the four aforementioned criteria are present, "according to the material elements of the crime criterion (not only formal elements), the facts and the behaviour recognized as insignificant are excluded, for in such cases the insignificance principle is applicable. The material elements of the crime criterion must take into consideration the importance of the legal good which is damaged in the concrete case"[4]. Although the STF's judges do not explain more precisely what this means, we can assume the following: the formal elements of the crime

[3] See HC 84.412-0, 19/10/2004, Judge Celso de Mello; see also HC 96.496-6, 02/10/2009, Judge Eros Grau; HC 92.531-6, 10/06/2008, Judge Ellen Gracie; HC 99.610-8, 08/09/2009, Judge Cezar Peluso.

[4] HC 92.531-6, 10/06/2008, Judge Ellen Gracie.

mean the subsumption of the fact under the norm. For example: Article 155 of the Brazilian Penal Code foresees a prison punishment of 1 to 4 years for somebody who "takes, for himself or for another, one's movable good". The formal elements of the crime would mean then that if somebody takes one's movable good, no matter how valuable it is, she would have to be sent to prison for 1 to 4 years. Now, the material elements of the crime would mean taking a look at how reproachable the action is and, if it is not, because there is no significant damage to the legal good, it should not be considered a crime[5]. Furthermore, the criteria for knowing whether there is a significant damage to the legal good would be the four aforementioned criteria, namely, (1) the offense criterion, (2) the social danger criterion, (3) the reproach criterion and (4) the damage criterion.

Before I move on to my second question (the cases concerning the application of the insignificance principle), it is important to stress two points which systematically appear in the STF's decisions: (1) in the first place, most of the judges affirm that one has to verify not only the economic value of the good (for example, in the cases of theft or attempted theft, the value of the stolen good or of the good that was to be stolen)[6]. (2) In the second place, they emphasize the necessity of casuistry in order to determine what an insignificant damage is, avoiding the use of abstract criterion[7]. Whether these two guidelines are in fact adopted will be verified later in this paper. For now, I will address the second question.

b. Cases of application of the so-called insignificance principle

The insignificance principle has been applied in different cases: injury, counterfeiting, embezzlement etc. Yet, the cases in which its application has been more widely observed are theft, tax crimes and possession of drugs by active members of the military for personal use.

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[5] See HC 84.412-0, 19/10/2004, Judge Celso de Mello.

[6] See HC 92.531-6, 10/06/2008, Judge Ellen Gracie and HC 97.036-2, 31/03/2009, Judge Cezar Peluso.

[7] See HC 97.189-0, 09/06/2009, Judge Ellen Gracie; HC 94.770-1, 23/09/2008, Judge Joaquim Barbosa; HC 95.445-6, 02/12/2008, Judge Eros Grau.

Indeed, the cases of theft in which the good has "little value" seem to be those in which the STF most often applies the insignificance principle[8]. Yet, recently, the application of this principle has been extended to tax crimes of low nominal value[9], for, according to the majority of the STF's judges, the fact that Article 20 of Statute 10.522/2002 (changed by Statute 11.033/2004) foresees that tax foreclosures of debts which have a value inferior to 10.000 reais (approximately $3,000 US dollars)[10] also justifies the recognition that the elements of the crime (in this case, withholding) are not present. Thus, acquittal in the penal branch would be justified. The STF has also extended the application of the insignificance principle to cases concerning the possession of small amounts of drugs for personal use by active members of the military[11], despite there being contrary precedents.

Thus, although there are other instances of the application of the insignificance principle, those concerning theft, tax crimes and possession of drugs for personal use by active members of the have been the cases in which the STF has been applying this principle more widely. Now I can move to a critical analysis of the STF's arguments.

3. Analysis of the STF's argumentation

As we have seen above, the STF has been grounding the insignificance principle on the idea that penal law should not handle what is of very little value, that is to say, when the damage to the "legal good" is minimal, the facts should be considered to not fit the elements of the crime.

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[8] See, for example, HC 96.496-6, 10/02/2009, Judge Eros Grau; HC 92.531-6, 10/06/2008, Judge Ellen Gracie; HC 92.988-5, 10/06/2008, Judge Ellen Gracie.

[9] See, for example, HC 96.976-3, 10/03/2009, Judge Cezar Peluso and RE 514.531, 21/10/2008, Judge Joaquim Barbosa.

[10] Later this value has been increased to 20.000 reais. I will use the values that were valid at the time of the decisions quoted in this essay, namely, 10.000 reais.

[11] See, for example HC 94.583-0, 24/06/2008, Judge Ellen Gracie; HC 94.524-4, 24/06/2008, Judge Eros Grau.

I now intend to analyse this idea from a double point of view: I would like to see (1) to what extent the STF's criteria can really determine what an insignificant damage is and (2) what is the justification for not punishing an action when the damage is insignificant. The first approach deals with the efficiency of the criteria, while the second concerns the correction of the adoption of the insignificance principle.

a. The efficiency of the criteria

At first glance, it seems evident that the insignificance principle is too general. Saying that the "judge should not handle what is insignificant" is at the very least insufficient, for, in order to be able to decide in a specific case whether the judge must punish or not, one needs additional criteria to determine what insignificance means. Is stealing a chewing gum box insignificant? What about a motorcycle, a brand new car or a very old valueless car that has sentimental value for its owner? Does the "significance" depend on the victim, on the offender or on society? A bicycle that costs 200 US dollars means little to a millionaire but can mean a lot to persons who rely on it as their sole means of transportation.

The STF has been considering the non-payment of one's taxes insignificant enough to justify the non-application of penal law, when the value is lower than 10.000 reais. However, the STF considers stealing a good that is worth 9.000 reais not insignificant. Why?

As we have seen, in order to try to solve the problem of the conceptual abstractness of the insignificance principle, the STF has tried to establish supposedly more specific criteria, namely (1) the offense criterion, (2) the social danger criterion, (3) the reproach criterion and (4) the damage criterion.

But if we take a closer look, these criteria are not really four different criteria; they are merely the general idea of insignificance reformulated!

To say that (1) the action has to be only minimally offensive means that (4) the legal damage has to be irrelevant, for the action offends the legal order in a minimal way when the damage is irrelevant and vice-versa. In addition, when (1) the offense is minimal and (4) the damage

is irrelevant, one could say that (2) the action is not dangerous. Now, an action that (4) does not damage, (1) does not offend and (2) is not socially dangerous (3) is not socially reproachable. Thus, STF's attempt to establish more specific criteria than the general idea of insignificance has failed.

Despite this, even if these criteria had a differentiation potential, the individualization of their application would be missing. Judge Ellen Gracie has been pointing out two different important things: (1) as noted above, the application of the insignificance principle cannot be made only by the application of an abstract criterion to a concrete case, that is, one has to look carefully at all specific factual elements of the situation. (2) Secondly, according to her and as noted above, the application of the insignificance principle cannot be limited to the analysis of the economical value of the good. However, in most of the cases, Judge Ellen Gracie and her colleagues have not been able to escape the double trap of the abstract-economical criterion. Indeed, the STF has not been practicing the individualization intended by Judge Ellen Gracie. Most of the time, the judges limit themselves to saying that "in this case the damage is insignificant". An analysis of some STF decisions will confirm this. In the following, I will analyse some of the STF's decisions regarding (a.i) theft, (a.ii) tax crimes and (a.iii) possession of small amounts of drugs for personal use by active duty military.

i. Theft

In the decision of *Habeas Corpus* 92.531-1, after saying that one should not ground the application of the insignificance principle only on the small economic value of the good, Judge Ellen Gracie justifies the application of the principle by saying that the stolen value was very low (80 reais, approximately 25 US dollars), as well as by pointing out that the victim did not remember exactly how much money she had in her wallet (the victim could not recall whether she had 8, 10 or 80 reais)[12]. Now, in the decision of another *Habeas Corpus*, in which the theft of around 40 reais from the cash of a snack bar was analysed, the same Judge Ellen Gracie, again after saying that one should not ground

[12] HC 92.531-1, 10/06/2008, Judge Ellen Gracie.

the application of the insignificance principle only in the low economic value of the good, justifies the non-application of the insignificance principle by saying that, although the stolen value was low (approximately 40 reais), "it was the result of an entire day's work"[13].

Let us compare these two decisions. The justification of the application of the insignificance principle was, in the first decision, the fact that the value was insignificant. The main reason the value was considered insignificant was that it was so little that the victim could not remember exactly how much money she had in her wallet. Now, this reasoning is at least problematic: if someone asks another how much money she has in her wallet at a certain moment, maybe she honestly cannot tell. But that does not mean she doesn't have a lot (or a little); it only means that she doesn't know! Now, in the case of the wallet's theft decided by the STF, the fact that the victim does not know how much was taken does not mean that the value was insignificant to her. The victim might not remember exactly how much money she had in her wallet (8, 10 or 80 reais), but maybe the value she had was the value she receives as payment for a day's work, as in the case of the second decision. One can easily see that the STF used two different criteria: in the first decision, 8 to 80 reais was considered an insignificant amount because the victim did not remember exactly how much money she had in her wallet, while, in the second decision, 40 reais was considered a significant amount because it was the result of a day's work. Thus, the STF treats similar cases differently without saying why. Let us imagine a final hypothetical situation: let us suppose that one steals from a snack bar and that the money stolen was the result of a day's work. But, let us imagine that the cashier does not know exactly how much was stolen. What would the STF decide in such a case? Will this value be considered insignificant because the victim does not know how much was stolen or will it be considered significant because the stolen value was the result of a day's work?

[13] HC 96.813-9, 31/03/2009, Judge Ellen Gracie.

ii. Tax crimes

When one does not pay the taxes she should, if the value is lower than 10.000 reais, the STF has been considering that the damage is insignificant and thus a crime was not committed. The STF's reasoning is the following: Article 20 of Statute 10.522/2002, modified by Statute 11.033/2004, foresees that when one's tax debts are less than 10.000 reais, the National Finance Prosecutor should require the non-continuation of the tax foreclosure procedure. According to the STF, this justifies also the non-punishment in penal branch.

The STF states that if the law determines that a value of up to 10.000 reais is insignificant for administrative matters, then the action cannot be considered a crime[14]. This seems, at first glance, to be a good argument: if an action is not justiciable in the province of administrative or fiscal law, it shouldn't be punishable in the province of penal law, which, according to the STF, is ruled by principles such as "the necessity and the minimal intervention principles". This would mean that penal law is "subsidiary and fragmentary". Indeed, it seems correct to say "one cannot admit that an action is administratively irrelevant and, at the same time, is considered criminally relevant and punishable"[15]. Yet, a closer look at this argument shows its weaknesses. The application of the insignificance principle in the cases of tax crimes is grounded on problematic premises. First, the reasoning assumes that when the law determines that debts lower than 10.000 reais should not be judicially foreclosed the law is saying that they are administratively insignificant. Second, even if the first premise were true, an additional premise has to be presupposed: the premise that determines that if one thing is administratively irrelevant then this thing is also, in general or at least in the branch of penal law, irrelevant. Nevertheless, both premises should be grounded, which the STF does not do. There is not only no grounding of the first premise, but also a logical step missing in the passage to the second premise. One could argue, for instance, that the justification for the non-foreclosure of debts that are less than 10.000 reais is utilitarian. It is widely known in Brazil that the Public Treasury

[14] See HC 96.976-3, 10/03/2009, Judge Cezar Peluso.

[15] HC 92.438-7, 19/12/2008, Judge Joaquim Barbosa.

charges very high taxes, taxes that should be paid by a large number of taxpayers. Taking into consideration the number of persons that do not pay their taxes, the amount of these debts, and especially the administrative structure of the tax prosecutions' office, one could say that the treasury does not have the means to carry out the tax foreclosure of all the credits it has. If this is true, then the treasury has to adopt a criterion for choosing which foreclosures will be carried out. Moreover, it seems reasonable that this criterion be the amount of the debt, for, for example, in deciding between those who owe 5.000 reais and those who owe 500.000 reais, it seems more reasonable to carry out the foreclosure of those who owe 500.000 reais. In addition, in order that the decision of who is going to be processed does not rely on subjective criteria, it is reasonable that a pre-established legal criterion is determined. Thus, the reason of the non-foreclosure of tax-debts lower than 10.000 reais is its economical unviability.

Now, the fact that a utilitarian criterion is admitted in tax or administrative law does not necessarily mean it should also be used in penal law. That seems to be an important point the STF has not been paying attention to. According to the STF, how reproachable an action is according to penal law should not be measured only by economic criterion. Moreover, it should almost never be measured by such economic criterion. In some cases, this is obvious: nobody would suggest that the how reproachable a murder is depends on how wealthy the victim was or on how great the economic damage the murder caused.

One could say that the economic criterion plays an important role for crimes such as theft and tax crimes. But this is not evident. The passage of the application of an economic-utilitarian criterion used in administrative and tax law to penal law cases demands a justification that, unfortunately, the STF has not been providing. I will further analyse the economic criterion later in this paper. For now, I shall say that the absence of this justification generates inconsistency that one can see when comparing the application of the insignificance principle to cases of theft to its application in cases of tax crimes: the STF did not apply the insignificance principle to the attempted theft of a laptop, which belonged to the National Treasury, for, according to the STF "not only is the action relevant from the standpoint of penal law but also the *res*

furtiva, a laptop, which belonged to the National Treasury, has an economically expressive value"[16]. But, as we have seen above, if one does not pay her taxes when the value is lower than 10.000 reais, this credit, which also belongs to the National Treasury, has been considered insignificant, and the STF considers that no crime was committed. Now, a laptop costs much less than 10.000 reais; thus STF's decisions have been inconsistent. Another example reinforces the inconsistency thesis: in cases of administrative dishonesty, the STF has made decisions arguing that, even when the values are small, since the public servant has the duty to guard and protect public goods[17], and also considering that the law protects not only public goods but also "administrative morality"[18], the insignificance principle is not applicable. But doesn't the taxpayer have the duty to pay her taxes the same way the public servant has the duty to guard public goods? If, on the one hand, the non-application of the insignificance principle in this case seems to be a step in the direction of the individualization of its application, on the other hand, it seems inconsistent with its application to "minor" tax crimes.

iii. Drug possession by members of the military for personal use, when on duty

As we have seen, the STF has been extending the idea that "when the damage is insignificant there is no crime" to cases of drug possession for personal use by active duty military. Here it seems that there has been a change in the STF's position: a few years ago it did not accept the application of the insignificance principle in such cases[19], but now it does. The argument that the STF now uses to defend its application is the following: the Statute 11.343/2006 does not allow for the detention of a drug user; this statute differentiates between the drug user and the drug dealer, foreseeing the restriction of freedom only for the later[20]. Thus, although the Military Penal Code foresees the use of drugs by active duty military as a crime, the STF states that one cannot

[16] HC 98.159-3, 23/06/2009, Judge Ricardo Lewandowski.

[17] HC 88.941-7, 19/08/2008, Judge Marco Aurélio.

[18] HC 85.184-3, 15/03/2005, Judge Marco Aurélio.

[19] See, for instance, HC 91.759-3, 09/10/2007, Judge Menezes Direito.

[20] See HC 94.524-4, 24/06/2008, Judge Eros Grau.

apply "the specialization principle" here (that is, the principle that demands that special law prevails over general law – in this case, that specific military penal law should prevail over general penal law).

The majority of STF's judges have defended the application of the insignificance principle to such cases by repeating what has already been said for other crimes: the application of penal law is secondary and minimal and, in cases in which the value is insignificant, the material elements of the crime are not present, that is to say, there is no crime when the four aforementioned criteria are not present.

Again, a discussion about the matter is missing. But fortunately there is an exception: an attempt to further debate the application of the insignificance principle in cases of drug possession for personal use by active duty military personnel has been made by Judge Ellen Gracie. In the *Habeas Corpus* 94.524-4, she pointed out that "damages that are insignificant for general penal law are not necessarily insignificant for military penal law, due to the necessity of preservation of military discipline and hierarchy"[21].

She cites interesting arguments from legal science[22]: the action of the military member who possesses drugs for personal use cannot be seen only from the perspective of her individuality; also, and above all, it has to be considered from the perspective of the common interests of the citizens. Would we sleep tranquilly if we knew our soldiers, who possess lethal weapons, also possess drugs for personal use? According to Judge Ellen Gracie, Article 290 of the Military Penal Code "protects not only the military member's own health, but also the working regularity of the Military Institutions"; thus, according to her, in such cases, the principle of insignificance should not be applied[23].

In my view, the cases of possession of a small amount of drugs for personal use by military personnel have nothing to do with the insignificance principle, especially *the* principle that the STF applies to theft and tax crimes. According to the insignificance principle, actions from

[21] HC 94.524-4, 25/06/2008, Judge Eros Grau. Split verdict, which did not prevail, was presented by Judge Ellen Gracie.

[22] In this specific case, by Ricardo Vergueiro Figueiredo.

[23] HC 94.524-4, 25/06/2008, Judge Eros Grau. Split verdict, which did not prevail, was presented by Judge Ellen Gracie.

which a very minor damage results should not be punished. Although the STF insists in denying it, the criteria that have been used by the STF for defining a minor damage are, most of the time, economical (I shall come back to this point). Now, regarding the possession of a small amount of drugs by military personnel, what is to be considered is whether one applies the general rule (drug users should not be punished with imprisonment, only drug dealers should) or the specific rule (military service personnel who use drugs while on duty commit a crime). The question is whether both cases, that is, possession of small amounts of drugs for personal use in general and possession of small amounts of drugs for personal use by military personnel on duty, are similar enough to justify equal treatment, or whether the case of the military personnel has specific features that justify treating it in a different way. That a drug user must be treated in a different way than the drug dealer is already foreseen by the legislation (see Statute 11.343/2006). In this way, the legislation already states that possessing drugs for personal use in general is insignificant according to penal law. The question is whether the two cases are similar enough to justify that a member of the military also should not be punished or different enough to justify that she has to be punished. If one wants to talk about "insignificance" here, one should handle the question whether the cases are "significantly" the same or if the differences between them are "insignificant", that is to say, one should question whether the rules that oversee the non-punishment of a non-military drug user could also be applied to the military member that uses drugs on duty.

Judge Eros Grau excluded the application of the "specialization principle" by saying that one has to consider the "human dignity principle", which is found in the Brazilian constitution[24]. But this argument is problematic. It does not present a concept of human dignity; more than that, it does not indicate that punishing a military member that used drugs on duty violates her dignity. Now, even if it did show what dignity in this context means, and moreover, even if it showed that dignity demanded not punishing the military member in such a case, there would still be the necessity of balancing the human dignity principle

[24] Constitution of the Federative Republic of Brazil, 1, III.

with the formal principle that demands that we obey the rules coming from the democratic legislator[25]. By not doing that, Judge Eros Grau seems to think that the principle of human dignity has an absolute character. But this is also problematic[26].

Thus, the analysis of the STF's decisions shows that the criteria used by the court are insufficient and sometimes incoherent. The criteria contradict themselves, violating a basic rule not only of legal argumentation, but also of any practical argumentation[27]. As already shown above, the STF treats similar cases differently and different cases similarly without any grounding. The theft cases aforementioned are an example of that. As Alexy states, in practical argumentation there is a valid rule that states that who treats two persons that are in a similar situation differently is obliged to justify this different treatment[28]. Now, the STF does not do that. Indeed, STF judges quote a precedent, without paying attention that, regarding precedents, what is important is checking how relevant are the differences between cases[29]. While a coherent effective criterion is not found, the STF's decisions seem to be too subjective and arbitrary. This subjectivity violates the necessity of rationally grounding legal decisions, which is not only necessary from the standpoint of a theory of legal argumentation, but is also commanded by the Brazilian constitution[30].

But let us suppose, only in order to continue our discussion, that it is possible to present a concept of "insignificant damage", that is to say, let us assume that the aforementioned criteria or other criteria can in fact differentiate a significant damage from an insignificant one. It is still necessary to ground the insignificance principle, to show why in-

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[25] R. ALEXY, *Theorie der Grundrechte*, Frankfurt a. M., 1994, 120.

[26] R. ALEXY, *op. cit.*, 94-97.

[27] See R. ALEXY, *Theorie der juristischen Argumentation – Die Theorie des rationale Diskurses als Theorie der juristischen Begründung*, cit., 234.

[28] "wer eine Person A anders als eine Person B behandeln will, ist verpflichtet, dies zu begründen" (R. ALEXY, *op. cit.*, 243).

[29] "das eigentliche Problem verlagert sich damit auf die Feststellung der Relevanz von Unterschieden" (R. ALEXY, *op. cit.*, 336).

[30] Constitution of the Federative Republic of Brazil, 93, IX.

significant damages should not be punished. In the following, I will analyse the way the STF has been doing that.

b. How can the insignificance principle be grounded?

When such a question is asked, a group of normative reasons are expected as a reply. It is expected that one will present a group of reasons that justify why insignificant damages ought not to be punished. But what has the STF been saying about such justification?

STF judges have limited themselves to repeating what Judge Celso de Mello said. According to him, "the legal system has to consider that (…) hindering one's freedom and rights is justifiable only when it is necessary for the protection of persons, of society and of other legal goods that are essential to them"[31]. Quoting arguments from legal science[32], Celso de Mello recognizes that the insignificance principle is not stated in positive law, but he understands that, "considering the principle of minimal intervention through penal law (which is addressed to the legislator) and the 'postulate' of insignificance (which is addressed to the judge), penal law should not handle actions that produce a result that does not represent an important damage"[33]. But Celso de Mello does not mention where the supposed principle and the supposed postulate come from.

Here, it is very interesting to note two things. (1) First, Celso de Mello grounds the insignificance principle both on the minimal intervention principle and on the insignificance postulate. Now, on the one hand, as we have just seen, according to Mello himself, the first is directed to the legislator; thus we can conclude it cannot ground the insignificance principle, which is addressed to the judge. If Mello wanted to derive the insignificance principle from the minimal intervention principle, he would have to do two things, which he does not: he would have to ground the minimal intervention principle, that is to say, he would have to say why intervention by the legislator has to be minimal, and he would have to show that the minimal intervention by the legisla-

[31] HC 84.412-0, 19/10/2004, Judge Celso de Mello.

[32] Namely, Edilson Mougenot Bonfim's and Fernando Capez's.

[33] HC 84.412-0, 19/10/2004, Judge Celso de Mello.

tor leads to an insignificance principle, addressed to the judge. On the other hand, a supposed insignificance postulate cannot ground the insignificance principle, for we would then have a vicious circle: the groundwork of the insignificance principle, or the principle that demands that actions that lead to insignificant damages should not be punished, would then be the insignificance "postulate", i.e. the "postulate" that demands that actions that lead to insignificant damages should not be punished! (2) Second, when grounding the insignificance principle, no mention of a constitutional norm or of another legal norm is made. Indeed, Celso de Mello and the STF judges in general cannot appeal to the constitution here, for one can find in it neither a direct mention to the insignificance principle nor the adoption of a more general idea from which the insignificance principle could be derived. As Alexy states, in order to justify a decision, at least one universal norm must be cited[34]. By not doing that, by not basing the decisions on at least one universal legal norm, STF compromises the rational justification of its decisions.

In saying this, I don't mean that the interpretation of a constitution has to be literal. Since the 19th century, it has been evident that, in interpreting legal texts, any legal interpretation is not limited to the literal meaning of the sentences found therein.

Thus, I do not intend that, in order to affirm its validity, one must find direct mention of the insignificance principle in the text of the constitution. But it is necessary to present arguments that justify its coherence with the constitutional system, that is, arguments that justify that it is coherent to interpret the constitution in a way that leads to such an insignificance principle. The STF could try to use, for instance, a genetic interpretation[35], by trying to demonstrate that the insignificance principle is a means to achieving a criminal policy established by the constitutional legislator. It could also use arguments from legal science appropriately, by quoting the arguments in favour of the insignificance principle and trying to show that the majority of legal scientists accept

[34] "zur Begründung eines juristischen Urteils muss mindestens eine universelle Norm angeführt werden" (R. ALEXY, *op. cit.*, 275).

[35] See R. ALEXY, *op. cit.*, 291.

them[36]. Only in such a way can an insignificance principle be considered as belonging to the legal system. General ungrounded affirmations such as "law should not handle what is insignificant", "penal law has to be minimal" and "penal law has a subsidiary character" do not fulfil this task. More than that, they seem to be subjective standpoints that the judges project on the constitution, making the constitution, as Tribe and Dorf state, a mirror for the readers' ideas and ideals[37].

Thus, it seems to me that the justification of the insignificance principle has not yet been provided.

4. Conclusion

If I am right, although the STF has been systematically applying the insignificance principle, the court has not been able to present a well-defined concept of insignificance; in other words, it has not presented criteria that are able to differentiate between insignificant and significant damages. Besides this, the court has also not been able to justify this principle, that is, it has not presented reasons demonstrating that it is a valid principle within the Brazilian legal system. But how could that be done?

The first thing would be clearly presenting the scientific arguments that ground the insignificance principle. As we have seen, the courts, and especially the STF, justify this principle in a very unclear way. They mix different ideas and theories, so that it is not possible to clearly identify their justification. From an analysis of what the STF says we can try to organize the following reasoning it is trying to express:

(1) according to the principles of contemporary penal law, penal law has a subsidiary character, in other words, intervention through penal law has to be minimal (it is the *ultima ratio*). The old Roman proverb *de minimis, non curat praetor* already pointed in this direction;

(2) therefore, penal law should punish only what is significant;

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[36] R. ALEXY, *op. cit.*, 317.

[37] M. C. DORF, L. H. TRIBE, *On Reading the Constitution*, Cambridge, Mass., 1991.

(3) the damage is insignificant when it damages no legal good, or when the damage is minimal;
(4) the criteria for knowing whether the damage exists or not, whether it is insignificant or not, are the offense criterion, the social danger criterion, the reproach criterion and the damage criterion;
(5) when no damage exists or it is minimal, according to the material elements of the crime criterion, no crime was committed.

When we organize the STF's unclear arguments we can see that, besides not quoting its sources, worst of all, it does not ground its premises. In (1) and (2), the STF is defending a subsidiary penal law. The STF says that, on the one hand, as in civil law, penal law should handle only actions that are "significant". This means that both civil and penal law should not handle what is insignificant and thus have the same extension and regulate the same issues. Yet, on the other hand, the STF states that penal law should only be used when other branches of law fail[38]. This means that penal law is not as wide as civil law. Thus it is not clear whether, according to the STF, both the other branches of law and penal law should not handle what is insignificant or whether the other branches of law should handle more than penal law (including what is insignificant).

In (3), (4) and (5), the STF supports the idea that insignificant actions should not be punished by arguing that, in such cases, there is no damage to any legal good (3), that these actions are not offensive, dangerous, reproachable or damaging (4), and that when one considers the (5) "material elements of the crime criterion" they are not punishable. Now, the STF neither explains nor grounds this argumentation, nor does it provide a clear concept of the "material elements of the crime", failing to express why it is the most adequate, nor showing that in such cases there is no damage to any legal good. The STF should open up the subject to debate, deepen the discussion, make its points clear and ground its argumentation. Regarding (1), (2) and (3), as I have already shown, the STF does not ground the premises it applies and, regarding

[38] An example of a mix of different theories can be seen in HC 94.809-0, 12/08/09, Judge Celso de Mello.

(4), as I have also shown, the four criteria the STF presents do not really differentiate significant damages from insignificant ones.

In my view, both the definition and the justification of the insignificance principle should be preceded by a discussion about the nature of punishment itself. In the following, I will provide some simple arguments and distinctions that should be present in such discussion.

A discussion about the concept and the function of punishment needs to distinguish between effectiveness and the legitimacy of the punishment. By effectiveness, I understand the characteristic of penal law in achieving the end for which it is conceived. By legitimacy, I understand fairly punishing an action. This differentiation somehow excludes a conception of punishment that is merely retributivist, although it does not exclude a mixed theory, for if effectiveness means that punishment should lead to an end, it is because punishment has an end besides punishment itself.

Kant stated that the crime should be punished because it is fair to punish it, not because it is useful to punish somebody[39]. The human being, even the criminal, cannot be treated as a mere means[40]. If, on the one hand, one can find general prevention aspects in Kant's work[41], on the other hand, it is difficult to deny that Kant's theory of punishment has a strong retributivist aspect[42]. I will not discuss here whether Kant's theory of punishment should be interpreted as a retributivist or a mixed theory. For my purpose, it is enough to say that, although retributivism can still work as a theory of punishment, the consideration of effectiveness presupposes that punishment is something more than retribution: it means that the punishment's function is to prevent the criminal or other

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[39] I. KANT, *1. Teil: Metaphysische Anfangsgründe der Rechtslehre. Die Metaphysik der Sitten*, *Kants Werke*, *Akademie-Textausgabe*, Berlin, 1968, Bd. VI, 331. I quote Kant's works by the *Akademie Ausgabe*.

[40] I. KANT, *op. cit.*, 331.

[41] See S. BYRD, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, *Law and Philosophy*, vol. 8/2, 1989, 153-200.

[42] See J.-C. MERLE, *Strafen aus Respekt vor der Menschheit im Verbrecher. Eine Kritik am Retributivismus aus der Perspektive des deutschen Idealismus*, Habilitationsschrift (Habilitation Thesis), Tübingen, 2005.

persons from committing crimes (special and general deterrence, respectively [see MERLE: 2005]).

On the one hand, if a deterrence function is admitted as essential to punishment, it is necessary to recognize not only that one can talk about effectiveness, but also that the punishment has to be effective in order to be legitimate. In other words, if the punishment is ineffective it cannot be legitimate, for if its essential function (or one of its functions) is to deter, when it does not deter it is not legitimate. On the other hand, if deterrence is not an essential function of punishment, one can also be punished when the punishment does not prevent the act of the crime, but merely because it is fair to punish. Furthermore, at least theoretically, some punishments can be effective and unfair: one can think about punishments that prevent the practice of some actions but that are not legitimate, either because it is not legitimate to punish these actions or because it is legitimate to punish them, but with a lighter punishment than the one actually proposed. This basic distinction between effectiveness and legitimacy seems obvious, but many times it is not clear in the current debate about punishment, and specifically in the discussions handled by the STF, whether a punishment has to be avoided because it is ineffective or illegitimate.

Let us look at some examples (some hypothetical, others not). Punishing with 1 to 4 years in prison somebody that parks her car and does not pay the parking fee can be an effective way to make her and others pay the fee, but it does not seem legitimate, not only because the punishment is too long, but also because it doesn't seem fair imprisoning somebody for not paying a parking fee. Here, the idea of the "subsidiary character" of penal law seems to play an important role. Now, punishing with 40 years in prison somebody that has driven a car while intoxicated and causing an accident in which a person died, can be effective in preventing people from driving drunk, but it seems illegitimate, because the punishment seems too long.

The STF's decisions do not make these basic distinctions. What is an insignificant damage considering the nature of punishment? Why shouldn't actions in which the damage is insignificant be punished? Is it because it is not effective or because it is not fair? One could argue that the examples mentioned above are based on subjective beliefs, for they

suppose that (1) there are legitimate and illegitimate punishments and that (2) that the primary function of punishment is deterrence.

(1) Regarding the first objection, in my view it is almost impossible to defend an absolute conception of justice in general, and therefore of fair punishment, rather there are actions that we consider, in a determined historical moment, as punishable. What we consider as punishable should be the result of argumentative consensus[43]. In the case of a democratic state, the best – though not perfect – way to establish consensus is a legal statute, which, if valid, must be applied[44]. Now, Brazilian legislation states that theft, tax crimes and possession of drugs by military personnel must be punished. In my view, valid arguments should be provided in order not to apply that ruling. However, in the cases I have analysed in this paper they were not. Naturally I am not saying that the courts should send to prison a person who steals 50 reais or who does not pay 5.000 reais in taxes. Indeed courts could refer to Articles 43 and 44 of the Brazilian Penal Code for these cases, which stipulate that when the prison punishment is less than 4 years and the crime is not violent, the judge can substitute the prison punishment with alternative punishments, such as a fine or community service. According to Article 44, the judge has to consider the guiltiness, the history and personality of the criminal and the reasons why she committed the crime. Thus, the individualization of the punishment is made possible by substituting imprisonment by any of the alternative punishments. Regarding the use of drugs for personal use by active military personnel, Articles 43 and 44 of the Brazilian Penal Code are not applicable, since Article 12 of the same code states that its general rules are applicable to other statutes only when these other statutes

[43] See R. ALEXY, *op. cit.*, 134-177.

[44] Although I think this topic deserves more attention, I will not handle here the problems related to it. I am aware that some critics, like Habermas, think that offering legislation such an important role in a democratic state implies relying too much on its correction (see J. HABERMAS, *Fakzität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt a. M., 1998, 284-285). Here I must only say that, in my view, Habermas also has to consider to some extent the correction of legislation.

do not say otherwise. However, the Military Penal Code has a general section that states otherwise, namely the one that determines the kinds of military punishments. Thus, it appears that unless one presents convincing arguments otherwise, the substitution determined by Articles 43 and 44 of the Brazilian Penal Code are not applicable to military crimes.

(2) Regarding the second objection, indeed the examples aforementioned assume that punishment has a preventive function, but this does not exclude other functions such as retribution and rehabilitation.

Coming back to the insignificance principle, as we have seen, so far the STF has not been able to precisely define what insignificance is. Besides that, the court has not grounded its application, that is to say, it has not provided arguments to show that punishment in such cases is neither effective nor fair. From a constitutional court, one would expect a discussion that analyses this and other related questions. This discussion should be almost exhaustive, if not in every case, at least in leading cases. After that, following the idea of universalizability[45], precedents would then have a normative strength and could be used in legal decisions[46]. Then, showing that a new case is similar to a previous case would be enough to decide the new case in the same way, and, if one wanted to decide it differently, she would have to present reasons not to decide according to the precedent case[47].

In criticizing the STF's arguments, I am not implying that arguments in favor of the insignificance principle do not exist. Indeed, what the STF seems to mean with its idea of "material elements of the crime" could be something interesting, though, if it were formulated in another way. If my interpretation is correct, considering the material elements of the crime means not only considering the facts in light of the legal norm, but also damage done to the legal good. Although I find the idea of penal legal goods problematic, I will not discuss it here. What mat-

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[45] R. ALEXY, *op. cit.*, 335.

[46] See R. ALEXY, *op. cit.*, 339.

[47] "es gilt das Perelmansche Trägheitsprinzip, das fordert, dass eine Entscheidung nur dann geändert werden darf, wenn hinreichende Gründe hierfür vorgetragen werden Können" (R. ALEXY, *op. cit.*, 336).

ters is that, with this problematic idea and with its correlated "material elements of the crime" theory, the STF seems to have made an important step towards the application of penal rules that take into consideration principles that are applicable in penal law. In my view, this idea, which is related to the "conglobated elements of the crime" theory[48], is not only fully compatible but also demanded by the application of law. However, in the case of penal law, the principle of legality also has to be considered.

On the one hand, the idea that less damaging actions should be punished with a lighter punishment seems correct. Indeed, if there are insignificant damages done, then the actions that perpetrate them should not be punished. On the other hand, the main question remains: are there insignificant damages? What are they? Are the damages in the cases handled by the STF really insignificant? The STF does not answer these questions coherently.

In defence of the STF, one could say that it is natural that different judges have different points of view and, thus, adopt different theories and make different decisions. Yet, as we have seen, the same judges also mix together different arguments and theories, some of them contradictory[49]. Furthermore, if different STF judges present contrasting and sometimes contradictory arguments, the STF should gather, expand the discussion, decide, and ground its decisions coherently. The STF doesn't do that, that is, it does not justify its decisions. This fact, that I will term "lack of justification", leads to potential criticism by those who wish for a tribunal that does not protect fundamental rights. This lack of justification may have its roots in the system that the STF uses to decide cases: the *seriatim* model[50]. It is well known that in the *seriatim* model each judge presents her opinion, and the position adopted by the majority prevails. There is not, in such a model, debate among the judges in order to try to reach a consensus or at least a ma-

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[48] E. R. ZAFFARONI, A. ALAJIA, A. SLOKAR, *Derecho Penal – Parte General*, Buenos Aires, 2002, 483-506.

[49] See, for example: HC 96.688-8, 12/05/09, Judge Ellen Gracie and HC.809-0, 12/08/09, Judge Celso de Mello.

[50] I borrowed this idea from Wilson Steinmetz, who analyses whether the *seriatim* model is an obstacle for the application of Alexy's principles' theory in Brazil.

jority. This is the reason for the paradox of the same decision with different justifications. The model *per curiam*, which is used for instance in Germany and in the U.S., allows the court to discuss a case and have a common opinion. In this model, the opinion that is registered in the records is the opinion of the court, not of individual judges. Naturally, a judge can disagree with the opinion of the court and present an opposing opinion, as happens in Germany. What is essential is that this method enables the court to not only justify its positions more rationally, but also to avoid incoherencies. I am not saying that adopting the *per curiam* method would solve the lack of rational justification that characterizes many decisions made by the STF, but it would, at least, minimize it. Further solutions should be searched, but they cannot be investigated within the limits of this essay.

CONSTITUTIONAL INNOVATIONS BEYOND REFORMS: LEGISLATIVE ENACTMENT AND JUDICIAL IMPLEMENTATION OF THE CONSTITUTION

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TABLE OF CONTENTS: *1. What does constitutional innovation mean? Legislative enactment, judicial implementation, and constitutional reform through amendment - 2. Innovation (transformation) beyond reforms (amendment) - 3. The legislative channel: Broad discretionary power in enactment (within the constitutional framework) - 4. Enactment and implementation: The judiciary channel - 5. Enactment and implementation: The role of the Constitutional Court - 6. Innovation beyond reforms: Criticisms and concerns - 7. Concluding remarks: Innovation beyond reform as physiological tool for constitutional implementation.*

1. What does constitutional innovation mean? Legislative enactment, judicial implementation, and constitutional reform through amendment

The paper aims to briefly analyse the role of the Constitution in the light of social innovation, which is conceived as the main future of a constitution. For the sake of this article, innovation is considered as a circular process that connects the legal and social dimension, and finds into the constitution the source of legitimation and the scope within which innovation – both social and legal – can develop[1].

Innovation is intended as a bi-directional process, from and towards social reality[2]: a gradual and ongoing process, which develops through

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[1] S. BARTOLE, *L'inevitabile elasticità delle costituzioni scritte tra ricognizione dell'esistente e utopia dei valori*, in AA.VV., *Il metodo nella scienza del diritto costituzionale (Messina, 23 febbraio 1996)*, Padova, 1997, pp. 16 ff.

[2] A. RUGGERI, *Dottrine della costituzione e metodi dei costituzionalisti*, in AA.VV., *Il metodo nella scienza del diritto costituzionale*, Padova, 1997, pp. 66 ff.; P.L. VERDÚ,

different and plural normative channels and actors (legislative, normative, judicial and constitutional reform). All these dimensions must coexist and interact, within a dynamic process.

On the one hand, innovation can be achieved beyond reforms, which means the effective implementation of constitutional principles and rights through multifaceted normative tools; on the other hand, innovation can also occur through constitutional reforms, in which the amending process of constitutional text is considered as one of the possible tools for constitutional innovation. The article will focus on the first dimension: innovation beyond reforms.

Therefore, constitutional innovation can run through (legislative) enactment, (judicial) implementation and (constitutional) reform through amendment. Those channels belong to different institutional actors – Parliament, judges, Constitutional Court – within a composed and interlinked legal environment. To different actors belong different ways for innovation: according to Veronesi, the implementation belongs to judges, by imposing the normative supremacy of the constitution; the enactment belongs to the Parliament, which is called to carry out the "constitutional project" by law[3].

According to this view, constitutional innovation means the fulfilment of constitutional purposes, through a composed and interlinked legal environment and in the light of a broad margin of appreciation to be recognised to the Parliament. Within this framework, judicial implementation, legislative enforcement and constitutional amendment find a common source of legitimation, which becomes also an absolute limitation: it is the essential core of constitutional order, the so-called

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La Constitución abierta y sus «enemigos», Madrid, 1993; A. SPADARO, *La transizione costituzionale. Ambiguità e polivalenza di un'importante nozione di teoria generale*, in AA.VV., *Le "trasformazioni" costituzionali nell'età della transizione*, Torino, 2000, pp. 33 ff.

[3] P. VERONESI, *All'incrocio tra "revisione", "applicazione" e "attuazione" costituzionale: verso un diritto sempre più "a misura d'uomo"?*, in G. BRUNELLI, G. CAZZETTA (a cura di), *Dalla Costituzione "inattuata" alla Costituzione "inattuale"? Potere costituente e riforme costituzionali nell'Italia repubblicana. Ferrara, 24-25 gennaio 2013*, Milano, 2013, pp. 297 ff.

supreme constitutional principles, which limit both legislative enactment and constitutional amendment.

Those principles, as recently confirmed by the Constitutional Court, represent «identifying essential elements of the constitutional order»[4]. According to the Constitutional Court, within the text of the Constitution it is possible to identify a set of supreme principles, which cannot be legitimately undermined or modified in their own essential content, not even by activating the constitutional amending process. This is because, according to the well-grounded constitutional case-law, they belong to the essence of supreme values which the Italian Constitution is founded on and, therefore, they must prevail also on amending and constitutional laws[5].

2. Innovation (transformation) beyond reforms (amendment)

Innovation beyond reforms consists in the dynamic and evolutive implementation of the constitution intended as a living normative document directly enforceable by a plurality of actors: it recalls the theory of the living constitution[6], to be interpreted and implemented according to the changing reality. Accordingly, Italian scholars have identified the Constitutional Court as the «essential bridge»[7] between the *corpus iuris* and the changing reality: Constitutional Court, since its early beginning,

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[4] Constitutional Court, decision n. 238/2014.

[5] Constitutional Court, decision n. 1146/1988.

[6] On the concept of the living constitution, see recently, among the Italian scholars, O. CHESSA, *I giudici del diritto. Problemi teorici della giustizia costituzionale*, Milano, 2015, pp. 188 ff., that distinguishes between "living constitution", which describes how constitution is concretely interpreted and implemented, and "living constitutionalism", which is a theory of constitutional interpretation calling for a continuous evolution in interpreting and applying constitutional text (Ivi, p. 194). See also C. SUNSTEIN, *A cosa servono le Costituzioni*, Bologna, 2001, p. 73; J. BALKIN, *Living originalism*, Cambridge (MA), 2011.

[7] N. OCCHIOCUPO, *Costituzione e Corte costituzione. Percorsi di un rapporto "genetico" dinamico e indissolubile*, Milano, 2010, p. 110, that refers to the image provided for by T. ASCARELLI, *Norma giuridica e realtà sociale*, in ID., *Problemi giuridici*, I, 1959, pp. 69 ff.

has performed an active role in guaranteeing the effective implementation of constitutional purposes, especially those dedicated to the protection of fundamental and social rights[8].

The Constitutional Court also participates to innovation beyond reforms, together – and mostly in dialogue with – ordinary judges. If we briefly analyse innovation beyond reform through the lenses of Constitutional Court's case-law, we can immediately understand that, within this category, two channels for innovation coexist: on the one hand, legislative enactment; on the other hand, judicial implementation.

According to the Constitutional Court, these dimensions are not alternative, but can – and must – cohabit, even if it is possible to identify the centrality of legislative intervention. At the same time, even if we accept the existence of a priority of legislative enactment, this does not mean that judicial implementation is conditioned to it: in other words, the lack of legislative enactment does not impede judicial implementation, which therefore can be intended as a complementary tool for constitutional enforcement.

The Court has repeatedly laid down this framework: on the one hand, «Parliament can always enact a specific legislation, based on a reasonable balancing between the fundamental constitutional principles involved»; notwithstanding, when a law is lacking, «it belongs to judges to find within the legal system the interpretation able to guarantee the protection of those constitutional goods»[9].

Enactment and implementation are interdependent and interactive, even if it is possible to recognise the priority of the former, based also on the democratic nature of its legitimacy source.

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[8] N. OCCHIOCUPO (a cura di), *La Corte costituzionale tra norma giuridica e realtà sociale*, Bologna, 1978.

[9] Constitutional Court, decision n. 334/2008.

3. The legislative channel: Broad discretionary power in enactment (within the constitutional framework)

With regard to legislative enactment, the role of Constitutional Court has been oriented, since the beginning[10], to guarantee the effectiveness of the First Part of the Constitution, dedicated to fundamental liberties and rights. In its first ruling, the Court fixed a fundamental principle of its own case-law, according to which the "programmatic nature" of fundamental rights does not preclude constitutional adjudication on the legislation referred to the concrete exercise of rights and liberties[11]. According to the Court, the Constitution as a whole provides for a «direct bound for the legislator» in regulating the exercise of a right[12]. At the same time, it must be recognised a broad discretionary power to the Parliament in enacting Constitution, especially when it goes to regulate political and social sensitive issues (family law; electoral law; social rights; bioethics). As a general principle, Constitutional Court usually does not go as far as to evaluate the merit of political choices provided for by the Parliament. Accordingly, it recognises to the Parliament a broad margin of appreciation in constitutional enactment, even if the Court has progressively developed types of decisions – such as the so-called *sentenze monito* or *additive di principio*[13] – which go to "orient" and even limit discretionary nature of political choices made by the Parliament.

The recognition of a broad discretionary power goes together with an interaction between Constitutional Court and the Parliament. The interaction can assume the form of a "dialogue", which can develop

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[10] Constitutional Court, decision n. 1/1956.

[11] On the concept of *norme programmatiche*, V. CRISAFULLI, *La Costituzione e le sue disposizioni di principio*, Milano, 1952; R. BIN, *Atti normativi e norme programmatiche*, Milano, 1988.

[12] Constitutional Court, decision n. 1/1956.

[13] L. ELIA, *Le sentenze additive e la più recente giurisprudenza della Corte costituzionale (ottobre 1981-luglio 1985*), in *Scritti in onore di Vezio Crisafulli*, I, Padova, 1985, pp. 299 ff.; M. D'AMICO, *Un nuovo modello di sentenza costituzionale?*, *Giurisprudenza costituzionale*, 1993, pp. 1803 ff.; G.P. DOLSO, *Le additive di principio: profili ricostruttivi e prospettive*, *Giurisprudenza costituzionale*, 1999, pp. 4111 ff.; A. RUGGERI, A. SPADARO, *Lineamenti di giustizia costituzionale*, Torino, 2014, p. 173.

towards an indirect – due to the non binding nature of the eventual indication provided for by the Constitutional Court's decisions – pressure on the way in which Parliament exercises its legislative power. This trend has been quite typical within the fundamental rights protection, especially when the necessity to provide for an enlargement of the scope of application of legislative protection (equality principle and non-discrimination) is detected by the Court (*sentenze additive*); or when the Court, even if it does not declare the unconstitutionality of a law, provides for an interpretation consistent with the Constitution or calls the Parliament to act in order to guarantee constitutionally relevant interests or social relationships.

Therefore, in the light of Constitutional Court's case-law, Parliament has the priority in enacting constitutional contents, also in the light of guaranteeing both legal and social innovation. Notwithstanding, priority does not mean exclusivity, neither in case of legislative action nor of legislative inaction: also different subjects – the judiciary, the Constitutional Court itself – can participate in the process of constitutional innovation, developing a function of subsidiarity (legislative inaction) and integration (legislative action) of the Parliament's activity.

4. Enactment and implementation: The judiciary channel

The judiciary, together with the Constitutional Court, participates to the process of direct implementation of constitutional principles and rights. In so doing, it is an active and direct actor of constitutional innovation, especially when there is the need for adjusting legal environment to the changing social reality[14]. The direct implementation of the Constitution[15] and the interpretation consistent with the constitution represent the main tools used by the judiciary. It must be underlined that this approach of the judiciary has been stimulated by the Constitu-

[14] AA.VV., *Giurisdizione e giudici nella Costituzione, Corte di Cassazione*, *Quaderni del Consiglio Superiore della Magistratura*, n. 155 del 2009; V. BARSOTTI (a cura di), *La Costituzione come fonte direttamente applicabile dal giudice*, Milano, 2013.

[15] E. LAMARQUE, *L'attuazione giudiziaria dei diritti costituzionali*, *Quaderni costituzionali*, n. 2, 2008, pp. 274 ff.

tional Court, which progressively has called judges to a more direct enforcement of constitutional principles, in order to prefer a "judicial use" of Constitution instead of, when it is possible, activating the judicial review of legislation[16].

The judiciary channel, intended as both effective implementation of the Constitution and adjustment of legal framework to the social reality, has become an essential tool for constitutional innovation, especially with regard to the protection of fundamental rights.

Among others, the right to health[17] (art. 32), the right to strike[18] (art. 40) and the right to a dignified existence[19] (art. 36) have seen the judiciary as fundamental institutional actor within the process of effective implementation of constitutional contents. In many cases, the "cooperation"[20] between ordinary judges and the Constitutional Court has become the essential element of innovation through implementation, according to a normative circle, which begins within the judiciary, develops through the Constitutional Court's case-law and comes back to the judiciary, which can implement the principle provided for by constitutional judges.

Also Parliament can participate to this circle, by integrating judicial implementation with legislative enactment. A paramount case is the regulation of abortion, which followed a Constitutional Court's deci-

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[16] G. SORRENTI, *L'interpretazione conforme a Costituzione*, Milano, 2006; R. BIN, *L'interpretazione conforme. Due o tre cose che so di lei*, *Rivista AIC*, n. 1, 2015; F. MODUGNO, *In difesa dell'interpretazione conforme a Costituzione*, *www.rivistaaic.it*, 2/2014; A. RUGGERI, *Alla ricerca del fondamento dell'interpretazione conforme*, *Forum di Quaderni costituzionali*, 5, 2013; I. CIOLLI, *Brevi note in tema d'interpretazione conforme a Costituzione*, *www.rivistaaic.it*, 1/2012.

[17] M. DOGLIANI, I. MASSA PINTO, *Elementi di diritto costituzionale*, Torino, 2015, pp. 191 ff.

[18] M. LUCIANI, *Diritto di sciopero, forma di Stato e forma di governo*, in T.E. FROSINI, M. MAGNANI (a cura di), *Diritto di sciopero e attuazione costituzionale*, Milano, 2010, p. 26.

[19] S. BARTOLE, *Interpretazioni e trasformazioni della Costituzione repubblicana*, Bologna, 2004, 166 ss.

[20] M. CAVINO, *L'intenzione del legislatore attuale come fondamento del diritto vivente*, in M. CAVINO (a cura di), *Esperienze di diritto vivente. La giurisprudenza negli ordinamenti di diritto positivo*, I, Milano, 2009, pp. 32 ff.

sion: in this case, the fundamental principle of the prevalence of the right to life and to health of the woman on the interest of the foetus (decision n. 27/1975) has been assumed by the Parliament when came to regulate the issue (Law 194/1978)[21].

Parliament's participation can be expressly required by both the judiciary and the Constitutional Court, when the exercise of legislative power is considered essential in order to regulate a specific issue: in this case, the Parliament is free to evaluate whether, when and how to act, even when the Constitutional Court formally asks for its intervention[22].

The case of the right to found a family of same-sex couples is especially relevant in order to understand this multifaceted "dialogue" between different actors, raising at the same time some concerns related to the effectiveness of this scheme in the light of the concrete protection of this right (see below). The Constitutional Court, after having excluded the possibility to broaden the scope of application of traditional marriage to same-sex couples (as required by the *a quo* judge), clearly stated that article 2 of the Constitution «must also include homosexual unions, understood as the stable cohabitation of two individuals of the same sex, who are granted the fundamental right to live out their situation as a couple freely and to obtain legal recognition thereof along with the associated rights and duties, according to the time-scales, procedures and limits specified by law». At the same time, the Court enacts an approach of self-restraint, by saying that «it is for Parliament to determine – exercising its full discretion – the forms of guarantee and recognition for the (…) unions».

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[21] P. VERONESI, *Il corpo e la Costituzione. Concretezza dei "casi" e astrattezza della norma*, Milano, 2007, pp. 120 ff.; M.P. IADICICCO, *Il contributo della giurisprudenza costituzionale italiana e spagnola alla complessa definizione di una ragionevole disciplina sull'aborto*, in A. PÉREZ MIRAS, E.C. RAFFIOTTA, G.M. TERUEL LOZANO (Dirs.), *Desafíos para los derechos de la persona ante el siglo XXI: Vida y Ciencia*, Madrid, 2013, pp. 209 ff.

[22] Many cases can be listed: the right to housing (decision n. 404/1988); the rights of same-sex couples (n. 138/2010); the right to health at the end of life (334/2008); the right to access to assisted reproductive technologies (n. 347/1998).

Therefore, on the one hand, the Court recognises the exclusive competence of Parliament to introduce a general recognition of such couples, without any room for the subsidiary intervention of the judiciary or the same Court; on the other hand, at the same time the Court outlines that the lack of legislative enactment does not preclude concrete implementation of constitutional principles by both ordinary judges and the same Court.

5. Enactment and implementation: The role of the Constitutional Court

As anticipated, the Constitutional Court directly participates to the process of both legal and social innovation. Its case-law is the turning point for the progressive (although difficult and not completed yet, as outlined above) implementation of the Constitution, especially in proclaiming the binding nature of constitutional principles, such as the principle of equality.

One relevant case is decision n. 215/1987, related to the assistance to be guaranteed to disabled students within the public education system. In this decision, the Court intervened to strength the commitment of public power in guaranteeing an adequate assistance to this category of pupils, by substituting – within the text of the law – the word «facilitate» with «guarantee»: accordingly, after the Constitutional Court's decision, public institution must act in order not only «to facilitate», but «to guarantee participation of disabled persons to high schools and universities»[23].

In this case, the need to guarantee the effective protection of the right to education prevails on the Parliament's discretionary power: it seems to confirm that constitutional implementation (Constitutional Court) coexists with legislative enactment and, under specific circumstances, can prevail on the latter, in the light of the common and prevailing target to guarantee the effective implementation of constitution-

[23] G. ARCONZO, *La normativa a tutela delle persone con disabilità nella giurisprudenza della Corte costituzionale*, in M. D'AMICO, G. ARCONZO (a cura di), *Università e persone con disabilità Percorsi di ricerca applicati all'inclusione a vent'anni dalla legge n. 104 del 1992*, Milano, 2013, pp. 20 ff.

al principles. At the same time, implementation does not preclude enactment. According to the Court, «it belongs to the Parliament to urgently provide – within its discretionary power – for an exhaustive legislation in order to regulate this highly relevant human and social issue»[24]. Therefore, implementation and enactment are both essential pieces of constitutional innovation.

The brief analysis provided seems to underline two general elements.

On the one hand, the Italian order is funded on an open and "weak" constitution, which allows its own transformation through the means of interpretation and not only through the procedures provided for by the text of the constitution, and this can facilitate unexpected innovations through both ordinary and constitutional case-law (the weak structure – open texture – as the real strength of the Constitution)[25]. On the other hand, Constitutional Court can be considered the watchdog of innovation. It provides a twofold function: *propulsive*, with regard to fundamental rights (self-restraint and state immunity); and *conservative*, with regard to the form of government, in the sense of reaffirming the general structure designed by the constitution (i.e. praxis of the law-decree; electoral law).

6. Innovation beyond reforms: Criticisms and concerns

The dimension of "innovation beyond reforms", although it has been decisive in order to allow the effective enforcement of constitutional principles and rights raises some concerns, which can be briefly listed here.

[24] Constitutional Court, decision n. 215/1987.

[25] S. BARTOLE, *Interpretazioni e trasformazioni della Costituzione repubblicana*, cit.

6.1. Slow process of implementation: the "de-freezing" of the First Part of the Constitution

The slowness and difficulty in effectively implementing the new constitutional order have characterised especially the first decade after the entry into force of the Italian Constitution[26]. This era has been called the "freezing" of the Constitution, because – on the one hand – Parliament does not acted in order to legislatively implement the First Part of the constitutional text, in which a new catalogue of rights and liberties was recognised and guaranteed; and – on the other hand – the integrative channel of implementation, the judiciary, contrary to the present times, did not provide for a judicial implementation of constitutional principles, in order to guarantee that protection to constitutional rights, which do not find adequate recognition at the legislative level.

The key element which this approach was funded on, embraced by both the Parliament and the judiciary, was a "weak" interpretation of the First Part of the Constitution: accordingly, the provisions on rights and liberties were considered as merely "programmatic", intended in a formal sense. Therefore, they did not directly attribute rights to individuals, but, in order to produce binding and concrete effects, law must formally implement them.

Those provisions, therefore, were left in a condition of "normative freezing", which only the Parliament can overcome, by approving statutory laws regulating the exercise of constitutional rights. During the period in which Constitutional Court was not established (1948-1956), also the judiciary (Court of Cassation) endorsed such interpretation, which had the effect to deprive the essential core of the Constitution – fundamental rights protection – of its own normative strength, living its concrete enforcement to the full discretionary power of the Parliament. Only the first decision of the Constitutional Court (n. 1/1956) started to overturn this interpretation, which excluded the possibility of a direct – without a statutory law enacting constitutional principles – implementation of constitutional rules by ordinary judges[27]. After this decision, the

[26] P. CALAMANDREI, *La Costituzione e le leggi per attuarla*, in AA.VV., *Dieci anni dopo. 1945-1955. Saggi sulla vita democratica italiana*, Milano, 1955, pp. 209 ff.

[27] R. BIN, G. PITRUZZELLA, *Diritto costituzionale*, Torino, 2014, pp. 137 ff.

direct implementation of the Constitution started to be assumed by judges as an ordinary and integrative tool, which has been used in a very large amount of contexts[28]: the direct implementation of the Constitution, together with the interpretation consistent with the Constitution, represent a fundamental tool for the "transformation" of the legal order[29], which goes to integrate or, in case of legislative omission, take the place of Parliamentary activity.

6.2. Self-restraint before discretionary power of the Parliament

It must be clarified that this attitude, which is common to both constitutional and ordinary judges, cannot be considered as expression of a pathological relationship between political power – the Parliament – and the judiciary, together with the body entitled with the function to guarantee the respect of principles and limits that Constitution provides for also the Parliament (Constitutional Court).

With regard to the perspective of the Constitutional Court, the respect for the merit of political choices made by the Parliament is due under article 28 of the Law 87/1953 (Rules on the establishment and functioning of the Constitutional Court), according to which the scrutiny of the Court excludes any political evaluation and scrutiny on the use of Parliament's discretionary power[30]. The Court has been very cautious in exceeding its power, when it would have comply a risk of bypassing the respect for the political discretion of the Parliament, especially in the field of criminal law. In those cases, the Court limits itself by assuming the existence of a strong presumption of constitutional compatibility, which can be overcame exclusively when the law is manifestly arbitrary, unjustified or unreasonable. The tool that the Constitu-

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[28] A. PIOGGIA, *Giudice amministrativo e applicazione diretta della costituzione: qualcosa sta cambiando?*, in V. BARSOTTI, *La Costituzione come fonte direttamente applicabile dal giudice*, cit., pp. 103 ss.

[29] Ivi, p. 107.

[30] A. RUGGERI, A. SPADARO, *Lineamenti di giustizia costituzionale*, cit., pp. 102 ss. They distinguish between political and institutional evaluation, which the Constitutional Court legitimately operates, and evaluation on the political content of the law, which is forbidden by the law (Ivi, p. 103).

tional Court is used to implement, in order to relax such limitation, is represented by article 3 of the Constitution, with regard to both principles: equality and reasonableness. When the principle of non-discrimination come into view, the Court usually goes further in its scrutiny: it happened, for instance, in all those cases in which the law provides for inappropriate criteria for accessing social assistance, which go to concretely discriminating the non-citizens.

According to Zagrebelsky, the limit imposed by law 87/1983 is the result of an idea that presumes the existence of spaces free from the Constitution, in which the rule is the freedom of the Parliament to enact political evaluations by selecting between different statutory solutions, not imposed by the Constitution itself[31]. This idea, which complies also a conception of the Constitutional Court as "negative legislator" (*legislatore negativo*), has been put in doubt, in the light of a theory professing the "elastic" (flexible) nature of the relationship between the Court and the Parliament[32].

This "elasticity" is derivable by the same constitutional case-law. Recently, the Constitutional Court, which has been called to evaluate the constitutionality of the electoral law (the so-called *Porcellum*), has stated that «due to the need to guarantee the principle of constitutionality, it is essential to conclude that the review power of this Court – which «must cover the legal system as fully as possible» (see Judgment no. 387 of 1996) – must also apply to laws, such as that relating to elections to the Chamber of Deputies and the Senate, «which would be more difficult to subject to [the Court's scrutiny] in any other manner» (see Judgments no. 384 of 1991 and no. 226 of 1976)» (decision n. 1/2014).

Therefore, according to the Court's reasoning, when the effective respect of essential constitutional principles comes into view, the scope of intervention for the Court must broaden, due to the need to guarantee the continuity of the constitutional experience and the same identity of both the Constitution and the legal order[33]. Accordingly, the general

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[31] G. ZAGREBELSKY, V. MARCENÒ, *Giustizia costituzionale*, Bologna, 2012, p. 244.

[32] Ivi, pp. 245-246.

[33] A. RUGGERI, *Gli "effetti politici" delle sentenze della Corte costituzionale emesse in occasione dei giudizi sulle leggi*, *www.giurcost.org*, 2014.

trend towards self-restraint can be reversed, or at least reduced, when there is the need to protect a fundamental right (in the case, the right to vote) or a fundamental constitutional principle (equality; representative democratic system of government). According to the Court, «any other conclusion would end up creating a free-for-all within the system of constitutional justice, precisely in an area which is closely related to the democratic framework as it involves the fundamental right to vote; for this reason, it would end up causing intolerable harm to the overall constitutional order» (decision n. 1/2014).

This conclusion seems to demonstrate that, in the light of the constitutional case-law, the theory of the existence of normative spaces free from constitutional principles, which legitimates a broad margin of discretionary appreciation of the Parliament, must be limited, at least when the protection of fundamental rights or essential constitutional principles comes into view. Therefore, the protection of the principle of constitutionality entails that the scrutiny must cover as more as possible the legal order (decision n. 387/1996), implicitly stating the absence of legal spaces empty of constitutional law.

This approach has been recently applied in the context of the right to health[34].

The Court confirmed the principle according to which, especially when it is at stake the violation of a fundamental rights, «it is essential to assert that the relative review must cover the legal system as fully as possible». According to the Court, therefore, it cannot «be conceivable for certain areas to be immune from review», unless not to tolerate the risk of an «intolerable harm to the constitutional order considered overall»[35]: the failure in enacting ordinary legislation, cannot in any case justify the Court not to intervene, in order to restore the violation of a fundamental right.

As the cases briefly analysed seem to show, self-restraint is an attitude that Constitutional Court adopts as general rule, when it is called

[34] Constitutional Court, decision n. 162/2014, on the prohibition of gametes' donation for reproductive purposes. See S. PENASA, *Nuove dimensioni della ragionevolezza? La ragionevolezza scientifica come parametro della discrezionalità legislativa in ambito medico-scientifico*, *Forum di Quaderni costituzionali*, 2014.

[35] Constitutional Court, decision n. 164/2014.

by ordinary judges to check constitutionality of laws; at the same time, it is enforced in a very elastic way, as assumed by quoted scholars, allowing the Court to scrutinise areas of law which are very overlapping with those covered by Parliament's political choices.

6.3. Distinction between declaration of rights and its effective protection

This is a possible threat, which comes very close to the previous one, as it also refers to the deference that both ordinary judges and Constitutional Court recognise to Parliament's discretionary power.

It can happen when, although it is recognised at the judicial level the existence of a fundamental right, its concrete enforcement, in terms of means and scope of protection, is left to the Parliament, which is recognised as the exclusive subject entitled with the function of regulating the implementation of such right. This approach, if it is consistent with the abovementioned constitutional asset (relationship between judiciary and legislative; Constitutional Court and Parliament), may produce a lack of protection in all those cases, in which, even if recognised as constitutionally relevant and protected, individual rights do not find direct and effective protection, because of a lack of legislative intervention.

Constitutional Court, in such cases, can decide to adopt a self-restraint approach, as it happened in the case of the protection of same-sex relationship[36].

The Court stated that also «homosexual unions, understood as the stable cohabitation of two individuals of the same sex, who are granted the fundamental right to live out their situation as a couple freely» are covered by article 2 of the Constitution, which provides that the Republic recognises and guarantees the inviolable rights of man, both as an individual as well as in social groupings in which he or she expresses his or her personality and requires compliance with the mandatory duties of political, economic and social solidarity.

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[36] Constitutional Court, decision n. 138/2010.

Notwithstanding, the Court clarified that the «legal recognition thereof along with the associated rights and duties» of persons forming part of a same-sex couple must be recognised «according to the time-scales, procedures and limits specified by law»: therefore, it does not belong to the Court to provide for such regulation, as it belongs to the Parliament's discretionary power[37]. In this case, the theory of Constitutional Court as "negative legislator" is assumed by the same constitutional judges, which, on the one hand, recognise the need for a legal recognition of a form of relationship that has constitutional ground (art. 2); and, on the other hand, leave to the Parliament the responsibility (and the function) to provide for a concrete legal protection, in terms of time-scale, procedures and limits.

It must be underlined that, also in this case, Constitutional Court does not completely renounce to affirm the need of an effective protection for the fundamental rights of individuals: accordingly, it clearly distinguish among Parliament's and Constitutional Court's function. On the one hand, «it is for Parliament to determine – exercising its full discretion – the forms of guarantee and recognition for the aforementioned unions»; on the other hand, «the Constitutional Court has the possibility to intervene in order to protect specific situations», when, «in relation to particular situations, there is a need to treat married couples and homosexual couples equally, which this Court may guarantee within a review of a provisions reasonableness»[38].

Different functions, therefore, are recognised respectively for the Parliament, to provide for a legislation of a general nature, and the Constitutional Court, to protect fundamental rights with regard to specific situation, especially when the principle of equality need to be asserted[39]. This allocation of function, coherent with a strict interpretation of the role of the review of the legislation, leaves the door of the Con-

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[37] See M. CROCE, *Diritti fondamentali programmatici, limiti all'interpretazione evolutiva e finalità procreativa del matrimonio: dalla Corte un deciso stop al matrimonio omosessuale*, *Forum di Quaderni costituzionali*, 2010.

[38] Constitutional Court, decision n. 138/2010.

[39] See B. PEZZINI, *Il matrimonio same sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sentenza n. 138/2010 della Corte costituzionale*, *Giurisprudenza costituzionale*, 2010, pp. 2715 ff.

stitutional Court open for an assessment of the eventual violation, by part of the Parliament, of specific rights of individuals forming part of a same-sex couple, even in absence of a general legislation.

The allocation of function designed by the decision n. 138/2010 has been implemented for declaring the violation of art. 2 of the Constitution, referred to a law (Law 164/1982) that provides for the "compulsory divorce" in case of gender reassignment order relating to the spouse[40]. Preliminary, the Court traces back to what it has said in the decision of 2010, affirming that the case «may be classified under the category of "specific" and "particular" situations involving same-sex couples, in relation to whom the prerequisites will be met for intervention by this Court in order to review the adequacy and proportionality of the provisions adopted by the legislator».

After having said that also the relationship deriving from a gender reassignment order represents a «stable cohabitation of two individuals» that is «capable of permitting and favouring the free development of the person through relationships», the Court declares, on the one hand, that the compulsory nature of the divorce infringes art. 2 of the Constitution, as it not adequately protects the exercise by one spouse, with the consent of the other, of the freedom to choose in relation to such a significant aspect of his or her personal identity; notwithstanding, on the other hand, the Court calls the legislator «to introduce an alternative arrangement (different from marriage) which enables the two spouses to avoid the passage from a situation in which they enjoy the utmost legal protection to one in which protection is absolutely uncertain»[41].

[40] Constitutional Court, decision n. 170/2014.

[41] F. BIONDI, *La sentenza additiva di principio sul c.d. divorzio "imposto": un caso di accertamento, ma non di tutela, della violazione di un diritto*, *Forum di Quaderni costituzionali*, 2014; R. ROMBOLI, *La legittimità costituzionale del "divorzio imposto": quando la Corte dialoga con il legislatore, ma dimentica il giudice*, *Consulta Online*, 2014.

7. Concluding remarks: Innovation beyond reform as physiological tool for constitutional implementation

Conclusively, innovation (legal, social, political) is guaranteed by the interplay between legislative enactment and judicial implementation of constitutional principles and rights. They interact and coexist, finding in the Constitutional Court's case law a tool not only for controlling, but also to boost and demand an active role in innovation for both, the Parliament and judges.

It has been shown that, in the light of innovation through the effective enforcement of the Constitution, the lack of enactment does not preclude judicial implementation, which can cover legislative gaps by, alternatively, the direct enforcement of constitutional principles and the interpretation of law in a way consistent with the Constitution, within the limits and scope admitted by the legal order.

At the same time, legislative enactment may be inspired by and be a consequence of judicial activism. Parliament, facing a judicial trend which provides for normative innovation through the interpretative use of the Constitution, can freely decides to intervene, in order to guarantee a stable and general form to judicial interpretation, or "react" to this, by approving a different discipline, which goes to overcoming judicial interpretation.

Therefore, a part from the listed concerns, innovation beyond reform, both through legislative enactment and judicial implementation, represents the physiological channel for the effective enforcement of the Constitution, whereas innovation through reforms can be considered an exceptional tool.

A DIALOGICAL PERSPECTIVE ON LEGAL REASONING

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TABLE OF CONTENTS: *1. Introduction - 2. Criticism of legal reasoning's modern representation - 3. But… what about dialogue? - 4. Concluding remarks.*

1. Introduction

The aim of this paper is to present some short reflections on legal reasoning, trying to outline, at first, a brief description of some theories developed on this topic and, then, possible guidelines for a proposal able to face some problems entailed by them. From this point of view, our main intention – according to the general aim of the volume in which this essay is contained – is to present legal reasoning as an issue to discuss rather to present a complete overview on it, which is, surely, one of the most important key-topic in contemporary philosophy and theory of law. To be more precise, it should be better to remember that, in this framework,

> there are thus three things (at least, there may be others) which legal theorists could mean by legal reasoning: (a) reasoning to establish the existing content of the law on a given issue, (b) reasoning from the existing content of the law to the decision which a court should reach in a case involving that issue which comes before it, and (c) reasoning about the decision which a court should reach in a case, all things considered[1].

[1] J. DICKSON, *Interpretation and Coherence in Legal Reasoning*, in E.N. ZALTA (ed.), *The Stanford Encyclopedia of Philosophy (Summer 2014 Edition)*, URL = *http://*

For what we would like to discuss here, our attention will be on (b) or, better, on (c). In other words, to speak about legal reasoning it means, for us, to look at courts' work from a descriptive (b) or, better, normative (c) point of view: what court should do when they reach a decision and not what it really does. So, our analysis is not an empirical or sociological one: it is theoretical and analytical. Anyway, it should be interesting that also (a) could be involved by our perspective if someone thinks that «when judges decide a case according to law, they do no more than ascertain the content of the law and apply it to the facts of the case»[2]: a thing that for example, Dworkin thinks[3].

By the way, in this theoretical context, the attention of legal theorist has been mainly directed, at least in Civil law Countries' tradition, to (1) type of reasoning involved by court's decision and (2) problems entailed, in such a type of reasoning, by norms (which are, as we are going to see, reasoning's major premise).

As for (1), we can remember that, generally speaking, the typical form of a reasoning (at least regarded from a linguistic and not from a psychologically point of view) is the following one: «if Premise 1, and Premise 2, … and Premise n, then Conclusion», where premises "P1, P2, … Pn", and conclusion "C", are verbal or written statements[4]. But legal reasoning is a particular form of reasoning, since it consists of a reasoning in which, at least, one of the premises and the conclusion is normative in its essence: from this point of view, legal reasoning is part of the set of all practical reasoning, as, for example, moral reasoning. But legal reasoning is also a reasoning hold by subjects which have public powers in an institutionalized context[5] (typically: courts and judges): they use legal reasoning to reach their decisions and to justify them in front of public opinion and other institutionalized subjects in-

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plato.stanford.edu/archives/sum2014/entries/legal-reas-interpret/, 2014, 1, accessed September, 3rd 2015.

[2] *Ibid*.

[3] *Ibid*.

[4] See D. CANALE, *Il ragionamento giuridico*, in G. PINO, A. SCHIAVELLO, V. VILLA (eds.), *Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo*, Torino, 2013, 316ff.: 316f.

[5] *Ibid.*, 317.

volved in the context (other courts or judges but also lawyers and even legal theorists).

(2) From this point of view, at least for Civil law Countries, it is well known that «essentially scholars in philosophy of law have improved their interpretation and application of written norms […] in terms of renewal (or subsumption) of facts to normative types»[6]. As for the modern idea of law – i.e. the idea of law developed since 17th Century in Europe – legal reasoning is precisely reducible to the model of the so called "legal" or "practical syllogism": a syllogism in which the major premise is a norm; the minor premise is the fact; and the conclusion is the subsumption of fact to norm[7]. As everyone knows (but we will come back on this very soon) this kind of model was especially 'promoted' by Thomas Hobbes and, then, developed by Cesare Beccaria and Montesquieu too, in the search for certainty in law: as someone well said, «the ideals of the law-application model characteristic of Continental law were shaped, historically, in the fight against […] arbitrariness»[8]. A fight conducted by the conviction that, in the name of the division of powers and the reduction of law to a system of written norms, judges have the unique duty to apply law following a formal model of rationality governed by deduction, a *more geometrico* use of reason. Now, as well known, this model is in crisis, and some of the main criticisms point to issues in its major premise: as hermeneutics explain, there is no evident and objective meaning of textual provision and norms are the result of complex operations of interpretation[9]. It is

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[6] M. TARUFFO, *La semplice verità. Il giudice e la costruzione dei fatti*, Bari, 2009, 199.

[7] A formal representation of legal syllogism is, among others, in C. BERNAL, *Legal Argumentation and the Normativity of Legal Norms*, in C. DAHLMAN, E.T. FETERIS (eds.), *Legal Argumentation Theories: Cross-Disciplinary Perspectives*, Dordrecht, 2013, 103ff.

[8] C. VARGA, *Logic of Law and Judicial Activity: A Gap between Ideals, Reality and Future Perspectives*, in Z. PÉTERI, V. LAMM (eds.), *Legal Development and Comparative Law*, Budapest, 1981 (now in: C. VARGA, *Law and Philosophy, Selected Papers in Legal Theory*, Budapest, 1994, 257ff.), 264.

[9] See for example J. ESSER, *Precomprensione e scelta del metodo nel processo di individuazione del diritto*, Napoli, 1983 (= *Vorverständnis und Methodenwahl in der Rechtsfindung*, Frankfurt am Main, 1970); H.G. GADAMER, *Verità e metodo*, Milano,

also clear that it is not possible to look at facts (the minor premise) in terms of mere descriptivism: according to epistemological outlooks revealed by criticisms of contemporary philosophy of science of the modern idea of knowledge, now it seems more suitable to speak of storytelling of facts[10] or construction of facts[11], and there is no lack of hermeneutical explanations for the constitution of legal facts[12]. Besides them, beyond the idea of reasoning as a sort of deduction, and reconsidering the crisis of the positivistic paradigm of knowledge, the form of legal reasoning is now better described in terms of constructivism[13] or as a complex set of rational operations in which abduction plays a constitutive role[14].

All these criticisms highlight that the modern idea of legal syllogism does not work: to better understand which kind of theoretical possibilities do we have, it is better to have a look inside some alternative proposal – and this is what we are going to do in the next paragraph.

2. Criticism of legal reasoning's modern representation

According to some contemporary legal philosopher[15], theories developed against the modern idea of legal reasoning may be grouped together in two different approaches: the anti-formalistic one and the

2001 (= *Wahrheit und Methode*, Tübingen, 1970); F. VIOLA, G. ZACCARIA, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Roma-Bari, 1999; G. ZACCARIA, *L'arte dell'interpretazione. Saggi sull'ermeneutica giuridica contemporanea*, Padova, 1990.

[10] As exposed, among others, by F. DI DONATO, *La costruzione giudiziaria del fatto. Il ruolo della narrazione nel "processo"*, Milano, 2008.

[11] See M. TARUFFO, *op. cit.*

[12] For example, J. HRUSCHKA, *La costituzione del caso giuridico. Il rapporto tra accertamento fattuale e applicazione giuridica*, Bologna, 2009 (= *Die Konstitution des Rechtsfalles. Studien zum Verhältnis von Tatsachenfeststellung und Rechtsanwendung*, Berlin, 1965).

[13] As well explained by V. VILLA, *Il positivismo giuridico: metodi, teorie e giudizi di valore. Lezioni di filosofia del diritto*, Torino, 2004.

[14] See G. TUZET, *Dover decidere. Diritto, incertezza e ragionamento*, Roma, 2010.

[15] We follow here and sum up D. CANALE, *op. cit.*

analytical one. The first one claims that the modern model of legal reasoning is wrong in itself, since legal reasoning has, in its essence, features which are incompatible with the legal syllogism's scheme; the second one, on the contrary, asserts that, also if this scheme is incomplete, it is useful to explain peculiar features of legal reasoning, even if it is not sufficient to understand how courts really reach their own decisions or to evaluate them.

To have a close look at both of these different approaches, we should remember that the first one is mainly represented by studies on legal rhetoric and by legal hermeneutics. As everyone knows, the interest in legal rhetoric started again thanks to Perelman's and Toulmin's studies, which have been an attack on the modern and Cartesian idea of knowledge in an attempt to regain forms of rationality different from the deductive one – and, as for Toulmin, informal criteria of logical validity. Perelman's main criticism (which have been more influent in legal theory then Toulmin's one) regards the fact that legal reasoning is a dialectical type of reasoning, which has doubtful premises, an unsure conclusion, with inference from premises to conclusion which is disputable too: in this context, Perelman claims, it is no possible to speak about truth, confined to the realm of deductive science, since legal reasoning is governed by a type of 'weaker' reason. For its part, according to legal hermeneutics, what is central in legal method is the role played by interpretation, governed by pre-comprehension and by hermeneutical circle: all things that stress the importance of judges' discretionary powers.

So, both legal rhetoric and legal hermeneutics claim that the model of rationality typical of legal reasoning is governed by reasonableness, which is different from the logical-rational-criteria of deduction (the one we find in modern legal syllogism): reasonableness it is not based on logical rules – in fact it is weaker than them; but this 'deficiency' is what makes possible to reach a decision based on judgement criteria which are not widespread but, at least, shareable. From this point of view, according to someone[16], these anti-formalistic approaches have

[16] *Ibid.*, 331ff. For an evaluative overview on Perelman's work see M. MANZIN, *Vérité et logos dans la perspective de la rhétorique judiciaire: contributions perelmaniennes à la culture juridique du troisième millénaire*, in B. FRYDMAN, M. MEYER

the merit to stress out the importance of judges' argumentative and interpretative practices, underlining the active role played by courts in the formation of law. But, at the same time, this point should be the main critical one of these two approaches: since courts' decisions seem to be strictly connected with values – on which reasonableness is based –, and since values are now governed by a pluralistic view (very often they are in reciprocal contrast), judges' discretionary power seems to be too vast. In this way, the certainty of law seems to be seriously in danger and courts end to be judges of their own work: so, the ancient question *Quis custodiet ipsos custodies?*, rises up again in its all dilemmatic dimension.

To maintaining the focus on the control and evaluation of courts' reasoning is the main goal of analytic approaches, which claim that

> legal reasoning is not characterized by a sui generis rationality oriented to identify the political and moral ends to be realized by law […]. On the contrary, it is possible to build a rational model of fair legal decisions which uses logical tools»[17].

So, according to analytical approach, it is possible to maintain the basic scheme of legal syllogism, which is able to identify some typical features of judicial decisions' logical form: but it is also necessary to integrate it, so to specify the criteria on which judges' choices are based on.

Among these kinds of approach, it should be useful to nominate the one developed by Robert Alexy, who tries to decline the analysis of legal reasoning taking account of hermeneutics and basic features and rules of practical speech. To be more precise, according to Alexy, legal reasoning is a particular case of practical speech,

> «addressed by judge to other subjects advancing, as itself, a 'correctness' claim': statements made by judge in her decision claim to be sus-

(dir.), *Chaïm Perelman: de la nouvelle rhétorique à la logique juridique*, Paris, 2012, 261ff.

[17] D. CANALE, *op. cit.*, 333.

tained as correct, fair, valid, on the base of the reasons which justify them»[18].

The rules which ensure all this kind of requirements are typical of each communicative context but are also, in part, universally valid. What is important to remember is that these rules are useful not to choose judicial speech's premises: these premises will continue to be chosen (as also Perelman claims) by judges taking account of their own values or personal believes. But Alexy's rational speech's rules «prescribe the *procedure* which has to be adopted to justify legal decision»[19]: and this is the unique role they play in the speech. In this way, from a certain point of view, it is necessary to assume that the contemporary pluralism on moral values makes impossible to guarantee a decision as for premises' position: what it is instead possible to do it is to guarantee the reasoning from a procedural and logical point of view, susceptible to be universally accepted.

But, if this (together with its prescriptive value) is a positive aspect of Alexy's proposal, it is also a very problematic one: in fact, «as already noticed by Wróblewski, the application of this set of rules it is not sufficient to justify in a complete way a fair legal decision»[20]. In addition, there is no common agreement on these kind of rules and so, at the end, Alexy's proposal seems to be the one of an ideal situation then a proposal of a real set of indication able to address practical judges' work.

All things considered, since both anti-formalistic and analytical approaches have some features which it is possible to accept and other features we are obliged to reject, it seems that a good proposal on legal reasoning should take into account both anti-formalistic and analytical approaches or, at least, their 'good' aspects. From this point of view, as for example Damiano Canale claims[21], analytical approaches are useful, for example, to describe some aspect of legal decision maintaining the

[18] *Ibid*., 335.

[19] *Ibid*., 336.

[20] *Ibid*. Previously, Canale examines Wróblewski's proposal (another example of analytical approach) on legal reasoning and shows its merits and limits too.

[21] *Ibid*., 339ff.

value of logical tools; and, in their own turn, anti-formalistic approaches are helpful to investigate, for example, what kind of psychological processes judges follow to reach their decisions or to stress which kind of political or value are involved in judges' choices for reasoning's premises.

We believe that this kind of suggestion must be undersigned: some contemporary developments of philosophy (to tell the truth, of philosophy *tout court* more than philosophy of law) make clear, in our opinion, that usual epistemic and philosophical divisions and dualisms – as, for example, the one between Continental and Analytical approaches, which seems very similar to the one we have met in relation to legal reasoning – must be now rejected. Not only because, sometimes, that kind of division has been based on real theoretical mistakes[22], but also because, now, the evolution of philosophy in itself suggests an 'unifying' approach: in other words, it is possible to maintain what is good in different approaches, trying to build an unified theory. We also believe that it is possible to reach a similar end in the field of legal reasoning or legal methodology[23]: for the aim of this brief essay, we would just like to suggest a possible path to reach this end then to develop a complete proposal on possible legal reasoning's unified model. In fact, on the one hand, it already exists a well-founded and good proposal about legal reasoning[24]; on the other hand, as a previous step, maybe it should be of

[22] This has been, for example, the case of division in ontology or in metaphysics, fields in which erroneous interpretations of Kant's thought have become real *topoi* in philosophical debates, without anybody knowing or worrying to verify what Kant really said. All this is very well explained by F. BERTO, *L'esistenza non è logica. Dal quadrato rotondo ai mondi impossibili*, Roma-Bari, 2010 or by F. D'AGOSTINI, *Realismo? Una questione non controversa*, Torino, 2013.

[23] This is what we have tried to do in F. PUPPO, *Metodo Pluralismo Diritto, La scienza giuridica tra tendenze 'conservatrici' e 'innovatrici'*, Roma, 2013 partially following the proposal developed by V. VILLA, *op. cit.*, and ID., *Il problema della scienza giuridica*, in G. PINO, A. SCHIAVELLO, V. VILLA (eds.), *Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo*, Torino, 2013, 374ff., which is, in our opinion, one of the best example of 'unified' approach in legal theory.

[24] For example, the one developed by D. CANALE, *op. cit.*, or the one developed by the last chapter of M. MANZIN, *Argomentazione giuridica e retorica forense. Dieci*

some interest to stress out a common feature between Perelman's and Alexy's theories which is strictly related with legal reasoning, since it concerns dialogue, one of the most important features of the argumentative context in which this reasoning is developed.

3. But… what about dialogue?

In spite of respective and important differences between their two approaches to legal reasoning, both Perelman and Alexy consider in a right perspective the communicative context in which legal reasoning is developed: a dialectical one, with special features compared to other practical speeches' context. Among other differences, one of the most important one between these two great theorists of argumentation is that

> «an element of argumentation (…) neither Toulmin nor Perelman nor formal logic enhanced – which is instead the keystone of the researches conducted on argumentative rationality from the 1970s onwards – is dialogue»[25].

And it is clear that one of the researches to which it is possible to think is the one conducted by Alexy: but, and this is the point we would like to underline here, when Alexy (but not only) looks at dialogue, he is conceiving it as rational procedure only, a practice which permits to reach a decision in respect of some rules. We have already said about rules' problems, but, in our opinion, this is not the main one in Alexy's approach: the main one is, for us, the conception of dialogue Alexy promotes, which reduces dialogue, at one time, to an ideal situation (as such governed by rules that is impossible to respect in the real world) and to a mere «procedure of justification […] which permits to justify

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riletture sul ragionamento processuale, Torino, 2014, which is the one we prefer for reasons that will become clear at the end of our discourse.

[25] P. CANTÙ, I. TESTA, *Dalla Nuova retorica alla Nuova dialettica: il "dialogo" tra logica e teoria dell'argomentazione*, *Problémata. Quaderni di Filosofia*, 1, 2001, 123ff.: 132.

trial's decisions mutually exclusive»[26]. From this point of view, it is necessary to remember that

> Alexy does not distinguish a separate evaluation component for the result of the discussion. In his opinion, the rationality of the result depends on the question whether the discussion has been conducted in accordance with the rules for rational discussions. Because the discussion rules already contain the requirement that the argumentation must be acceptable according to common starting points, it ensures that the final results is coherent with the starting points and values which are shared within the legal community[27].

In this way, Alexy is one of the theorists – like, for example, Aarnio, Peczenik or pragma-dialectical theorists[28] – which consider legal argumentation in a dialogical perspective as a part of rational discussion. But

> what these theories have in common is that the rationality of the argumentation is related to the quality of the procedure followed in the discussion and to the question whether certain rules for rational discussion have been met[29]

and to these indexes only. The final end – at least for Alexy – is that, also applying rational speech's rules and without disobeying them, it is possible to justify a normative statement but its negation too[30]. This analytical approach has been developed to preserve the possibility to maintain rationality and certainty in legal reasoning: but

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[26] D. CANALE, *op. cit.*, 338.

[27] E. FETERIS, *Fundamentals on Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions*, Dordrecht, 1999, 197.

[28] An analysis of the dialectical dimension of pragma-dialectics is offered by J. WAGEMANS, *Dialectics and Pragmatics*, *Cogency*, 2, 2010, 95ff.

[29] E. FETERIS, *op. cit.*, 197.

[30] See R. ALEXY, *Teoria dell'argomentazione giuridica. La teoria del discorso razionale come teoria della motivazione giuridica*, Milano, 1998 (= *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt a.M., 1978), 226.

> obtaining absolute certainty […] in each issue by means of rational practical discourse is impossible, because the rules of discourse, due to their perfect nature, can only be fulfilled approximately in real condition. Furthermore, even an "ideal discourse" that ends in success does not guarantee the final certainty […] of its outcome[31].

We believe that this result is due to a wrong comprehension of what dialogue really is: to understand dialogue as a mere procedure of rational speech acts just catch one aspect of dialogue but, at the same time, it undermines its value and power. In our opinion, what we have here is a sort of 'secularized' conception of dialogue, strictly confined in the inner realm of language and discourse, really analytical in its essence if regarded from this point of view. A conception which forgives the necessary realistic relationship between language and world[32], already remembered by Aristotle by founding the undeniable value of the principle of non contradiction, which is based on the essence of every discourse – that is a necessary link between words and things named by words[33]. Something that allows us to speak in term of truth in the realm of argumentation and dialogical context, without putting this term (that is: truth) in quotation mark or feeling the obligation to replace it with the less binding "reasonableness".

To understand this point it is however necessary to explain what dialogue means, because (as everybody knows) it is possible to assign dif-

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[31] A. GRABOWSKI, *Juristic Concept of the Validity of Statutory Law. A Critique of Contemporary Legal Nonpositivism*, Heidelberg, 2013, 88.

[32] The discussion of this point will be here impossible: a deep analysis of realism with the demonstration of the impossibility of alternative positions is offered by F. D'AGOSTINI, *op. cit.* The possibility offered by this approach with regard to argumentation theory is discussed by EAD., *La verità avvelenata. Buoni e cattivi argomenti nel dibattito pubblico*, Torino, 2009.

[33] The discussion of the principle of non contradiction as presented by Aristotle's *Metaphisics* is well offered by R. GUSMANI, *Il principio di non contraddizione e la teoria linguistica di Aristotele*, in F. PUPPO, *La contradizion che nol consente. Forme del sapere e valore del principio di non contraddizione*, Milano, 21ff. Some clarification for the ontological issue entailed by the use of the word "things" – and about the possibility to embrace a Meinongian approach in ontology – is offered by F. BERTO, *op. cit.*

ferent meanings and several semantic values to this word[34]. We believe that a good way to understand the profound meaning of dialogue is to look at it from a philosophical perspective, namely to remember that, in the Western philosophical tradition,

> philosophy has been essentially seen as logos, in the word's great sense, namely not as a mere "discourse", semantic (exclamation, prayer, order, etc.) or apophantic (statement, assertion, announcement, revelation, observation, discovery, testimony), but as "argumentation" [...]. By "argumentation" I intend a discourse which is not limited to saying how things stand, but which tries to justify, to motivate, to demonstrate what it asserts, to bring reasons, to "account" for itself[35].

As is well known, the distinctive form of argumentation we find in philosophy is dialectical confutation, «that is to say to state the truth of a statement through the verification of the impossibility of the statement opposite to the first one»[36] thanks to use of the principle of non-contradiction and of the principle of excluded middle. From this point of view, dialectical confutation is the result of a dialectical confrontation, i.e. of a dialogue, which entails argumentation. Argumentation demands that every interlocutor involved in dialogue, when tries to persuade his interlocutor, advances a precise claim of truth[37]: when I argue for something or for someone I want that the listener agrees with me, since what I am saying it is true and what my interlocutor in saying is

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[34] We already discussed this point in a previous work (namely: F. PUPPO, *Is There a Fact in Trial? A Rhetorical Account of Legal Reasoning*, *Diritto e Questioni Pubbliche*, 1, 2015, 211ff., URL = *http://www.dirittoequestionipubbliche.org*, accessed September, 3rd 2015) we would like here to refer to just to remember what is, in our opinion, a good qualification of dialogue.

[35] E. BERTI, *Logo e dialogo*, *Studia Patavina*, 42, 1995, 31ff. (now available from URL = *http://www.ilgiardinodeipensieri.eu/storiafil/berti95.htm*, accessed March, 4th 2015), 1.

[36] *Ibid*., 2.

[37] All this topic, included the discussion of Tarski T-scheme's version to which we are referring to, is very well discussed and presented by F. D'AGOSTINI, *La verità*, cit., whose main thesis we would simply like to sum up here: every clarification may be find in D'Agostini's already cited essays.

false. And, in this conception, my thesis (so to say: what I assert and the argument I offer to support it) is truth or false because
(a) it respects logics;
(b) there is an external state of affair in the world which makes my statement truth or false.

As for (a), it is clear the difference between anti-formalistic approach: logic is strictly involved in this conception of argumentation, since an argument, to be accepted, must be, at first, valid (so to say: logically observant). Logic is an unavoidable part of argumentation and "logic" means that argumentation admits not only deduction, but also induction and abduction as valid rules of inference. But logical validity is not the only criterion we must aspect to verify for accepting arguments: to accept an argument means to verify that it is not only valid, but correct too. In a word: sound, which means to include reference to (b), which entails a widening conception of argumentative rational practice then the one exposed by analytical approaches. At the end, rhetoric enter argumentation, since arguing means to expose a thesis in a persuasive way, making an argument a good argument. But, by reducing our discussion to (b), it is quite clear that to refer to an external state of affair means to embrace an ontological and metaphysical position according to which we need to assume a 'light' conception of reality[38]: thinking about a fact that makes my thesis truth means to refer non only to 'objective fact' but also to imaginary facts, discourses, possible facts, etc. In other words, to every kind of 'thing' to which my discourse is referring to: and, we do believe, this is very important for legal argumentation, a context in which, very often, discussion is also about something that is not properly a fact (just think, for example, to a certain interpretation of statutes).

In addiction, we should remember that argumentation «takes place necessarily within the frame of a dialogue […] between two interlocutors, each one of whom claims a thesis conflicting with the thesis of the

[38] Reality – F. D'AGOSTINI, *Realismo?*, cit. claims remembering Hegel position – is not a stone under snow to discover, but it is thought's living bread: what do we have here is the proposal of a dynamic and not static conception of reality, which is, from our point of view, nearer to contemporary epistemological assumption then the modern one we find, for example, in the legal syllogistic model.

other»[39]. In this way a strict (or we could say an essential) relationship is reached between argumentation, dialectical confutation, truth and dialogue. And this is the reason why, when we speak about dialogue, according to Berti, we have to understand:

> dialogue […] in a strong sense, that is to say not as simple conversation, but as discussion, as comparison between opposite theses, aiming to determine which of them is true and which of them is false. […]. When somebody says that dialogue could be fictitious too, it hints at the possibility that someone holds talks with himself, that is to say someone who represents to himself the negation of his own position trying to confute it. […]. From this point of view, dialogue, for philosophers, is not a mere state of affairs, or only an ethically advisable behavior, but a sign of willingness to listen, of respect of others, of self-criticism. Dialogue is the unavoidable condition of dialectically arguing, and so of philosophically thinking. […]. I consider dialogue not simply a fact, but a transcendental structure of philosophical argumentation, given its non-apodictic, namely monological, nature, which is dialectical, therefore dialogical[40].

According to this lecture, it is clear that in our philosophical tradition, which can be dated back to Thales and Parmenides and then to Plato and Aristotle, the link between logos and dialogue and truth is essential.

Logos is however a word which has many meanings, such as "discourse" and "argumentation", but also "reason" and "logic": in this way, our philosophical tradition points out to us a model of knowledge in which all these elements are in some way strictly interconnected.

And, Berti continues, it is possible to deny dialogue if and only if somebody brings it into question; but to do this he/she is obliged to carry out a dialogue (maybe a fictitious one, but this is not important) to determine which claim is true: the one which states dialogue is undeniable or the one which states it is not[41]. A very peculiar situation, which echoes Aristotle's *Protrepticus*, which explains that it is impossible to not philosophize, since if we want to say that it is not necessary to phi-

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[39] E. BERTI, *Logo*, cit., 3.
[40] *Ibid*., 3 f.
[41] *Ibid*.

losophize we are obliged to assume a philosophical position, precisely the one according to which it is not necessary to philosophize. So, whether somebody wants to philosophize or not, it is necessary to philosophize.

We think that this kind of approach to philosophical dialogue could be considered valid for the structure of dialogue in general and then also for that special kind of dialogue that is a trial, since the transcendental nature of a dialogical situation is the same in all these argumentative contexts.

As we have seen, Berti talks about two types of dialogue: dialogue in the strong sense of the word, in which interlocutors try to understand which discourse is true; and dialogue in the weak sense, that is to say a mere conversation in which there is no interest at all in truth (maybe, we say, because interlocutors believe that truth does not exist and so all opinions are misjudgements or all opinions are true, which amounts to the same thing. Now it is quite clear why Plato and Aristotle attacked the Sophists and Eristics, who denied the presence of truth in rhetoric and the dialectical power of confutation)[42]. As already mentioned, we have dialogue in the first and strong sense of the word when: i) there are two interlocutors, each one of whom claims a thesis conflicting with the other's; and when: ii) the interlocutors are concentrated on determining which opinion is true through the dialectical verification of the opposite opinion's impossibility. Dialogue in the strong sense of the word could be fictitious too, since it is possible that somebody, as it were, speaks with himself to criticize his own opinion trying to confute it and so verify if his opinion is true or false. A note only: also if we say "opinion", we are perfectly aware that, concerning the epistemological basis of dialectic (which is now at stake), Aristotle clarifies that the premises of dialectical confutation are *èndoxa* and not mere opinions, which are different from *èndoxa* since *èndoxa* are opinions which «are "generally accepted", which are accepted by everyone or by the majority or by the philosophers – i.e. by all, or by the majority, or by the most

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[42] For an explanation of the necessary presence of truth in rhetoric see for example A. ZADRO, *Verità e persuasione nella retorica classica e nella retorica moderna*, *Verifiche*, 1, 1983, 31ff.

notable and illustrious of them»[43]. So it is clear that opinions and *èndoxa* are not the same thing, since «opinions […] do not coincide with *èndoxa*, but […] these are comprised by those»[44]. But I think I can continue talking about opinion, making clear that when I use this word in a dialectical context according to Aristotle I mean *èndoxa*.

As mentioned, next to these types of dialogue I think it is also possible to consider at least other types of dialogue in the strong sense of the word, in which we could however find some aspect of real dialogue and some aspect of fictitious dialogue, but also a few differences. I think in fact it might be possible to imagine dialogical situations which present different phenomenological aspects compared to the one I have already analyzed; and it might be interesting to point them out, and to contribute to forming, so to speak, a taxonomy of dialogical situations one might come across in real life, trying to contribute to providing an as exhaustive as possible illustration of it.

Think, for example, of dialogue between two interlocutors (as in real dialogue) who however share the same idea, so that we have not a duplicity of positions (as in fictitious dialogue): so, also if we have two interlocutors, it is possible to not find any clash of opinions. In my view[45] what avoids a dialogue between people sharing the same opinion degenerating into a mere conversation could be the fact that, as in fictitious dialogical situation, one of the interlocutors, or maybe both of them, hypothesizes a possible confutation to their common opinion, to

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[43] ARIST., *Top*. I 1, 100b 21-23.

[44] E. BERTI, *L'uso "scientifico" della dialettica in Aristotele*, *Giornale di metafisica*, XVII, 1995, 169ff. (now available form URL = *http://www.ilgiardinodeipensieri.eu/storiafil/berti1.htm*, accessed March, 4th 2015). About the value of *èndoxa* in Aristotle's conception see also E. BERTI, *Il valore epistemologico degli endoxa secondo Aristotele*, *Dialéctica y Ontología. Coloquio Internacional sobre Aristóteles, Seminarios de Filosofía*, 14-15, 2001/2, 111ff. We discussed this issue in relation with legal methodology and legal informatics (in particular with reference to information retrieval processes) in F. PUPPO, *Informatica giuridica e metodo retorico. Un approccio "classico" all'uso delle nuove tecnologie*, Trento, 2012.

[45] From this point of view, I repeat that what I am saying here is not a confutation of Berti's thesis, but only an enhancement of his exemplification; on the other hand a close examination of contemporary theories of argumentation about this proposal is surely a point which is here left.

check its truth. But, unlike fictitious dialogue, in this case it could be easier to analyze the problem, since in fictitious dialogue somebody is alone to discuss his own opinion and maybe it could be harder to think about objections to it. To sum up briefly this point, I could say that if we have many people speaking together but sharing the same idea without trying to confute it, we have only the guise of dialogue even if we have various interlocutors: despite appearances the situation would be in fact monological and not dialogical.

Another example of dialogue to enhance our exemplifications could be the one in which we have two interlocutors without difference of opinions because one of them does not have a precise opinion. Think, for example, of a dialogue between doctor and patient: maybe they do not have a different opinion about treatments (even if this could be possible) since the patient does not have opinions at all. But it could be the case that the doctor speaks to persuade the patient about the treatment's efficacy, discussing different medical possibilities to show that treatment he prescribes is truly appropriate. So, also in this case it is necessary to imagine other hypothetical possibilities to discuss, trying to explain which is the best. And the same thing happens, for example, in a dialogue between lawyer and client, with whom it is necessary to discuss the case for the defence, imagining the opponent's objections. And so on.

I think that these examples allow us to specify that when speaking of multiplicity of interlocutors in dialogue it is better to think of the multiplicity of positions than the multiplicity of people, since it could be the case that we have one but not the other. Obviously a thesis is defended by someone, and so to think of objections it is necessary to imagine a supposed interlocutor to assume, in a monological context, a dialectical opposition, which is what is needed to check the alethic values of the opinions.

All things considered I think it is possible to say that, at a basic level, we are in the presence of dialogue[46]:

1. when we have two or more people in reciprocal relation (or just one for fictitious dialogue), speaking together about a common subject

[46] See also the analysis proposed by F. D'AGOSTINI, *La verità*, cit.

in a rational way, namely to bring a thesis up for discussion with the aim of assessing if it is true or false; if they share the same opinion (or always in fictitious dialogue) to reach this alethic aim they (or he/she in fictitious dialogue) are obliged to think of an opposite thesis and to discuss it by trying to confute it;

2. when there are two or more people with a difference of opinion; in this case, dialogue could assume a controversial form, in which we should expect that people would be clearly willing to discuss their own opinion, searching for truth and trying to persuade one another (I say that dialogue could assume a controversial form because it is possible that people do not agree to discuss their opinions or discuss them in respect of rationality; but in this case there is no space for dialogue and peaceful coexistence, but for violence only);
3. a peculiar form of controversy is the one we find in a trial, since it is characterized, beyond two or more people with different opinions, by the presence of a third person (namely the judge) who has to be persuaded by parties involved in the trial and who is called on to determine in an impartial way which part is in the right according to substantial and procedural laws, stating about the trial's truth. So I think it is possible to say that a trial is a peculiar form of dialogue, namely of controversy, characterized by a very specific and well identifiable institutionalized context.

As already mentioned, these examples probably do not exhaust the different types of dialogue we might find in real life, but we are quite sure that every kind of dialogue presents this basic dimension: two (or more) people in reciprocal relation, speaking together about a common topic, searching for an affirmation of truth putting into question the different opinions they argue, trying to confute the opponent's one (this is valid for fictitious dialogue too, since it is sufficient to say that one is obliged to imagine an opposite opinion and so another interlocutor).

With regard to law, this identifies the trial as the original dimension of law instead of rules understood as State's formal will, for which a multiplicity of parties (State and citizens) is needed but not a multiplicity of opinions (for example, in the Hobbesian or imperativistic conceptions, legal theorists conceives obedience of law only or, otherwise,

ways of bringing somebody in line), so as to make truth extraneous to law.

4. Concluding remarks

As we have seen, for modern ideas of law the model of legal reasoning is reducible to a practical syllogism. The model of knowledge which is correlated to this model of reasoning refers to a monological and not a dialogical legal context, conceiving the judge as a sort of scientist and the trial as a sort of laboratory, in which the judge can reach the certainty of his/her decision describing facts and, in the end, knowing law as a fact, since any interpretation of it is forbidden. What do we have here is a conception which embraces an objective and neutral knowledge of law and fact: judge can reach truth, but "truth" stands for certainty, according to the foundationalist idea of modern knowledge, in which the two souls of the Cartesian and empiricist model coexist[47].

This is exactly the model of truth we find in Perelman but also in Alexy (and so in anti-formalistic and analytical approaches): a truth that it is clearly impossible to reach in dialogical context.

Moreover, these models are directed in particular towards judge's work, without taking seriously in account parties' presence in trial. Judge's decision is the outcome of trial, but it is after parties' argumentations: it is not a solitary work (and this is what has been really forgotten by modern model of legal syllogism). From this point of view, by remembering the dialogical and dialectical dimension of trial together with the real nature of truth we find in it, which is argumentative and not objective (even granting that objective truth could exist; and I think it cannot)[48], means to remember, at the same time, the real dimension of

[47] See D. PATTERSON, *Diritto e verità*, Milano, 2010 (= *Law and Truth*, New York, 1996), ch. 8.

[48] It is impossible to think of a 'pure' fact or to speak about a fact as a 'pure' fact, because in any case there is a subject who thinks or who speaks about fact. Here also it is possible to think of philosophy of science and remember Heisenberg's indeterminacy principle and the idea that observations always modify experiments, to the extent that even a measuring entails subject's interferences (see for example G. BONIOLO, P. VIDA-

trial which is a trilogue[49], a three-parties speech: *Processus est actus trium personarum actoris rei iudicis in iudicio contendentium*.

To reflect in this way about trial's structure implies to argue that its dialogical feature is the main thing which allows us to find a rigorous foundation for argumentation. The analysis of the nature of dialogue in the perspective of the Western philosophical tradition, and in particular of Aristotle's conception, allow us to understand the essential relationship we find between argumentation, dialectical confutation, truth and dialogue, which gains undeniability as a transcendental situation.

But, in the legal experience, dialogue is consisting of parties' rhetorical activities (in this sense we are referring to judge too): each party (in this sense not judge) claims their own interpretation of norms and their own definition of facts. The dialectical confrontation between them will bring judge to a right interpretation of the norm and to a true cognition of fact. But judge is a party involved in trial's dialogue. To analyse legal reasoning means to develop look at it recognizing, at first, this complexity: a very hard work since, as we already remembered, for several centuries the only subject of legal reasoning's titular has been the judge and lawyers have been systematically removed by legal theorist. But this is a work already started by others[50] and, anyway, it is outside the announced aims of this present brief essay.

LI, *Filosofia della scienza*, Milano, 1999, ch. 3). In other words, there is no such thing as a neutral observation of the world: the role of subject is constitutive of every kind of knowledge and it is impossible to think of a mere descriptive representation of "facts". And it does not mean to deny realism: rather, it means to give to realism is right place in philosophy, since it seems impossible to deny that something we call "reality" does exist, as well explained by F. D'AGOSTINI, *Realismo?*, cit.

[49] As exposed by C. PLATIN, *Le trilogue argumentatif. Présentation de modèle, analyse de cas*, *Langue Française*, 122, 1998, 9ff.; C. PLANTIN, C. KERBAT-ORECCHIONI (dir.), *Le trilogue*, Lyon, 1995.

[50] We refer to the so called "CALS" model of legal reasoning developed by M. MANZIN, *Argomentazione*, cit., which is a very interesting proposal since it takes charge of trial's trilogical structure, explicitly regarding to parties presence in trial's dialogue.

LABOUR LAW, ACTIVITIES AND LEGAL INSTRUMENTS: HISTORY AND CIRCUMSTANCE

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TABLE OF CONTENTS: *1. The itineraries of Law - 2. What does a judge witness? - 3. The role of a minimum history.*

1. The itineraries of Law

History is not written from a single event. In the confluence of itineraries, there is a somewhat vivid perception of the situation, being the fusion of contingencies in the interpreter, distanced by time, with (its) his own itineraries[1].

To law, History and historiography represent a method of the epistemological itinerary or a trail to be blazed, also based on the overlap of circumstantial experiences. It is not the case, however, of an automated perspective. It is not the redundancy when quoting the same theoretical references as an indispensable step to every academic work. It is not repeating what today's scholars have said about yesterday's scholars and echoing others from the day before. The History of Law only makes sense when it does not veer off from a sudden turn on the way, from the slippery road, from the steep descent towards the experience of law. In order to learn it, one needs to be guided by a premise that

[1] As good grounds for this statement see H. GADAMER, *Verdade e Método*, Petrópolis, 2003, especially on the topic of the position of the interpreter who describes history. There are indeed many different ways to face the issue, but hermeneutics is always a good way amongst so many itineraries.

exposes the inaccuracy of the historian's perspective, according to one of the interpreters of history:

> Historians relate plots, which are like so many itineraries that mark out at will through the very objective field of events (which is infinitely divisible and is not made up of event worthy atoms); no historian describes the whole field, for an itinerary cannot take every road; none of these itineraries are the true one, is History[2].

The goal of the following words, although in its sketchy lines, is to delineate a short pathway of the History of Law. The perspective is that of the contingencies of Labour Law, seen from the point of view of legal procedure. The justification is the importance of reflection on the history and historical sources of legal epistemology. The itinerary chosen encourages picking the path less travelled of the experience lived beyond the standard ways of expressing law.

In order to synthesize the purposes, one question is posed: if, in 200 years from now, historians look into the history of today's Labour Law in Brazil, will they be able to decipher the developments experienced by every legal instrument in each activity or will they be paralysed by the dogmatic freezing imposed by the procedures, by the law and by the doctrine?

Other questions are worth answering, for asking them is an expression of the interest in exploring important and rarely visited spaces. Just by the very disclosure of such purposes, one runs the risk of being excessively presumptuous in pursuing certainties in a vast field, crisscrossed by shortcuts. There is, however, a strictly personal clamour that justifies the wish to say and that contaminates it with a familiar subjectivism. In this specific case, in which the text is announced by the writing of one determined author, within the ever circumstantial horizon of her experience, the reason lies in the frustration of knowing, through everyday observation, about all that is lost in the dynamics of every labour law instrument, given the difficulty to be encountered in understanding all the pathways followed by it in everyday life. From this point derives the conviction that there is a lot to know regarding legal

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[2] P. VEYNE, *Writing history*, Middletown, CT., 1984, p. 36.

instruments – this expression is being used here as to spare one from the complexity[3] – whose pure conceptual limits are always outdated in the fusion with the moving factors of human rational experience.

The idea would be to treat the historical source as if it would be someone saying something about the future. The idea is that, in the blink of an eye (as in a magic trick) it could literally talk about what records should be committed to memory regarding legal instruments. In a historical fantasy, it would be as if the source could speak about its expectations of recovery, either in the future or in present times of Brazilian Labour Law.

The topic seen from this perspective, revolves (*resolve-se ou revolve-se*?) around the potential chronicle that routinely supports the legal instruments and that lies always beyond the word of law and sometimes, beyond the word of the decision. The attempt, already exposed in other opportunities[4], departs from the surprises hidden in the analogical process of law enforcement or its spontaneous assimilation. This process, of an essentially interdisciplinary nature, implies the vital extension of distinct knowledge that is indispensable, not only for judges to base their decisions on, but also for the law-making authorities to build laws, both of which dialectically lead to the transformation of Law as a fact that has been experienced (even in its dysfunctionality). The transformation is very often lost whenever law is appropriated as an object of knowledge. When this minute experience becomes invisible, it fails to make history, in other words, it may remain as a distant point from the itineraries ordinarily taken to write the history of law.

Who would say that a Labour Court Judge should hold some knowledge on the breeding of a little wasp (Cotesia flavipes), released

[3] This way, a legal instrument is regarded as a range of human interests regulated in a more or less comprehensive way that holds the possibility of adding distinct levels (*esferas*) of normativity.

[4] Cf. M.S. LOPES, *A formação do juiz para a oralidade: relato, memória e pedagogia do direito não escrito*, in I.G.S. MARTINS FILHO, M.G. DELGADO, N. PRADO, C. ARAÚJO (Org.), *A efetividade do direito e do processo do trabalho*, Rio de Janeiro, 2010, p. 137-177; M.S. LOPES, *O trabalho e a concreção do direito: a principiologia pela observação dos ofícios*, in I.G.S. MARTINS FILHO, N. MANNRICH, N. PRADO (Org.), *Os pilares do direito do trabalho*, Porto Alegre, 2013, p. 128-193.

over sugar cane fields for the successful prevention of borer[5]? Knowing the reality of work and assessing how Labour Law Instruments (working hours, wages, health protection) adapt to it are intrinsic elements of the cotangential (and historical) formation of the law in action. There is a certain knowhow found in this analogical process of facts meeting norms that underpins the juridical dynamics and that builds the history (and historiography) of Law, a fundamental support to legal epistemology as a method and as a substrate of knowledge about the law experienced[6].

In the composition of juridical phenomena, there is always the pathway followed by the interpreter (be it the law maker, the judge, the lawyer, the researcher) to establish how the legal rule may reach the moving sphere of the fact experienced. The core interest of law in action lies in the dynamics that are revealed as historicity. It is for no other reason that historical methods will always stand out in legal epistemology.

For every legal instrument (including the ones with a Labour Law nature) there is a whole array of contingencies that stem from time elapsing and that mould it to a perspective that was neither predicted nor even thought of, but still relevant in the understanding of how it shapes itself in the sedimentation of the layers that are aggregated to the naked body of normativeness as formality.

In a short paper where he discusses the role of the history of law and justice in contraposition to general history, Koselleck approaches the different rhythms of the time of law that are historicised, emphasizing the need for perdurability and repeatability, which is a feature of the specificity of law. Permanence-repetition and change are signs of consolidation of the rights and needs that bear some correspondence to general history[7]. The exegesis of sources, that he qualified as "imma-

[5] Cf. file n. 00118-2010-157-03-0-00-0-RO, Minas Gerais Labour Law Court (*www.trt3,jus.br*, access on Dec 18, 2014).

[6] About the role of analogy in Law, see A. KAUFMANN, *Analogia e "naturaleza de la cosa"*, Santiago, 1976.

[7] R. KOSELLECK, *História, direito e justiça*, in R. KOSELLECK, *Os estratos do tempo*: *estudos sobre história*, Rio de Janeiro, 2014, p. 332.

nent to the history of law"[8], leads him to approach the tension between permanence and change

> Every historical controversy about the interpretation of legal rules which have been made to last leads us to challenges that precede Law or that, being left aside by it, require a new answer. Every determination of the difference between that which is and that which should be raises the question about pre or extra-juridical factors framing this difference. When an old transgression becomes a new Law […] what prevails is the need for extra-juridical adaptation due to social or political reasons, and the pressure generated by those reasons may lead to a new juridical quality[9].

The text also tackles the role of the political needs and strengths required for the creation of new contents in the legal universe[10]. When observing the way through which perdurability acts on the History of Law, one may dare to say that the change does not happen only when an extra-juridical element catalyses an alteration in the status of the regulation of a given area of human interest. The new quality happens through the juridical use of an instrument or a set of rules, due to reasons stemming from its nature and specificity of incidence and/or enforcement. In the paradox, the external factor may be the way through which factual circumstances, relevant to that group of interests, act in many argumentation and/or assimilation spheres. This is how they contribute to the transformation of a legal instrument into a different version from the one originally conceived and they, in turn, interfere with the image that the instrument has within the realm of the Theory of Law.

We may depart from an example that is substantially present in the hearing chambers of the Labour Law Courts in Minas Gerais.

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[8] R. KOSELLECK, *op. cit.*, p. 330.
[9] R. KOSELLECK, *op. cit.*, p. 330.
[10] R. KOSELLECK, *op. cit.*, p. 330.

2. What does a judge witness?

All Labour Court Judges have been witnessing a significant increase in volume of cases of the indirect termination of an employment contract. This used to be a rare request about 20 years ago, as opposed to the current 1/3 of the daily agenda of the courts. One cannot be naïve enough to think that the only cause for this is a sudden awareness of employees in denying mistreatment or non-compliance to the rules by the employers. There are two factors to be considered: on one side, the employee's wish to obtain unemployment benefits and Government Severance Indemnity Fund for Employees (FGTS) plus 40%, compensation that they wouldn't be entitled to in the case that they terminate the employment contract themselves; and on the other side, the pressure from the number of lawyers in the market today, fostered by the exacerbated increase in the volume of Law Schools and professionals competing for cases and the profit percentage received for them.

It is hard to tackle this topic without touching on susceptibilities. However, hiding facts leads to the hopelessness and discouraging feelings that nowadays, to a great extent, stem from this paradox between a Labour Law based on noble principles and a practice marked by simulation and a huge volume of very redundant demands and, in some cases, untruthful in their own purposes. One cannot run the risk of falling into the epistemological hypocrisy, which is to clean the juridical reality so as to hide the pathways of law and its variety.

A historian of the future, when searching for ways to understand Labour Law in its complexity, may not consider a popular tabloid newspaper, sold for R$0,35, as a historical source. But if by any chance he stumbled upon a sample of *Super Notícias*, a popular newspaper from Belo Horizonte, with the headlines of Jan 27th 2015, he might be intrigued by the sheer number of advertisements for lawyers' services. This imaginary historian will be acquainted with section 483 of the CLT[11], but he will notice a paradox: although all adverts would encourage employees to look for legal advice in order to claim for the indirect

[11] Section 483 of the Consolidation of Labour Laws provides the situations in which employees are granted the right to terminate the employment contract due to faulty actions committed by the employer.

termination of their employment contracts, with explicit reference to the very name of this instrument, none of them mentions the prerequisite for the application of the instrument which is some of the serious faults listed in the section committed by the company. The idea spread by the adverts is that severe fault or worse is implicitly assumed, the idea that there is an innate right that legitimizes employees to get the severance (FGTS and unemployment benefits, more specifically) out of their own will. This conclusion is drawn from the literal interpretation of the adverts' content. "Indirect termination of employment contract. Do not ask for your employment contract to be terminated, leave the company with all due severance", reads one of the adds. "Do you want to leave the company with full severance? Know how to do it", reads another.

One can say this is irrelevant to the Theory of Law for it pertains to sociology or to Labour Law. One can state that this does not bear any interest to History of Law. This is not true. The destination of Law to the practice leads to all obstacles inherent to it being relevant to the understanding of its history.

Should the historian of the future be a bit curious, as all historians from all times should be, and if he seeks for information on the due severance after indirect termination, he may come across the headline of the *Contas abertas* website on April 11th 2014: "Number of unemployed falls, but payment of unemployment benefits is still a record"[12]. Taking a pathway that is not usually covered today, he may then want to ascertain whether there is any link between the two symptoms (the increase in the volume of indirect termination claims and the increase in unemployment benefits in times when there is a significant number of available jobs).

There is no book or legal manual that contains the recipe: to withdraw the FGTS and receive unemployment benefits, when the employee simply decides to leave the company, he/she should claim for indirect termination of the contract and try to reach a settlement. There is no interest in dealing with it as a mere legal aspect and deviate from the

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[12] *http://www.contasabertas.com.br/website/arquivos/8253#sthash.81zaExOl.dpuf*, access on Feb 12, 2015.

utmost meaning of indirect termination. This ploy, formulated in view of the possibility of reconciliation, gained strength amidst various circumstances that can act as credible hypotheses to justify it: low wages; high levels of available jobs for a certain period of time, as to enable employee mobility; the poor training of workers in Brazil (which does not prepare them for more stable positions to meet technical demand); the under valuation (including the remuneration point of view) of intermediate technical positions; the possibility of receiving unemployment benefits and the FGTS and, for some time, to have another informal activity of his/her choice; the already mentioned law market pressure, expressed by an ever higher supply of professionals.

Distinguishing those situations, where this simulation is configured, from those in which the claim is genuine, is a somewhat distant experience from the interests of the Theory of Law, but it does happen every day in the routine work of lawyers and judges as renewal of the same problematic experience.

This search for the history of the parties, which is known only from the limited information of the claim, leads to an ordinary comparison between the judge and the historian[13]. The judge looks at the past and seeks to recover it in the present by means of evidentiary or indexing sources, both being argumentatively treated when building the grounds of his/her decision. In the decision, the judge justifies the way he understood the signals interpreted in order to reproduce the relations of life that should be analyzed from the legal perspective. The judge is a historian who judges and, in particular, the judge is a historian who writes the history he/she will judge. Carnelutti emphasized the essential aspects:

> The judge is a historian but not just a historian. If, at first, he does no more than historiography, in a second moment he/she makes history, to the extent that whatever was decided by him/her, is converted into action[14].

The historiographical action of the judge establishes a route to the disputed facts. From this perspective, the decision is a judge's action in

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[13] See M. S. LOPES, *A equidade e os poderes do juiz*, Belo Horizonte, 1993.

[14] F. CARNELUTTI, *Teoria general del derecho*, Madrid, 1955, p. 474.

history. The point to emphasize here is the part of the story that, in time, escapes from the composition of legal instruments as experience. Judges do know that the increased volume of claims asking for indirect termination has causes that go beyond the limits of formal legality. They talk about this during their gatherings at coffee breaks. They complain about it in their offices and corridors. They warn parties and their lawyers that they do not ignore the signs despite the attempt to reconcile. But they do not go beyond this expansion of knowledge in the language of orality that gets lost in the wind as time elapses. The words of the decision are cleansed from the awareness of the gaps in concrete law, that are not and do not create res judicata.

António Manuel Hespanha highlights the need to understand the everyday law[15]. In a lecture, he exemplified this absconded side of law and its history, by giving an example of the reaction of consumers to malfunctioning ATMs. There are various answers to this everyday fact that can bring momentary losses to someone who has a legitimate expectation of access to services but does not encounter it. The volume of people who will claim compensation for such damage is insignificant, but that fact says something about the law as an event. Rights end up being solved in a variety of ways, most of which are unforeseen by formally established standards.

So there is a need for taking into account Law's counterpart in everyday life and vice versa.

That is what is said when one takes record of the need to frankly put the questions about why this revival of the volume of indirect terminations should be launched even in small advertisements of a popular newspaper. The indirect termination is not only what is expected of section. 483 of the Labour Code (CLT). Time has laid layers over this instrument to be unveiled because they intervene with the composition of Law.

This situation proves that everyday life does interfere in labour relations and Law. There is a history(ies) in the decision(s), but, above all, the underlying history, including the oral basis, which is not accounted

[15] See A.M. HESPANHA, *Cultura jurídica europeia: síntese de um milênio*, Florianópolis, 2005, p. 492-497.

for in the case. And in it there is the history of the pluralism of sources and also pluralism in the absorption of the very framework of the juridical rule in its various routes.

The history of a legislative route transits between relevance and irrelevance pertaining to what is considered as Law, legal epistemology[16] and, last but not least, the history of law.

This everyday life of legal phenomena, perceptible in processes and especially in the circumstances surrounding them, does not seem to interest the theoretical performance of Law.

A judge reports, in deep despair, that he has nowhere to expose and reflect on the impressions of the daily life that roam the corridors of the Labour Court and are known to all. In the courtroom, amid the formalities of the decision pathway, when saying who is right, the judge can not handle the newspaper, he can not deal with what he knows is no more than a trick to trigger payment for FGTS and unemployment benefits, besides the corresponding percentage on fees. He also knows that each case is unique and that he cannot take them all for a mitigated request for dismissal. This cleansed reality arriving at the courts, as well as others of the same nature, are not considered as factors stemming from the concrete essence of law. It is unlikely, therefore, that it should make some history. But it does happen. It is the precursor of the right to be faced. However, it may not be discovered by the historian of the future, in case he does not venture into the most unlikely sources (newspapers, hearings schedules and minutes, oral reports, retrieved who knows where from obscure black boxes).

This residual contingency, fostering a side passage of labour law (that which refers to the termination of the employment contract), intervenes in the regulatory framework and reveals the legal relationship as a channel for the mutability of Law, allegedly perennial in its conceptual constitution. The same thing (termination) unfolds in various ways of being, through ways that were not imagined at the time its normative fabric was being knit with the enactment of CLT in 1943, or FGTS in 1966, or unemployment benefits in 1990. It is easy to find, in legal the-

[16] The use of the expression “Science of Law” is being avoided for it evokes some ambiguity in the discussion of the content.

ory, defence arguments so as to guarantee (due) stability for the employee. But this desire to perpetuate the employment relationship is pretty close to the desire to consume using the FGTS about the magnitude of the issue. For this is something that goes beyond the letter of the law and consistently foments the habit of risking the claim for employees who wish to leave the company, providing them with funds they would not get otherwise.

Discussing these routine symptoms means frustrating the rigid concept that the principle of continuity of the employment relationship dwells deep within worker's and his lawyer's souls. It may or it may not be true. But this is how history evolves and there must be a way to write it as such in the crossways of everyday life.

3. The role of a minimum history

Minimum history, despite its apparent insignificance, scribes the essential route of the dynamics of Law in daily life. This is where one can see the pain in Law, the veins of its concreteness. The ever-posing question is to find out why it does not matter to what might be called a science of law. As if it were the painful side of Law. This is a pain about which no one wants to talk, but that spreads throughout a history that cannot find the sources to rescue it.

In a letter written by parents who have survived their children, killed in plane accident, there is a long appreciation for the support of all and a request for privacy released in a short sentence: "Pain is not a history"[17]. The text contains a plea for not transforming their suffering into news. "Do not talk about our pain, do not throw it in our faces again", is the final message of these parents, torn apart by the loss of their children.

When speaking about Law, pain is the mandatory intersection of itineraries already walked at a later stage to the potentiality of Law as text and idea-value principles. The history of law is made up of pains

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[17] *http://revistacrescer.globo.com/Curiosidades/noticia/2014/07/casal-perde-os-tres-filhos-no-voo-mh17.html*, access on Sep 21, 2014.

about which we should speak, although we may not always wish to. They are many, and they hide behind the shadows of each legal instrument and the reality of the facts they capture. Therefore, even if the characters or participants appeal for some isolation, a nagging chunk of history is right there, based on the conflict.

Conflict, here, in the sense of something that goes beyond the disputes between parties. The idea covers the windings of the process of enforcement and spontaneous assimilation of Law. Those are complicating factors of the abstract version of Law, such as power, about which a lot less than necessary is spoken.

The theory of Law constantly sends isolation messages, similar to the hurting parents', when it limits what Law is and when it excludes the daily life of legal instruments from the borders of what is the History of Law. This is not an isolated event, absolutely transformed into the whole being of Law, but rather a farrago that should attract curiosity inherent in the knowledge of what has passed With regards to Law, the pain, that makes history, is found not only in the conflict. It also resides in the ways Law is applied, which can even be the antithesis of all expectations created around it and the legal system.

During the movement of argumentative building in the legal process, judges, lawyers, labour prosecutors and officials do not exclusively experience the synthesis condensed into the decision.

Throughout the corridors of chambers, and around courtroom tables, arguments always stretch beyond the purity of the legal concept. They do reach, even subliminally, in the contact between bodies, in voices and looks, the whole extension of events and experiences that goes beyond the linear margin that designs the body of law. In recapitulating their lives, a lot more fits within the search that consolidated the prospects of Savigny or Puchta, founding composers of the Historical School and the Jurisprudence of Concepts[18]. Both were focused on a residually internal history of instruments and concepts, respectively, as if mere textual observation and understanding of everyday Law were ever possible.

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[18] For this topic, a digression that does not fit in this text would be needed. Although aware of its insufficiency, a suggestion is presented here: K. LARENZ, *Metodologia da ciência do direito*, Lisboa, 1989, p. 10-26.

In the introduction to his *Crime and everyday life*, Boris Fausto demonstrates how to make history using lawsuits as a source. For him, one should not be necessarily interested in great crimes, but rather in banal ones, precisely because they encroach on daily life and because they allow access to what would be a regularity, precisely centred on this routine and ordinary path, followed by the applicant[19]. When summarizing his feelings after examining those sources, he states:

> "I do not know if I can convey to the reader some of the impact produced by contact with thousands of criminal cases. The previous hypotheses are drawn by an emotional torrent, in this contact with clots of feelings, tensions, human relations – sparse remains of an apparently contemptible life fabric to cutting out the facts that deserve a seat in the repository of History. [...] Also, when trying to set an order to the documents we ended up realizing that they themselves are largely fictional, open to the imagination of those who read them. Their vital breath accompanies us throughout the whole rationalizing effort[20]".

All this is the basis of what was intended in this small study, initially prepared for an oral presentation, that comes loaded with the subjectivity of the interpreter-author, who is also, in her own way, a character of the processes, living and writing the fiction of someone's life.

The history of (labour) Law, however, is scattered throughout the flow of processes, not by the weight of the decisions, nor by their size. The details of daily life present in the decisions clot the text of life.

The complexity of contingencies, sometimes peripheral, allows one to know how a particular legal instrument, in this case any of those that affect the march of the legal relationship of employment, acts and generates effects on their concrete experience.

The possibility of theming is significant and covers all stages of the lives of workers while employed. For each, there is a dose between the known and the knowable, between what is valued and what is spurned on cleansing the selection of theoretical and historical relevance.

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[19] B. FAUSTO, *Crime e cotidiano: A criminalidade em São Paulo (1880-1924)*, São Paulo, 2001, p. 38-39.

[20] B. FAUSTO, *op. cit.*, p. 38-39.

If one takes trade unionism as an example, the observation can follow the disputes over management positions up to the specificity of the negotiating tradition of each category in its territorial base. There is no way to generalize the Brazilian labour movement from a long-term history, based on grand facticity, which repeats its abstract image according to the legislative developments. However, there are questions to be asked: Why have trade unions been led by the same person or the same groups for decades? Did the State step away from the regulation of trade unions or does it keep interfering with economic dependence and external control over the negotiating limits? Considering the diversity of subcategories and the low participation of employees, how can one experience a change from unity to pluralism? Why is it so difficult to strike in certain categories? Why is it easier today in categories related to public service? What does the low adherence of employees to unions mean? What is the weight of the control imposed by the judiciary on the content of collective norms? Would they participate more should they themselves have to fight to change the content of the subsequent collective norm?

The same applies to the working hours in the breaking down of its various instruments and situations and, in particular, in detailing what one can collectively bargain through it.

The fact that the source of labour law is the tension between the time devoted to work and idleness can be enough to be sure that there is more at stake than the establishment of the eight-hour limit per day and/or forty four hours a week, with a one hour break within shifts and eleven hours between shifts.

The special regimes tell the story of certain activities and reveal the anachronism of time in demands that openly unveil the impossibility to predict an absolute future.

Yesterday's six-hour shift of bank workers is not the same as today's. The system of continuous shifts has been expanding its scope beyond what was predicted by the Constitution of 1988. The 12/36 hours shift is experienced in hospitals as well as in surveillance and janitorial activities. There are categories that are subject to a range of absolutely unpredictable timetables.

Contingency interferes with how the work is developed in various activities, affected by changes in the world of life, culture, technology, just to go beyond the simple economic factor. Time in 1943 was different from time in 2015, measuring by the settlement of consolidated interpretation. Clocks pace the flow of life in a different way now and then.

Shifts and time, which could not be monitored remotely from one's eyes, can now be mastered under tight control through satellite and other equipment. The driver who does several trips to load and unload iron ore freight is different from the driver-salesman who distributes beverages, who in turn is different from the telephone or cable TV technician serving these companies. For each of them, there is a different and innovative means of control: public phones, tracking devices, palm tops, notebooks, mobile phones, the volume of service orders controlled by customers. A truck that deviates from the planned route can be stopped by a command issued by the satellite, which means that the driver will be under someone's full time surveillance while driving. When John goes to Sao Paulo with his truck, the company knows how long he will take. The company knows about the history of that activity and the customs formed. It also knows about the road conditions. But, beyond that, technology allows it to follow the vehicle's motion. This is a different reality from the time when the law was enacted, in 1943, and stated that this time could not be controlled. The history of labour law, therefore, in the contingency of each profession, keeps hidden in spaces which are given no importance, the remnants of changes affecting the ways of being of the relationship between the employee and the employer, within the singularity of each activity temporarily considered.

Amidst the confusion of the days, processes do carry this history of diversity and recompose it under the stress and complexity that escapes any attempt at generalization. There is no eloquence in these details that should be substantially absorbed by the theory of Law by the simple observation that they make reality experienced in concretion and prompt themselves to the history that Law weaves and to the historiography that it creates.

But the history of the instrument and what it represents for the history encompassing labour law involves other developments transposed to

customary application of law. Labour law thrives in activities and in the way their different instruments consolidate. This story revolves around contingency and it is essential for the knowledge of Law that has its contours defined by the problematic dynamics of everyday life.

The plurality of factors in the formation of the normative phenomenon justifies the anguish in the absorption of sources for the history of Law. The complexity of the concretion of Law leads the dialogue with them to permeate the uncertainty concerning the questions that can be posed by the projected invisibility by Law as an event in the routine that goes beyond texts and shapes.

This is not a concern that affects only today's interpreters-historians, who face the horizon of an ancient past, wishing to decipher it. It is a frustration of today's living-interpreters, who cannot translate much of the relevant legal experience and, therefore, will leave to interpreters-historians of the future the task of walking various itineraries, pursuing the pathways of legal instruments, recognizing (or not) their living faces and the many layers that, with time, have been aggregated to the pure form that was originally drawn by the words of Law.

DECENTRALIZATION AND RECENTRALISATION: TRENDS OF LABOUR LAW IN ITALY

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TABLE OF CONTENTS: *1. Premise - 2. Starting from Trentino Observatory on the labour social rights the decentralization of legislation and contract - 3. The judicial recentralisation - 4. Conclusions and recent trends with the Jobs Act.*

1. Premise

This papers aims to analyse the current trends of Labor Law in Italy, within the dimension of European Union Law, in the logic of decentralization, regulatory and contractual, on the one hand, and the recentralization, from a judicial point of view, on the other.

The perspective on the dynamics of the "double movement" recentralisation-decentralization is borrowed from economic sociology. The opportunity to discuss the trends of Brazilian Labor Law is fruitful and interesting, because Brazilian Trade Union Law is moving from a predominantly sociological perspective, while Italian Trade Union Law is moving from a mainly positivist perspective[1].

The opportunity is just as stimulating as it allows to report the results of the project which started the development of the Trentino Observatory on labour social rights[2]: the website that has allowed, during the two years of research, to shed light of this double movement.

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[1] M. HASSEMER, *Il diritto sindacale brasiliano: le più importanti differenze con quello italiano*, *Massimario di Giurisprudenza del Lavoro*, 4, 2015, p. 186.

[2] See: *www.dirittisocialitrentino.it*. Post-doc research on "The evolution of the European Union sources in social matters: the effects at legal-institutional national and provincial levels, with particular reference to the Autonomous Province of Trento" financed by Autonomous Province of Trento ("bando post doc 2011"). The final book is A. MATTEI (ed.), *Il diritto del lavoro tra decentramento e ricentralizzazione. Il mo-*

2. Starting from Trentino Observatory on the labour social rights the decentralization of legislation and contract

First, the theme explored in the course of the research is linked to the development of the trends established at EU level and also at the regional level in the regulation of the labour market and some relevant institutions of labour law.

The work reflects the preparation of the monitoring website, which would allow a work of systematization of matter and analysis of data based on the comparison between the two areas, the supranational and national and subnational, with special reference to the legal and institutional context of the Autonomous Province of Trento.

More specifically, the identification of specific areas to be analysed follows from the attempt to clarify the process of Europeanization of Labour Law sources. It is not a one-way process, a mere adaptation of national and subnational rules to those coming from the supranational headquarters. It is instead a conditioning process of mutual interaction and multilevel cross-fertilization.

With regard to the aspect of legislative and contractual decentralization, the Trentino Observatory has identified some areas of analysis through constant monitoring of the sources of legislation, case law and contractual law.

In particular, the freely accessible website contains documents and materials related to collective bargaining agreements signed by territories; case law on Labour Law, in particular the judgments delivered by the Tribunals of Trento and Rovereto and by the Court of Appeal of Trento; the legislation on Labor Law at European, national and provincial levels; and the doctrinal contributions on Labour Law which are available in the Internet.

As a whole, the sources have continually developed, through the following steps of the research: monitoring of the topic with collection of material through the Internet; better understanding through a systematization of organic materials added from time to time in internal data

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dello trentino nello spazio giuridico europeo, Napoli, 2014, with presentation by S. Scarponi, premise by P. Mengozzi, and articles by A. Mattei, G. Bolego, M. Colasanto, M.V. Giovannacci, S. Vergari, C. Alessi, R. Salomone, A.L. Terzi.

sheets; finally, the analysis of individual tabs within the Trentino Observatory which, thanks to its free availability, has led to public disclosure and open access to all stakeholders.

It should be further noted that the collection was not made in purely quantitative terms, but tried to make available a pool of knowledge including hundreds of documents, available within the website through various search tools (e.g. search for keyword).

Among the materials that were monitored we can consider, adopting an empirical approach to the analysis of the sources, the proximity agreements subscribed pursuant to Article 8 of Law 148/11.

In fact, it is the most significant regulatory decentralization in the Italian system: national rules legitimize collective bargaining, also at decentralized level, to introduce a legal framework that may waive for the worse the standards adopted in the national collective agreements. The "history" of this type of bargaining is believed to be born at the instigation of the European Union, but internally stands out the FIAT case that hit the Labour Law debate: it was, in essence, the will of the company, global player around the world including Brazil, to sign a new collective agreement for the first level outside the system of national bargaining, with specific requirements for the company voted by a majority, and in fact accentuating the break in the unity among Italian trade union organizations.

This process is inserted into the thrust of the European Union that promoted the creation, as stated in the TEU, of a highly competitive social market economy (art. 3.3), with the Euro Plus Pact, in March 2011 and the letter of the European Central Bank addressed to the Italian Government, in August 2011.

In the case of the Euro Plus Pact, signed in March 2011, approved by the Heads of State and Government of the Euro Zone and other countries which have joined the European Union, aims to further strengthen the economic pillar of the Economic Union and Monetary Union, as to lead to a quantum leap in the coordination of economic policies, with the aim of "improving competitiveness and thereby leading to a higher degree of convergence reinforcing our social market economy".

A few months later, with the letter of 5 August 2011 the European Central Bank asked the Italian Government, among other measures, “to further reform the collective wage bargaining system, allowing firm-level agreements to tailor wages and working conditions to firms’ specific needs and increasing their relevance with respect to other layer of negotiations […]”. A few days later Article 8 came into force.

In this way, it shifted the attention and the focus of the national collective agreement of the category-level negotiation decentralized, territorial and company level, expanding the structure of collective bargaining.

The degree of application of this type of negotiation, monitored within the Trentino Observatory[3], was brought to light in its various formations: in the normative source, it is structured to the norm (constraints purpose; structural constraints of the type regulated directions than National Law, European Union Law and International Labour Law and procedural constraints); and in the case law, which has finally been interpreted by the Tribunal and the constitutional jurisprudence; in forming the contract-application, with interventions which are “patchy” across the country.

3. The judicial recentralisation

While it has been shown that the trend towards legislative and contractual decentralization has taken place, a reverse process of recentralisation is taking place at the judicial level.

This has led to a dialogue among courts of different levels, local, national and supranational. It is a dialogue that involved non-standard contracts, in particular those relating to flexible labour contract with public administrations, which features the school sector.

A dynamic evolution of the sources on the subject, including the European level and the national and sub-national levels was reported by the Autonomous Province of Trento. A major reason, looking at the discipline of fixed-term contract as it was changed significantly over

[3] See: *www.dirittisocialitrentino.it/?p=2238*.

the years: the text of 2001 (legislative decree n. 368) is implementing the European directive on fixed-term work. Since 2005 it has been changed almost every year, so it was a test case for legislative action or the Constitutional Court.

In the judicial sphere, a considerable dispute emerged at both the national and local levels. It regards the fixed-term contract in the school sector, under review by the Court of Justice of the European Union from a series of appeals : 1) a reference for preliminary ruling of Naples Tribunal, asking the Court of Luxembourg to clarify if employees linked to the public administrations with private law relationships are entitled to the permanent transformation of the employment contract; 2) but also during the trial of constitutionality, through the ordinance n. 207 of 2013, with which the Italian Constitutional Court has referred to the judge of the European Union some issues of interpretation related to the compatibility of national legislation with EU law (Law no. 124 of 1999 on the subject of school personnel)[4].

In this regard, the Trentino Observatory has been able to analyze this evolutionary process: from the case law of the Italian courts that between 2010, 2011 and 2012 have had the chance to rule on the issue of recurrence of fixed-term contract with different results; the conversion into permanent contract to the recognition of indemnity; how the case law of the Courts of Trento and Rovereto ruled; and how the judges of the Supreme Court, the Constitutional Court and the Court of Justice of the European Union ruled (the latter at the end of November 2014: Joined Cases C-22/13, C-61/13 to C-63/13 and C-318/13 Mascolo c. Ministry of Education)[5].

In that judgment, the Court of Luxembourg ruled that the Italian legislation on fixed-term contracts in the school sector is contrary to Euro-

[4] In this case, it was also asked whether the clause 5 of the EU Directive 99/70/EC must be interpreted to prevent the application of national law in the school sector, with particular reference to substitute pending completion of the proceedings for employment of permanent staff: this legislation allows to make use of fixed-term contracts without, however, indicating deadlines for the completion of the competitions without including the right to indemnity.

[5] See: *www.dirittisocialitrentino.it/?p=1829*.

pean Union Law, and in particular Directive 1999/70 on fixed term works.

At the national level, pending a ruling of the Constitutional Court, there were the first rulings of the Courts and, among others, the Labour Court of Naples has determined that workers completing more than 36 months of service have the right to the stabilization of the contract (Case 528, 529 and 530 January 21, 2015).

4. Conclusions and recent trends with the Jobs Act

From research conducted by the Trentino Observatory emerged, in summary, that the context of Trentino has some specific characteristics of government of both trends, both with regard to decentralization and with regard to the recentralisation.

The double movement of the rules of decentralization-recentralisation was prompted by the evolution of the regulatory sources of the European Union Law in social matters. At the same time, this brings about a dynamic balance with respect to the protection of labour social rights. In this frame of development, we see the weakness of the regulatory law at the state level.

In this trend, taken as a whole phenomenon, the choice of values should not be placed in the light of the Labour Law of the European Union, including the needs of supranational markets and national needs for social protections, but it is appropriate to ask how both hold together without conflicts.

For these reasons, monitoring and systematic collection of the materials and of the more varied forms examined tried to highlight the trends of the sources of the European Union in the social field, also in terms of increasing knowledgeability of the overall dynamics related to a particular local context, such as the Autonomous Province of Trento.

The dynamics of double movement is confronted today with the trends at the national level and is being developed with the reform of the labour market.

In this phase of acute economic and financial crisis not only in Italy, the regulation of internal rules on dismissal had its important harbour in

2012 by Law no. 92, aimed at addressing the problem of growth. The reform, promoted by the technical government led by Mario Monti, has sought to make it harder incoming flexibility, putting limits on the use of atypical contracts and making it easier exit flexibility, introducing a less rigid discipline of dismissal.

This equation has been considered by the doctrine extremely simplistic, since it spoke instead on the internal flexibility that could increase the labour productivity[6].

Lately, since the second half of 2014, the focus of attention is the broad reform plan, the Jobs Act, which is contained in the text of the enabling law 183 of 2014.

The areas in which the Government is delegated to adopt legislative decrees are numerous and cover almost all labour law: for example, the reform of social welfare services and active policies; the reorganization of the law of non-standard contracts, protection and the requirements relating to care, life and work.

At the time of writing this paper, the legislative decrees have definitively been approved on the reorganization in the field of social safety nets in the event of involuntary unemployment and relocation of workers unemployed (n. 22) and the controversial permanent contracts with increasing protections (n. 23).

In the latter case, the approach adopted by the legislature is to have a strong impact on the idea of exceeding the protection of the workplace for new hires: through the introduction of permanent contracts with increasing protections the attention is shifted from the place of work in favour of the labour market, in the employability perspective[7].

The reform raises several questions and doubts: the new rules on permanent contracts with increasing protections, which consist essentially in a change to the regulation of dismissals by making the penalty mainly indemnity in case of illegitimate dismissal, which applies only to new hires.

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[6] L. NOGLER, *Problema e comparazione nella controversia sulla riforma del diritto del lavoro*, *Politica del diritto*, 1, 2012, p. 71.

[7] See in the business newspaper A. ORIOLI, *Jobs Act, se il diritto al lavoro si chiama occupabilità*, *Il Sole 24 Ore*, 27 dicembre 2014.

The impact of the labour reform, and in particular the rules of the Labour Law, on the labour market will have to be monitored. But it is clear that, compared to this trend, much will depend on full economic recovery across Europe.

THE MEANING AND EFFECTIVENESS OF CONSUMER PROTECTION IN BRAZIL

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TABLE OF CONTENTS: *1. Introduction - 2. National and regional system of consumer protection - 3. Brazilian Code of Consumer Protection - 4. Challenges in consumer protection - 5. Conclusion.*

1. Introduction

The concern with unbalance in consumer relations is relatively recent. It can be attributed to the excesses and deviations of economic liberalism.

The mass consumption society in the mid-twentieth century already suffered from some market failures, e.g. economic concentration, captive and abusive contracts, irregular advertisements. Additionally, a number of new sales techniques did not consider the recipient of all this complex and multifaceted production process, the consumer, as a subject of rights.

Sweden, in the 70s, pioneered the introduction of the Ombudsman and of the Consumer Claims Court. France, in 1973, promulgated the famous Royer Law. The United States made a great contribution to the recognition of consumer rights with the famous message of President Kennedy to Congress on March 15, 1962, according to which we are all consumers. Thus, there was a widespread awareness of the need for instruments of regulation and effective protection.

Until the 80s, Brazil lacked a systematic, consistent and technically sound approach to consumer relations. There were laws with implications for consumption, but a specific law on consumer protection was missing.

In 1985, a significant contribution was made by the publication of Law n. 7.347/85, which went beyond the model, hitherto conceived and designed, of settling conflicts between individual interests and took into account collective and diffuse interests. It was the instrument of Brazilian class action, well-suited to a society of mass consumption.

In the history of consumer interests' protection, housewives associations, for example in the State of Minas Gerais, were equally important. But it is worth mentioning the creation in July 1987 of an important civil entity of consumers, that is the Brazilian Institute for Consumer Defense (IDEC).

However, only with the Constitution of 1988 consumer protection was included in the category of fundamental rights (art. 5, XXXII) and explicitly considered a fundamental principle of the legal and economic order (art. 170, V). Art. 48 of the Temporary Constitutional Provisions Act mandated the enactment of a code of consumer protection, which was then adopted with Law n. 8.078/90.

The aforesaid Code of Consumer Protection (CDC), alongside established contemporary regulation of consumption relations, provided for the National Policy for Consumer Relations (Arts. 4 and 5) and the National System of Consumer Protection (art. 106).

The National Policy for Consumer Relations, founded on several principles, aims to harmonize the interests of participants of consumer relations and the compatibility of consumer protection with the need for economic and technological development. In order to implement this policy, the CDC provides for the participation of various public and private entities, integrating the so-called National System of Consumer Protection (SNDC).

2. National and regional system of consumer protection

According to the CDC, in its articles 105 and 106, parts of the SNDC are the Secretariat of Economic Law (SDE) of the Ministry of Justice, through its Department of Consumer Protection and Defense (DPDC), and other federal, state organs, the Federal District, as well as municipal and civil organizations for consumer protection. DPDC is the

coordinating body of the SNDC and acts specifically in cases of national importance and matters of major interest to the consumer class. It develops initiatives to improve the system, on consumer education and on consumer information. The DPDC has only the coordination of the National System of Consumer Protection. There is no hierarchical relationship among the agencies and organizations that defend and promote consumer interests because constitutionally this activity fits all federal entities in the full exercise of their jurisdiction and is of a concurrent nature.

In this context of competing jurisdictions defined by the federal model, PROCONS are state and local consumer protection agencies, created under the law specifically for this purpose, with powers in their regional or local jurisdictions.

In most Brazilian states, the state system of consumer protection is managed by the Executive Power. A different choice was made in Minas Gerais, where the system coordination lies with the Public Attorney General (*Procuradoria-Geral de Justiça*).

The original State Constitution, trying to remedy the unavailability of full consumer protection, saw it fit to assign the direction of the State Program of Consumer Protection (PROCON-MG) to the Public Attorney General of the State of Minas Gerais, institutionalizing the program and integrating it within a permanent institution, essential to the protection of this fundamental right. It thus moved away from the situation of instability caused by the entrustment of PROCON-MG to various government departments in the State of Minas Gerais.

Importantly, under the Brazilian constitutional model, the Public Attorney General is a permanent and independent institution, essential to the State's jurisdiction function. Its duty is to defend the juridical order, the democratic regime and social and individual interests. It is granted judicial and extrajudicial powers to promote consumer relations.

In the State of Minas Gerais, the Public Attorney General can apply administrative sanctions to suppliers. The possibility of a punitive function of damages for illegal acts is recognized.

3. Brazilian Code of Consumer Protection

The Brazilian Consumer Code includes chapters on basic consumer rights, quality of products and services, business practices, contractual protection, administrative sanctions, criminal offenses and consumer protection in court. The code proposes advanced solution on the treatment of torts, contract advertising and contract content. Protective effects for third parties, external effects of credit rights and, notably, good faith as a fundamental principle in consumer relations are recognized.

The unwarranted frustration of legitimate expectations entails responsibility, particularly in relationships between unequal parties. High importance has to be attached to collateral or instrumental duties such as loyalty, honesty, transparency, clarification, care, protection, collaboration and cooperation, to name the most important ones. A breach of these and other duties can trigger a positive breach of contract. The incidence of good faith, as a normative source of legal obligations, is not limited to the negotiation phase, but extends to the phase of qualified social contact and also to the post-negotiation phase.

3.1. Basic consumer rights

The following basic consumer rights are recognized:

a) The protection of the consumer’s life, health, and safety against any risks arising from any practices when buying supplied products and services considered harmful or dangerous;

b) Education and information about the adequate level of consumption for products and services, ensuring freedom of choice and equality in economic processes;

c) Adequate and clear information about different products and services, with correct specifications for quantity, characteristics, composition, quality and price, as well as any risks involved;

d) Protection against misleading and abusive publicity, commercial methods based on coercion or in any other way unlawful, as well as against practices and terms that are abusive or imposed as part of the products and services being supplied;

e) Changes of contract clauses that introduce disproportionate installments or revisions based on supervening facts that make them exceedingly expensive;
f) Effective prevention and reparation for damage against pecuniary, moral, individual, collective, and diffused damage;
g) Access to judiciary and administrative entities so as to prevent or provide compensation for pecuniary, moral, individual, collective, and diffused damage, thus ensuring the judicial, administrative, and technical protection given to those in need;
h) Easy protection of consumer rights through the shifting of the burden of proof in favor of the consumer in a civil action, when the judge finds that the accusation holds true or when the consumer is unable to meet the ordinary burden of proof according to common rules of experience.
i) Adequate and effective provision of public services in general.

In short, we seek to promote consumer protection in all areas of living, with an emphasis on protection of non-material interests. In this sense, there is a concern for life, health and consumer safety.

In the economic sphere, balanced contractual relations are an end to be pursued. Others think that it is not enough that the relation is initially balanced, it has to remain so. Thus, the drastic modification of the contractual obligations by subsequent change of circumstances does evoke, in contrast to the hype of volunteerism, the incidence of *rebus sic stantibus*, the theory of the objective basis of the business and resolution for excessive burden.

The market should be a space of balanced trade. According to Richard A. Posner and Anthony T. Kronman (1979, p. 2), "the existence of a market – a locus of opportunities for mutually advantageous exchanges – facilitates the allocation of the good or service in question to the use in which it is most valuable, thereby maximizing the wealth of society". In the Brazilian legal system, both art. 6, V, of Law No. 8.078 / 90 and arts. 317, 478-480 of the Brazilian Civil Code could be interpreted in accordance with the principle of absolute impossibility of performance in case of subsequent and costly change in circumstances. Paolo Gallo (2002) emphasizes that compliance with the obligation may not be required where economically impractical, referring to Enzo

Roppo's (1988) position that impossibility stems from unusual business risks. And in accordance with the principle of conservation of the contract, the remedy of negotiating the review of the contract competes with the remedy of termination. Within that review, argued Innocent Galvão Telles (2010) that courts should proceed in that field with the greatest caution and prudence in order to avoid disturbing trust and security.

Genetic imbalance of business is also likely to trigger legal control through the concepts of state of danger and injury. In the state of danger (Art 156 Brazilian Civil Code), there is the use of deceit – the contractor takes advantage of the other party's vulnerability, earning disproportionate advantage. Injury, by art. 157 Brazilian Civil Code, requires disproportion between the provision and consideration in commutative contracts (objective requirement), as well as considering the pressing need or inexperience of the obligated party (subjective requirement). More broadly, the Consumer Protection Code recognizes as abuse the manifestly excessive advantage, independently of the intention of the contractor (art. 39, item V).

Indeed, the promotion of harmony in consumer relations, objective of the National Policy for Consumer Relations, requires control of genetic and supervening imbalance of business. Unjust enrichment applies as a basis for repayment of the advantages.

3.2. Product and service quality, damage prevention and redress

The contract is permeable to the social conditions that surround it and are in turn affected by its conclusion. The social function of the contract is to outlaw abusive behavior. It also entails an external protection of credit rights, thus mitigating the *res inter alios acta* principle.

A duty to respect other people's agreement may be inferred from the principle of respect for the rights of others. Thus, as the contract may not offend interests of third parties, you can sanction third parties interfering in business relationships of which they have prior knowledge. This protective effects for third parties or external effectiveness of credit rights justifies the thesis of direct action, allowing a creditor to seize, in her own name, the assets of the debtor of his debtor.

According to Thierry Bourgoignie[1], the legal guarantee against product defects justifies direct consumer action against the manufacturer, mitigating the principle of relativity of contracts. Jacques Ghestin, in the preface to Wintgen (2004), justifies softening the principle of relativity of contracts, enshrined in art. 1165 of the French Civil Code with the notion of opposition influenced by Pothier. The mechanism of direct action is recognized by art.12 of the Brazilian Consumer Protection Code, establishing joint and several liability of the manufacturer, the builder, the producer and the importer.

The security of products and services is a value to be preserved in consumer relations. Brazilian law underscores the objective nature of suppliers' liability, pointing out the subjective responsibility of professionals. Ignorance of the provider about the quality defects of products and services is not a legal excuse. In fact, internal accidents, related to the risks of the activity carried out by the supplier, also do not exclude its liability.

As a guarantee mechanism for recovery of loss caused to consumers, the possibility of piercing the corporate veil is recognized. This is a mechanism employed in concrete situations where there is a central allocation of rights and duties, although without legal personality, for various objectives of its founding purpose. This mechanism overcomes, specifically, the rule of limited liability and allows to seize personal property necessary for remedying losses from abusive and/or fraudulent acts.

3.3. Commercial practices

As part of business practices, there is a concern with the forms of supply of products and services. The duty of correct and adequate information guides advertising. Any misleading and abusive advertising is forbidden. It is noteworthy that the businesses bear the burden of proof of the truthfulness and correctness of the information or advertis-

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[1] T. BOURGOIGNIE (1988, p. 292): "Le fabricante d'un bien de consommation court donc le risqué d'une action directe intentée par l'acheteur final du produit, bien qu'il n'y ait entre ces parties aucune relation contractuelle. L'atteinte ainsi portée au principe de la relativité des contrats reste relative".

ing communication. Humiliating and embarrassing ways of communication are prohibited.

Among abusive practices, we highlight the "joint sale"[2], unjustified refusal to sell goods and services and sending or delivering the product or service to the consumer without advance request.

As for consumer registration and databases, there are guidelines on ensuring broad accessibility to consumers, as well as the clarity and accuracy of the information. According to art. 43, paragraph 1 of the Consumer Protection Code, "the records and consumer data should be objective, clear, truthful and in easy to understand language, and may not contain negative information for a period exceeding five years".

3.4. Contract protection

Consumer relations entail depersonalization and mass behavior typical of contemporary societies, but they are entered into to satisfy essential needs of life. The reality is hypercomplex, with several variants, but there is a common point: the need to promote good faith in consumer relations in accelerated economic times.

Good faith is the ultimate guiding principle of the Consumer Protection Code, presenting transparency as the principle required to contract.

In positive law, the incidence of good faith is highlighted in the well-known paragraph 242 BGB, stating that "the debtor is required to make the provision as requiring loyalty and good faith, in response to usage of trade". This principle had its source in a commercial practice endorsed and interpreted by the German courts.

Art. 1375 of the Italian Civil Code provides that the contract must be performed in accordance with good faith.

Art. 227, paragraph 1, of the Portuguese Civil Code provides: "Whomever negotiates with others to conclude a contract must, both in the preliminary phase and in the formation phase, act in accordance with good faith, under penalty of liability for damage caused with fault to the other party". Art. 239 emphasizes that good faith may be used to

[2] Art. 39, I Brazilian Consumer Code, conditioning product or service delivery to the delivery of another product or service as well as specific quantitative limits without just cause.

integrate the will of the parties. In turn, art. 437, paragraph 1, gives the burdened party the right to termination or modification of the contract in case of changes in circumstances that make it contrary to good faith to ask the performance of obligations. Finally, art. 762, paragraph 1, summarizes that "in the performance of the obligation, as well as in the exercise of the corresponding right, the parties must act in good faith".

The French Civil Code, art. 1134, paragraph 3, provides that the obligations must be performed in good faith. Although in its origin, the provision has been emptied by the exacerbated individualism and the idea of contractual intangibility, in current French law good faith is presented as an expanding principle. According to Philippe Malaurie, Aynès Laurent and Philippe Stoffel – Munck (2013), good faith entails a duty of initiative, cooperation or collaboration, in order to allow effective implementation of the contract. Jean-Calais Auloy (1992, p. 37) already in the third edition of his well-known book defended the application of good faith in the formation, conclusion and execution of the contract, including the general obligation of adequate consumer information.

In Brazil, art. 131 (1) Commercial Code of 1850 indicated good faith as a source of contractual interpretation.

The emphasis on the principle of good faith, the various discussions and comprehensive approaches proposed by the doctrine and its judicial application influenced the Consumer Protection Code, which establishes (art. 4, III) among the principles of the National policy for Consumer Relations the "harmonization of the interests of those who take part in the consumer relations and compatibility between consumers' protection and the need for economic and technological development, so as to make feasible the principles that support the economic policy (article 170 of the Brazilian Constitution) always based on good faith and balance in the relationship between consumers and suppliers". In the context of contractual protection, art. 51, IV Brazilian Consumer Code exemplifies as unfair terms those that are "unfair, abusive, or that lead the consumer to an unreasonable disadvantage or those that are not consistent with good faith or equity".

The Brazilian Civil Code of 2002 also recognized the importance of the principle. According to art. 113, "legal transactions must be inter-

preted in good faith and according to the uses of the place of its conclusion". Under the abuse of rights, art. 187 states that "commits an unlawful act the holder of a right who in exercising it clearly exceeds the limits imposed by the economic or social order, good faith or the good customs". As for the contract program without the necessary breadth and scope, art. 422 provides that "the parties are obliged to maintain, during the conclusion of the contract, as in their implementation, the standards of integrity and good faith". Admittedly, good faith applies both at the stage of negotiations and during the performance of the contract. Therefore, there is an important dialogue between the Consumer Code and the Civil Code.

In European Common Law legal systems, good faith is not presented explicitly as a general duty. According to Reinhard Zimmermann and Simon Whittaker (2000, p. 39-40), good faith in English law arises from the very nature of the contractual process.

In the context of standardization attempts, we highlight the Principles of European Contract Law - PECL and the Principles concerning international commercial contracts of the International Institute for the Unification of Private Law (Unidroit). Art. 1:201 PECL disciplines good faith as follows: (1) each party must act in accordance with good faith and fair dealing, (2) the parties may not exclude or limit this duty. Art. 6: 102 (c) PECL provides that, in addition to the express terms, the contract may contain implied terms arising from good faith. Art. 1.7 UNIDROIT Principles provides: (1) each party must behave according to the dictates of good faith in international trade; (2) the parties cannot exclude that obligation or limit its scope.

4. Challenges in consumer protection

In over twenty years of the Code of Consumer Protection, much progress has been made. Intense dialogue with the Civil Code of 2002 stands out. But undoubtedly, the biggest change was cultural. The majority of the population recognizes the CDC as an instrument of citizenship. Some challenges, however, persist.

How to effectively regulate consumer relationships in the face of the accelerated pace of the economy? The concept of consumer itself remains a subject of intense debate. In Brazil, the courts have decisively contributed to build this policy, expanding or restricting the concept of consumer, which can include entities.

According to art. 2 CDC, "consumer is any individual or legal entity acquiring or using a product or service as an end user". There are still three interpretations of the concept of consumer. For the finalist interpretation, what matters is factual and economic destination of the goods or services, the lack of purchases for resale or business use, and the lack of professional status. For the maximalist interpretation, the consumer must be the factual recipient of the product, whether natural or legal entity, even with a profit purpose, provided that he or she removes the product from the market and uses it for any purposes. For the depth finality interpretation, the consumer must be the factual recipient of the goods or services, his or her vulnerability must be proved, and must include legal persons who purchase the product or service outside the scope of their specialty.

The Brazilian Code also brings together different consumer figures. The concept and status of consumer is extended to a collective of individuals, that may even be indeterminate and that participate in consumer relations (Art.2, sole paragraph). For the purposes of this section (Liability over the fact of the product and service), all victims of the event have the same rights as consumers (art. 17). And finally, any persons exposed to what is described in this chapter (commercial practices) and the next (contract protection) will be considered equal to consumers (art. 29).

The crucial point of the discussion is not the equivalence among different figures of consumers, but the definition of final user. It can be recalled here the Italian debate on the inclusion in the concept of consumer of not only the legal figure of the consumer-person, but also of the natural person who purchases the product or service in relation to his or her professional activity.

Moreover, the acquisition of products seems to be overcome by the use or enjoyment of services. Examples are commercialized ideas, images, concepts, access to technology, consumer credit. Unlike the Ital-

ian Consumer Code, the Brazilian Consumer Code defines service as any activity provided in the consumer market by remuneration.

The notion of ownership is overcome by the complex relationship of accessibility. The intangible seems to be the characteristic of a market in which social relationships present themselves as commodities. But the dot-com generation coexists with the generation of the product, the thing's body. The various manifestations of consumption deserve different approaches.

In a research project under development at the Law School of the Federal University of Minas Gerais, I propose a discussion of the economic rights with a plural approach, recognizing the many – old and new – domains in a development strategy of Democratic State law, promoting the access of the subject of law to various assets, ensuring forms of protection and building new rights. It is necessary to promote consumer relations involving more primary and essential goods, as well as those that are part of a dynamic, growing and endless technological era. Two worlds coexist. New and old rights overlap. There are electronic, dematerialized and borderless markets. But there is a market for things which is geographically delimited. The pursuit of systematization cannot ignore a complex and changing reality.

Part of this reality is the subject of legislative debate. The Senate Bills 281, 282 and 283 and their substitutes, aiming to update the CDC, deal with electronic and distance commerce, collective action, mechanisms of conciliation and mediation, consumer credit, prevention of over-indebtedness, harassment consumption (misleading and unfair advertising), sustainable consumption, national register of collective processes and civil investigations and commitments of behavior adjustment, adoption of punitive damages.

In Brazil, the legalization of collective demands seems to have reached exhaustion. It is pointed out the need for alternative mechanisms of conflict resolution, notwithstanding the improvement of special courts, facilities for conciliation and mediation. The Senate bill 283 provides for the conciliation mechanism in situations of overindebtedness. "In case of consumer overindebtedness (individual), the judge may initiate the process of renegotiation of debts, aimed at conducting a conciliatory hearing, chaired by him or an accredited mediator in court,

with the presence of all creditors, where the consumer will present a payment plan with a maximum term of five years, preserving the minimum needs". Thus, it would be interesting a study of Directive 2013/11 /EU on alternative dispute resolution for consumer disputes and of Regulation (EU) No. 524/2013 on online dispute resolution for consumer disputes, aimed at possible improvements of Brazilian proposals.

Themes to be discussed include the scope of State action in opposition to the autonomy of economic agents. Should the possibility of private arbitration in consumer issues be considered? Senate Bill No. 406, 2013, provides in its art. 4, § 3, such a possibility. Is it a step forward or a step back? Further, in times of borderless transactions, would there be a model of consumer protection and defense policy? And what about the specificities resulting from local experiences? These also seem to be the challenges of the Italian model, whose normative system of consumer protection – especially the Legislative Decree 206/2005 (known as the Consumer Code) – is constantly integrated with European standards and principles.

5. Conclusion

One thing is certain: in times of speed economy in which the intense and dynamic range of services is the keynote of a hypercompetitive market, even from the perspective of suppliers, the continuous satisfaction of consumer expectations is more than a challenge, it is a matter of survival of the capitalist model.

There seems to be no doubt that Consumer Law has its own principles and standards, but they are not absolutely unbound from traditional contract law. The complementarity is a reality. The big challenge, in this market society without borders, is the development of the law of supranational consumers. Is there a feasible and possible regulation of consumer relations which boosts the evolution and harmonization of general economic rights? This is the theme of today and tomorrow.

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THE MEANING AND EFFECTIVENESS OF CONSUMER PROTECTION: AN ITALIAN PERSPECTIVE WITH A GLANCE AT THE BRAZILIAN LEGAL SYSTEM

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TABLE OF CONTENTS: *1. The legal foundations of consumer protection in the European Union and Italy - 2. The scope of application of the Italian Consumer Code - 3. Enforcement and effective redress - 4. Concluding remarks.*

1. The legal foundations of consumer protection in the European Union and Italy

Italian consumer law has developed on the bedrock of European consumer law. Within the framework of the European Union policy "confident, informed and empowered consumers are the motor of economic change as their choices drive innovation and efficiency"[1]. The E.U. policy is mainly aimed at enhancing consumer capability to access market and strengthen its competitiveness. Boosting confidence and growth is again on the European Consumer Agenda for these coming years, in which new challenges will be tackled as brought by the digital revolution, the rise of sustainable consumption, the risk of social exclusion for consumers having limited capability to afford essential goods or services[2]. Ensuring a high level of consumer protection is among the commitments taken by the European Union within the Charter of Fun-

[1] Communication of 13 March 2007 from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *EU Consumer Policy Strategy 2007-2013*, COM(2007) 99 final.

[2] Communication from the Commission, *A European Consumer Agenda*, SWD (2012) 132 final.

damental Rights[3]. The Treaty on the Functioning of the European Union (hereinafter TFEU) provides for further recognition of consumer protection, both in the first part of the Treaty devoted to the principles, and in the third part, which is devoted to the policies of the Union. Art. 12 TFEU states that Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities. Art. 169 TFEU defines the contents of consumer protection having special regard to health, safety and economic interests of consumers, as well as their right to information, education and to organise themselves in order to safeguard their interests.

Despite the lack of explicit recognition of consumer rights by the Italian Constitution, some scholars tend to frame consumer protection within the scope of art. 41 It. Const., stating the limits of the freedom of private economic initiative with regard to social utility and to human safety, freedom and dignity[4]. Of course, the scope of art. 41 goes well beyond the area of consumer protection. Moreover, it is highly debated which implications derive from its application in the area of contract law[5]. In this respect it can be questioned whether the lack of explicit

[3] See Charter of Fundamental Rights, art. 38 (2000/C 364/01).

[4] See, among recent contributions: F. MACARIO, *Dalla tutela del contraente debole alla nozione giuridica di consumatore nella giurisprudenza comune, europea e costituzionale*, *Obbl. contr.*, 2006, p. 872 seq., part. par.7; M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, *Riv. dir. ind.*, 6, 2012, p. 259 seq.; D. VALENTINO, Timeo danaos et dona ferentes. *La tutela del consumatore e delle microimprese nelle pratiche commerciali scorrette*, *Riv. dir. civ.*, 2013, p. 1157; G. CAPO, *Codice del consumo*, *Enc. Diritto. Annali*, VII, Milano, 2014, p. 223 seq. In Italian recent case law, see Cass. 17.12.2009, n. 26516; Cass. 12.12.2014, n. 26242.

[5] Without aim of completeness, see: S. RODOTÀ, *Le fonti di integrazione del contratto*, Milano, 1969, p. 177 s.; M. NUZZO, *Autonomia privata e utilità sociale*, Milano, 1975, part. p. 19 and p. 196; G. GRISI, *L'autonomia privata. Diritto dei contratti e disciplina costituzionale dell'economia*, Milano, 1999, part. p. 121 seq.; P. PERLINGIERI, *Norme costituzionali e rapporti di diritto civile*, in ID., *Tendenze e metodi della civilistica italiana*, Napoli, 1979, p. 109 seq., part. p. 125; F. GALGANO, *Art. 41 Cost.*, in G. BRANCA (a cura di), *Commentario della Costituzione. Rapporti economici*, II, Bologna, 1982, p. 3 seq.; P. RESCIGNO, *Contratto. I) In generale*, *Enc. giur. Treccani*, IX, Roma, 1988, p. 11 seq.; R. SCOGNAMIGLIO, *Negozio giuridico e autonomia privata*, now in *Scritti giuridici*, Padova, 1996, p. 43 seq., part. p. 55; C.M. BIANCA, *Diritto civile. Il contratto*, Milano, 2000, p. 30 seq. Against a direct application of art. 41 Const. to con-

recognition of consumer protection in the Italian Constitution represents a major difference from South American legal systems. More particularly, the Brazilian Constitution expressly declares that "the State will promote, within legal terms, consumer protection"[6].

Like in the Brazilian legal tradition, also in the Italian legislation it is the Consumer Code which is responsible for defining the scope of consumer protection. Art. 2 It. Cons. Code considers as "fundamental rights" those already recognised by art. 169 TFEU, to which few others are added, namely: the rights to products and services quality; fair advertising; the enactment of commercial practices in accordance with the principles of good faith, fairness and loyalty; fairness, transparency and equity in contractual relations; the supply of public services in accordance with quality and efficiency standards.

Whatever the opinion about qualification of these rights as *constitutional*, it is not without consideration that art. 1 It. Cons. Code defines the scope and policy objectives of the Code having express regard to the principles stated in the Italian Constitution and the European Treaties, explicitly referring to the above cited art. 169 TFEU. We can then conclude that at systematic level a constitutional framework for consumer protection also exists in the Italian system.

The existence of a Constitutional framework for consumer protection represents an important trend in the observed systems and finds its echo in a wider debate on the social dimension of private law. Indeed, in the view of some scholars (both European and South American)

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tract law: L. MENGONI, *Forma giuridica e materia economica*, in *Studi in onore di A. Asquini*, Padova, 1963, now in *Diritto e valori*, Bologna, 1985, p. 147 seq., part. p. 165 seq.

[6] Art. 5, XXXII, Brazilian Federal Constitution (1988). On this and other aspects of South American consumer law, see S. PINTO OLIVEROS, *La tutela del consumatore in Sud America*, unpublished in the Italian version but published in the Spanish one as *A propósito de la protección del consumidor en América del Sur*, in *Revista de Derecho Privado y Comunitario*, 2013, 3, pp. 656-689. On the focus of Brazilian Consumer Law on fundamental rights and the social and economic roles of consumers and businesses within the framework of an increasingly "solidarity private law" see C. LIMA MARQUES, *Il codice brasiliano di protezione e difesa del consumatore*, in *Obbl. Contr.*, 2009, 6, p. 559 seq.

there is an increasing space for a social function of private law[7]. In the area of consumer law this social function is mainly transposed in terms of *accessibility* and, more particularly, accessibility to justice[8].

The borders and contents of consumer protection of course vary depending on legal traditions and applicable law. Focusing on European and, within this, Italian consumer law, the analysis below will tackle two main aspects of consumer protection:

- the scope of application of consumer law with special regard to the Consumer Code;
- the modes of enforcement.

Both these aspects may help substantiate the concept of accessibility envisaged by modern consumer law. Moreover, their analysis allows to address some of the possible implications deriving from the current digital revolution and, more particularly, the impact determined on consumer law by the emergence of new modes of supply and demand in the globalized market.

The contribution is structured as follows. Section 2 deals with the scope of application of Italian consumer law with some comparative remarks regarding some aspects of Brazilian law under this respect. Section 3 addresses the topic of consumer rights enforcement at both European and, more particularly, national level, then exploring some similarities with Brazilian consumer law. Section 4 concludes showing the main implications of the comparative analysis with a view to the common challenges posed to both systems by the diffusion of digital technology in a globalized market.

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[7] H.-W. MICKLITZ, *Social Justice and Access Justice in Private Law*, EUI working paper, LAW 2011/02; C. LIMA MARQUES, *Il codice brasiliano*, cit.; B. LURGER, *Old and New Insights for the Protection of Consumers in European Private Law in the Wake of the Global Economic Crisis*, in R. BROWNSWORD, H.W. MICKLITZ, L. NIGLIA, S. WEATHERILL (eds.), *The Foundations of European Private Law*, Oxford and Portland, Or., 2011, p. 89 seq.

[8] H.-W. MICKLITZ, *Social Justice*, cit.; C. LIMA MARQUES, *Il codice brasiliano*, cit.

2. The scope of application of the Italian Consumer Code

Consumer protection is not confined within the limits of private law: constitutional law, administrative law, criminal law, international law are among the relevant areas in which principles, rules, enforcement mechanisms provide consumers with various modes of protection[9]. Within private law the traditional divides between contracts and torts and, within contracts, between pre- and post-contractual regimes tend to be blurred. Well beyond the traditional boundaries of private law as the reign of private autonomy, consumer law shows its regulatory dimension[10] and its ability to rule the market as such besides the single market transactions[11].

Like in the Brazilian tradition (and unlike other European Member States, e.g. Germany) the Consumer Code represents the main legislative instrument used by the Italian legislation to ensure this protection. The Italian Consumer Code has been in force since 2005 and since then has known several changes and adaptations.

Developed on the bedrock of European consumer law, the Italian Consumer Code aims at harmonizing and providing a systematic legislative order on "purchase and consumption processes"[12]. *Purchase and consumption processes* are therefore the core subject of the Code, so escaping from any stigmatization in terms of acts (contracts) or facts (torts). Also the distinction between product and service tends to blur in consumer law, partially due to the increasing relevance of intangible

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[9] G. DE CRISTOFARO, *Le discipline settoriali dei contratti dei consumatori*, in *Trattato dei Contratti*, directed by V. Roppo and A. Benedetti, vol. V, Milan, 2014, p. 9 seq.

[10] H.W. MICKLITZ, *The Visible Hand and the European regulatory Private Law*, EUI working paper, Law 2008/14; V. MAK, *Policy Choices in European Consumer law: Regulation through "Targeted Differentiation"*, available at *http://ssrn.com/abstract=1960638*.

[11] A. JANNARELLI, *L'attività*, in N. LIPARI (ed. by), *Trattato di diritto privato europeo*, vol. III, Padova, 2003, p. 3 seq.; A. BARENGHI, *I contratti dei consumatori*, *Diritto civile*, directed by N. LIPARI and P. RESCIGNO, coordinated by A. ZOPPINI, vol. III, II, Milan, 2009, p. 109 seq., part. p. 118; G. GRISI, *Rapporto di consumo e pratiche commerciali*, in *Eur. dir. priv.*, 1, 2013, p. 1 seq.

[12] These are the stated objectives in art. 1, It. cons. c.

products (mainly digital ones), partially due to the more and more diffuse combination of product and services in consumer contracts[13]. Like in most South American regimes, consumers and users are often equalized in consumer legislation[14].

Part II of the Italian Consumer Code clearly shows the functional approach of this piece of law. Devoted to education, information, commercial practices and advertisement, it provides principles, rules and sanctions, that are applicable to parties' conducts, irrespective of their contractual or extra-contractual nature. In a different way also part IV of the Code follows a hybrid approach when dealing with product safety and quality: here, information duties, assessment and monitoring procedures, liability rules are applicable to several actors along the production and distribution chain. These all look at complex sets of relations where the contract is sometimes the source of specific rights, other times the mere antecedent for extra-contractual liability that is more easily framed in terms of torts rather than contracts. This is, for example, the case for defective product liability.

The contract core of the Italian Consumer Code is definitively included in Part III, which has been recently and partially reformed on the wave of the transposition of the European Consumer Rights Directive[15]: a directive that has contributed to drive the turn away from the previous idea of the minimum safety net for consumers towards a full harmonisation approach within the European Single Market[16]. Indeed, the con-

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[13] See art. 2, nn. 5 and 6, Directive 2011/83/EU of 25 October 2011 on consumer rights (Consumer Rights Directive, hereinafter C.R.D.), defining a sale contract as possibly incorporating the function to provide service together with the transfer of ownership on goods, and the service contract as any contract other than a sale contract under which the trader supplies a service in exchange for a price. For an application of the Italian Consumer Code to service contracts see the recent decision of the Italian Corte di Cassazione, n. 21419/2013 (on hotel hosting contract).

[14] See art. 1, It. Cons. Code; for South American legislation see S. PINTO OLIVEROS, *La tutela del consumatore in Sud America*, cit.

[15] See C.R.D., recital (5). On the transposition by the Italian legislator, see V. CUFFARO, *Nuovi diritti per i consumatori: note a margine del d.lgs. 21 febbraio 2014, n. 21*, *Corr. Giur.*, 2014, 6, p. 745 seq.

[16] E. HALL, G. HOWELLS, J. WATSON, *The Consumer Rights Directive – An assessment of its Contribution to the Development of European Consumer Contract Law*, *Eur.*

tractual dimension dominates the scene of all sub-sections of Part III, addressing, among others, the following aspects: unfair terms; pre-contractual information duties (in distance contracts, off-premises contracts and any other consumer contract); the right to withdraw from distance contracts and off-premises contracts; delivery, payment and passing of risk terms in sale contracts; distance financial services; time-share contracts; holiday services contracts, to consider the main aspects. Even within this contractual domain, the focus is not on the contract as an act but on the contract as a relation[17]. It is the dynamic dimension of consumer behavior which is at stake: his ability to access the market, to make grounded decisions, to exit from unsatisfactory relations[18].

Once again *accessibility* is the key. Among the main purposes of this legislation is the aim to facilitate consumer access to market in all the several forms it may occur and limiting the several obstacles that may hinder such access. Under this perspective two comparative elements may help provoking a discussion about possible differences between the Italian and the Brazilian systems:

Rev. Contr. Law, 2012, p. 139 seq.; K. TONNER, *From the Kennedy Message to Full Harmonizing Consumer Law Directives: a Retrospect*, in K. PURNHAGEN, P. ROTT (eds.), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz*, New York, 2014, p. 693 seq.; H. SCHULTE-NÖLKE, *The Brave New World of EU Consumer Law - Without Consumers, or Even Without Law?*, in *Journ. Eur. Cons. Mark. Law*, 2015, Issue 4, p. 135 seq.; R. SCHULZE, *The New Shape of European Contract Law*, *ibidem*, p. 141. Criticism has been expressed with regard to the maximum harmonization approach in respect of the detrimental effects relating to the higher standards of consumer protection currently in force in some Member States; see N. REICH, H.W. MICKLITZ, *Crònica de una muerte anunciada: The Commission Proposal for a Directive on Consumers' Rights*, *Common Market Law Review*, 2009, 46, p. 471 seq.; B. LURGER, *Old and New Insights*, cit., p. 93.

[17] It is worth noting that Part III is labelled "rapporto di consumo".

[18] See, among the latest decisions, the one released by the Regional Administrative Tribunal of Lazio region, sec. I, 18 September 2014, n. 9831, *Diritto & Giustizia*, 2014, 3 November, invoking, with regard to unfair practices legislation, the principle of proportionality as a means to strike a balance between the freedom of movement of goods and services and the consumer right to take informed decisions in a competitive market.

a) although the law of the European Union would allow an extension under this respect[19], the Italian legislator has not extended the application of consumer protection in favor of legal persons whatever the purpose pursued by the legal person in the economic transaction; by contrast, pursuant to article 2, Brazilian Consumer Code, a consumer is a natural *or legal* person that purchases or uses a service or a good as final beneficiary ("destinatario finale");
b) unlike the Brazilian Consumer Code[20], the Italian Consumer Code rules on unfair commercial practices have been extended to protect, besides consumers, micro-enterprises[21].

The analysis below addresses the proposed comparison taking into account the possible use of digital technology in distance contracting and the impact generated by this use on consumer contracts legislation.

(a) Legal persons as consumers?

As just seen, whereas the Brazilian code admits that a consumer may be a legal person, the Italian Consumer Code requires the consumer to be a physical person, neither it *extends* consumer protection to entities that could engage into a functionally similar commercial relation to the one entered by a consumer with a professional[22].

At first glance both the Italian and the Brazilian systems adopt a functional approach: what is relevant for defining the scope of consumer law is the destination of the purchased good/service to the need of a purchaser that will not use it within a productive or commercial process. As a consequence, as far as the purchaser is a professional or a

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[19] See C.R.D., recital 13. The possible extension of consumer protection to legal entities would not in fact change the notion of consumer, that would remain confined to the case of natural persons. See Eur. C. Just., 22.11.2001, cases C-451/99 and C-452/99, Cape v. Idealservice.

[20] See art. 39 seq., Brazilian Consumer Code.

[21] See art. 19, It. Cons. C., as reformed by art. 7, par. 2, Law-decree n. 1/2012, converted, with changes, by law n. 27/2012. In accordance with the European definition provided by the European Commission Recommendation n. 2003/361/CE, a micro-enterprise has, among other requisites, approximately less than ten workers and less than two million Euros turnover.

[22] G. DE CRISTOFARO, *Le discipline settoriali*, cit., p. 30 seq.

business acting within the scope of its professional activity, the contract relation is out of the scope of consumer law under both the examined legal systems[23]. Differences emerge when one looks at legal entities different from businesses[24].

Particularly interesting could be the case for consumer groups organized as non-business entities, e.g. associations operating through the sole voluntary contribution of members with the purpose of optimizing purchases and monitoring over the quality of goods and suppliers[25]. Indeed in these circumstances the existence of an organized structure, which is not acting as a professional intermediary, may fail to reduce the weakness of purchasers as consumers, though aggregated. Therefore legal consumer protection could also be needed in these cases. By contrast, if consumer law is applicable merely in favour of natural persons, the risk is that the intermediation played by the association, as a non professional actor, could deprive final users of the consumer protection in both contractual relations: the one between the supplier and the association as a legal entity and the one between the latter, as non-business entity, and the consumer since they are both different from a "business-to-consumer" relation. An extension of consumer law protection in favour of legal entities, that are merely aggregating consumer

[23] See, for the Italian system, G. DE CRISTOFARO, *Le discipline settoriali*, cit., p. 33 seq. and, in case law, among the latest ones, Cass. 23 September 2013, n. 21763. Among the most recent ones in the E.U. case law see the judgement of the Court released on 3 September 2015 in the case C-110/14 *Volksbank* on the nature of a consumer contract concluded by a lawyer for purposes standing outside of his professional capacity.

[24] For a comparative view on this issue in some E.U. member states, see H.W. MICKLITZ, J. STUYCK, E. TERRYN, *Cases, Materials and Text on Consumer Law*, Oxford and Portland, Or., 2010, p. 29 seq. For a recent judgement released by the Italian case law applying the concept of consumer as physical person, see Corte di Cassazione 22 May 2015, n. 10679, in *Giust. civ. Mass.*, 2015, which applies consumer law to a contract signed on behalf of a condominium since the latter does not constitute a separate entity from co-owners.

[25] See, for example, the Italian purchasing groups for Vega food or bio-product as listed on the web at *http://www.retegas.org/index.php?module=pagesetter&tid=3*. See also R. SCHULZE, *The New Shape of European Contract Law*, cit., p. 144, raising the issue of the scope of European consumer law in relation to "online platforms for services that are not provided by businesses".

purchases without providing services as professional intermediaries, could fill in this gap.

The digital revolution influences the observed dynamics in at least two ways: on the one hand, it fosters the operation of such groupings on a non-professional basis as consumer-driven platforms, making more apparent the observed gap of protection to be filled in[26]; on the other hand, the use of digital technology could enable an entrepreneurial change in the nature of these groupings, unleashing their potentials for a professionally-oriented operation as web-based service providers[27]. In both cases consumer law needs to be reconciled with non-traditional models of, respectively, demand and supply.

(b) The extension of consumer law to micro-enterprises

Whether small businesses face similar obstacles to the ones encountered by consumers when accessing the market is a critical and still debated issue, both at national and European Union level[28]. At the nation-

[26] For an example of purchasing groups establishing a web-based platform, see the web-page of "Tra Sole e Terra" at *http://www.agora-gas.it/gas/ag2_soleterra/*.

[27] See, for example, the apartment renting platform Airbnb, Inc. (*https://www.airbnb.com/*) or the car-sharing network Blablacar (*https://www.blablacar.it/*). They are all flourishing businesses born from the initiatives of single users and consumers.

[28] It is debated whether art. 114, T.F.E.U., provides for a solid basis for the adoption of any action in the area of unfair practices in B2B relations. For the negative see J. STUYCK, *Do We Need 'Consumer Protection' for Small Businesses at the EU Level?*, cit., p. 367, who also holds that, if ever any legislative action was taken, no black list should be adopted and a looser standard should be in force being businesses, though small, repeat players taking entrepreneurial risks. For a positive answer see M. HESSELINK, *SMEs in European Contract Law*, in K. BOELE-WOELKIE, W. GROSHEIDE (eds.), *The Future of European Contract Law. Essays in Honour of E. Hondius*, Alphen aan de Rijn, 2007, p. 359 seq. On the extension of the fairness test on contract terms in the area of business-to-business contracts, see H. SCHULTE-NÖLKE, *No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts* (2015) 23 *European Review of Private Law*, Issue 2, pp. 195-216. For a comparative view on the extension of business-to consumer legislation to business-to-business contracts in the 28 European Union Member States, see A. RENDA, F. CAFAGGI, *Study on the Legal Framework Covering Business-To-Business Unfair Trading Practices in the Retail Supply Chain. Final*

al level, the Constitutional Court has repeatedly excluded that the restriction of the unfair terms legislation to business-to-consumers contracts poses a question of unequal treatment in respect of small businesses[29]. Moreover, the legislator has occasionally addressed the issue of fairness of business-to-business contract relations in special-scope legislation out of the area of Consumer Law[30]. A part from that, the extension of unfair practices legislation to micro-enterprises stands as an isolated measure in the Italian general legal framework on business-to-business relations.

Having special regard to the mentioned extension, one critical aspect is whether the definition of unfairness and the practices thereof should vary depending on the nature of the potential victim. Indeed, the obstacles faced by micro-enterprises in accessing the market and the global supply chains are rather different from the ones faced by consumers. For example, unlike in an ordinary "business-to-consumer" relation, a micro-enterprise may be much more concerned about practices occurring during the course of the contractual relation, when unilateral and abrupt changes in contract rules or unfair termination of a business relation may hinder specific investments and leave the victim unable to access alternative contractual options without significant losses. The focus on pre-contractual practices, as shown in the business-to-con-

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Report, February 2014, prepared for the European Commission, DG Internal Market, DG MARKT/2012/ 049/E, part. p. 63 seq.

[29] See It. Const. Court, 30 June 1999 n. 282; It. Const. Court, 22 November 2002 n. 469.

[30] See art. 9, l. n. 192/98, on abuse of economic dependence in subcontracting; art. 7, leg. d. n. 231/02, on late payments in business transactions; art. 62, law-decree n. 1/2012, converted by law n. 27/2012, on agri-food contracts. Whether this legislation is rooted on the same legal basis as consumer law, it is still debated among Italian scholars. See for the positive, V. ROPPO, *Parte generale del contratto, contratti del consumatore e contratti asimmetrici (con postilla sul «terzo contratto»)*, *Riv. dir. priv.*, 2007, p. 679 seq.; ID., *"Behavioural Law and Economics", regolazione del mercato e sistema dei contratti*, *ibidem*, 2013, p. 167 seq.; D. VALENTINO, Timeo danaos et dona ferentes, cit. See, for the negative, G. AMADIO, *Nullità anomale e conformazione del contratto (note minime in tema di 'abuso dell'autonomia contrattuale')*, *Riv. dir. priv.*, 2005, p. 285 seq.; F. MACARIO, *Dalla tutela del contraente debole*, cit.; M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, in G. GITTI, M. MAUGERI, M. NOTARI (eds.), *I contratti per l'impresa*, Bologna, 2012, I, p. 33 seq.

sumer legislation, may fail to attain the policy objectives of a stronger protection of micro-enterprises for a better functioning of the internal market[31].

Some counter-arguments may help understanding the choice of the Italian legislator. Indeed, the existence of general clauses, enabling a wider application of the rules on business-to-consumer unfair practices beyond the array of the listed conducts, may represent a former tool to deter unfairness in business-to-business trade relations. Moreover, as it is shown in the following section, the application of these rules makes available a wide menu of enforcement mechanisms, possibly suitable for effective use in favour of microenterprises[32].

From another perspective the development of digital-based commerce could provide additional elements for reducing the distance between business-to-consumer and business-to-business trade, extending to the latter the legal framework provided for the former in the specific context of web-based contracting. Not only e-suppliers could more easily structure their web-platforms as uniformly accessible for both consumers and businesses, e.g. providing the same type of information for both classes of users, but also "customers" would be relieved from the burden of qualifying themselves as businesses or consumers in order to benefit from the specific protection respectively provided[33].

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[31] Moving from a different perspective it has been observed that the core of unfair practices in business-to-business relations, as presented in the Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe (Brussels, 31.1.2013, COM(2013) 37 final), regards unfair practices in pre-contractual negotiations then embedded in unfair contract terms; see J. STUYCK, *Do We Need 'Consumer Protection' for Small Businesses at the EU Level?*, in K. PURNHAGEN, P. ROTT (eds.), *op. cit.*, p. 359 seq., part. p. 365.

[32] For an example of unfair practice sanctioned by the Competition Authority to protect micro-enterprises in the area of informatic technology services, which resulted in fact largely unavailable without the users being then able to withdraw from the contract, see the *Yearly Report 2014* from the Italian Competition Authority, p. 176.

[33] See the Statement of the European Law Institute: *Unlocking the Digital Single Market – An Instrument for 21st Century Europe*, 2nd Supplement to the Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law; along similar lines: H. SCHULTE-NÖLKE, *The Brave New World of EU Consumer Law*, cit., p. 138 seq.; acknowledging the remaining differences between busi-

Moving from this perspective, the E-Commerce Directive already offers a modular regime combining consumer-oriented rules, business-oriented rules and rules that are common to both[34]. However, the most of E.U. legislation applicable to e-commerce, this covering, among other aspects, distance contracting, unfair terms and unfair practices, is still largely restricted to business-to-consumer relations. More importantly, this approach seems due to be confirmed by the most recent Communication from the European Commission on "A Digital Single Market Strategy for Europe", where a forthcoming proposal on some aspects of online sales is announced with a(n apparently exclusive) focus on consumer contracts[35]. Whether this regime, if ever adopted, will be able to produce spill-over effects in favor of small businesses accessing online platforms may not be excluded at this stage. Neither predictable is whether these effects, if ever welcome, may be better generated by unconstrained private autonomy or by a legislative default regime designed in the shadow of consumer law with the necessary adaptations.

3. Enforcement and effective redress

Enforcement and effective redress remain pivotal aspects of consumer protection both in the Brazilian and the Italian legal systems. Recent trends include the growing complementarities between public and private enforcement, judicial and administrative procedures, individual and collective redress[36]. Indeed, both systems provide for a wide

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ness-to-business and business-to-consumers contracts: R. SCHULZE, *The New Shape of European Contract Law*, cit., p. 143.

[34] See Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*Directive on electronic commerce*), part., e.g., art. 10 (on information duties) and 11 (on placing orders) establishing rules that are mandatory for consumer contracts and not-mandatory for business contracts.

[35] See Communication from the European Commission, *A Digital Single Market Strategy for Europe*, Brussels, 6.5.2015, COM(2015) 192 final, part. p. 5 seq.

[36] In the perspective of European Union law, see F. CAFAGGI, H.-W. MICKLITZ (eds.), *New Frontiers of Consumer Protection – the Interplay between Private and Public Enforcement*, Cheltenham, 2009; H.W. MICKLITZ, J. STUYCK, E. TERRYN, *Cases,*

array of criminal, administrative and civil measures against violations of consumer code provisions[37]. Public and private authorities are in charge of enforcement of consumer rights, including administrative bodies, courts and private organizations established for the interests of consumers[38]. Within private enforcement measures both individual and collective forms of redress are provided in order to protect diffused, collective and homogeneous individual interests[39].

Once again the Italian legal landscape cannot be presented without regard to the status of consumer rights enforcement in the European Union. Data collected through European Consumer surveys show that the percentage of consumers aggrieved by unfair practices or illegal conducts, who resort to enforcing authorities, is still limited. The Consumer Empowerment survey (2010) shows that, of those consumers who experienced problems, only 16% contacted consumer organisations or public authorities to resolve them. In most cases, consumers do

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Materials and Text on Consumer Law, cit., p. 499 seq.; H.W. MICKLITZ, *Administrative Enforcement of European Private Law*, in R. BROWNSWORD, H.W. MICKLITZ, L. NIGLIA, S. WEATHERILL (eds.), *The Foundations of European Private Law*, cit., p. 563 seq.; L. ROSSI CARLEO, *Il* public enforcement *nella tutela dei consumatori*, *Corr. giur.*, 2014, issue 7, p. 5. See also the proceedings of a Conference held in April 2015 at the University of Groningen (the Netherlands) on "Public and Private Enforcement of European Private Law: Perspective and Challenges", published in *Eur. Rev. Priv. Law*, 2015, 4.

[37] See, among others, artt. 27 - 27-*ter*, 111-127, Italian Consumer Code (relating to unfair commercial practices and product liability). In the Brazilian Consumer Code, administrative sanctions are provided in Title I, Chapter VII; criminal sanctions in Title II; judicial private law sanctions in Title III.

[38] See, for example, in the Italian Consumer Code, art. 27 on the role of Competition Authority and the one of the Courts in sanctioning unfair commercial practices; and art. 136 seq. on consumer associations. In the Brazilian Consumer Code, see part. art. 82 on the standing to sue the court by public prosecutor, public administration, consumer associations.

[39] See part. art. 140-*bis*, Italian Consumer Code, on class action; art. 81, Brazilian Consumer Code, on individual and collective redress, and art. 91 seq. on collective actions for the protection of homogeneous individual interests. On the main changes occurred in the enforcement mechanisms of European Private Law: H.-W. MICKLITZ, *The Transformation of Enforcement in European Private Law: Preliminary Considerations*, (2015) 23 *European Review of Private Law*, Issue 4, pp. 491-524.

not consider going to court if an initial contact with the trader has proved unsuccessful, in particular if the sums involved are small[40]. Besides highlighting these data, the European Commission spots the challenges and constraints (including resources constraints) faced by enforcement authorities with special regard to cross-border situations[41].

The role of European Union law under this respect is crucial and still debated. One important challenge relating to consumer rights enforcement is posed by the *principle of subsidiarity*. In many instances European institutions, including the European Court of Justice, have stated that procedural rules enforcing European rights are a matter for the national legal order of each Member State[42]. However, the principle of Member States' procedural autonomy is conditioned upon the requisites that: (*i*) procedural rules are no less favourable than those governing similar domestic actions (*principle of equivalence*) and (*ii*) they do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by European Union law (*principle of effectiveness*)[43]. In a comparative perspective it is important to notice

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[40] Communication from the Commission, *A European Consumer Agenda*, SWD (2012) 132 final, p. 6.

[41] On consumer's access to justice through the ordinary court system see M. LOOS, *Individual Private Enforcement of Consumer Rights in Civil Courts in Europe*, in R. BROWNSWORD, H.W. MICKLITZ, L. NIGLIA, S. WEATHERILL (eds.), *op. cit.*, p. 487 seq., where some Dutch surveys are reported showing that in almost half of the cases where consumers were dissatisfied with the goods or services provided and complained thereof, they ceased action without their complaint having been resolved. Among obstacles to justice the following are mentioned: ignorance of the possibility of settlement of the dispute by a court, language and formalities relating to the court procedure, duration and costs of the procedure, specific costs relating to international cases.

[42] On the issue concerning the debated introduction of uniform European consumer protection instruments in national procedural law in the light of the ECJ case law, see V. TRSTENJAK, *Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU from the Perspective of Insurance Law*, 21 *Eur. Priv. L. Rev.*, 2, pp. 451-478 (2013).

[43] See Case C-168/05 Mostaza Claro [2006] ECR I-10421, para. 24; Case C-40/08 Asturcom Telecomunicaciones [2009] ECR I-9579, para. 38; Case C-415/11 [2013], para. 50. See also J. STUYCK, *Enforcement and Compliance: An EU Law Perspective*, in R. BROWNSWORD, H.W. MICKLITZ, L. NIGLIA, S. WEATHERILL, cit., p. 513 seq., part. p. 517 and 520 seq. on consumer law.

that this latter principle features in the Brazilian Consumer Code with regard to judicial enforcement[44].

Important implications have been derived from these principles by the European Court of Justice, for example in the area of consumer sale of goods[45] unfair terms in consumer contracts. In some cases the judicial power to evaluate terms of its own motion has been based upon the principle of effectiveness[46]. In others, effectiveness has opened the possibility to seek interim relief due to suspend the application of an unfair term, e.g. in mortgage enforcement proceedings[47].

Among others, the last mentioned case is the one of a Moroccan national working in Spain, who in 2007 concluded with a Spanish bank a loan agreement secured by a mortgage on his family home. In case the

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[44] See art. 83, Brazilian Consumer Code: "Para a defesa dos direitos e interesses protegidos por este código são admissíveis todas as espécies de ações capazes de propiciar sua adequada e efetiva tutela".

[45] See, among the most recent decisions: Judgement of the Court of 3 October 2013, Case C-32/2012 *Duarte Hueros*, commented by S. Jansen, *Price reduction as a consumer sales remedy and the powers of national courts: Duarte Hueros*, in *Common market law rev.*, 2014, p. 975 seq.; see also: M. GOZZI, *Codice del consumo e direttiva 1999/44/CE. Risoluzione del contratto e riduzione del prezzo nella compravendita: i poteri del giudice*, in *Riv. dir. proc. civ.*, 2015, 1, p. 243 seq.; Judgement of the Court of 4 June 2015, Case C-497/13 *Froukje Faber*. On this decision and the main case law in this area: R. POSDUN, *Procedural Autonomy and effective consumer protection in sale of goods liability: Easing the burden for consumers (even if they aren't consumers)*, in *Journ. Eur. Cons. Mark. Law*, 2015, Issue 4, p. 149 seq.

[46] Joined cases C-240 to 244/98 *Océano Grupo* [2000] ECR I-4941; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421. See on this topic R. STEENNOT, *Public and Private Enforcement in the Field of Unfair Contract Terms*, (2015) 23 *European Review of Private Law*, Issue 4, pp. 589-619. The E.C.J. case law has also impact on national case law. See, for example, in this field the decision issued by the Italian Corte di Cassazione, 12 December 2014, n. 26242 on the ex officio power to declare invalidity of unfair terms.

[47] Judgement of the Court (First Chamber) of 14 March 2013, Mohamed Aziz v. Caixa d'Estavis de Catalunya, Tarragona I Manresa (Catalunyacaixa), Case 415-11, on which see A. LAS CASAS, M.R. MAUGERI AND S. PAGLIANTINI, *Cases: ECJ – Recent trends of the ECJ on consumer protection: Aziz and Constructora principado*, in *Eur. Rev. Contr. Law*, 2014, pp. 444-465. For a similar, more recent decision see Judgement of the Court (Third Chamber) of 10 September 2014, Monika Kušionová v SMART Capital, Case 34/13.

debtor failed to fulfil his obligation to pay any part of the principal or of the interest on the loan, the loan agreement conferred on the bank both the right to call in the totality of the loan and the right to bring enforcement proceedings to reclaim any debt and therefore to seize the debtor's house. In fact, although the debtor accessed the court requesting to declare the unfairness of the loan agreement clause, the rules applicable to the eviction process did not allow any suspension of such eviction. The clause could be considered unfair by the declaratory judgement but such declaratory judgement would be totally *ineffective* coming after final eviction of the family house. This is what the E.C.J. concluded in its 2013 decision disputing the effectiveness of Spanish procedural rules. Indeed, the procedural rules into force in fact impair the protection sought by the European directive on unfair terms, in so far as they render it impossible for the court hearing the declaratory proceedings to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision. Moreover, the declaratory proceedings declaring unfair the contractual term on which the mortgage is based and annulling the enforcement proceedings would enable that consumer to obtain *only* subsequent protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13.

At the very core, the decision helps reasoning about the alternative between measures of consumer protection that are able to provide satisfaction *in kind* v. measures that are unable to do so and merely provide *compensatory* satisfaction. When fundamental rights are at stake (e.g. right to property on assets destined to family residence) the principle of effectiveness leads to favour the former over the latter: deterrence more than compensation is the aim[48]. In other areas of consumer protection law, European Union legislation has expressed the same preference for

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[48] See F. CAFAGGI, *The Great Transformation. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective*, in *Loyola Consumer Law Review*, 2009, p. 496 seq., part. p. 517 seq., comparing remedies upon their function of, respectively, deterrence or compensation.

remedies in kind, e.g. in the field of guarantee for conformity of goods[49]. An even stronger position is taken by the Brazilian Consumer Code as far as obligations to do or not to do are concerned; indeed, damages are deemed a subsidiary remedy with respect to specific performance[50].

The principle of effectiveness plays a major role in situations in which a large number of persons can be harmed by the same illegal practice relating to the violation of rights granted under Union law[51]. In these circumstances the adoption of measures of collective redress may bring about relevant advantages in terms of fairness, efficiency and effectiveness[52].

In the specific area of consumer protection a European Directive has been adopted in 2009[53], stipulating that Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by "qualified entities" (consumer protection organizations) the following measures: (a) an order requiring the cessation or prohibition of any infringement; (b) measures such as the publication of

[49] See art. 3, Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; when indicating a clear priority for repair and replacement over price reduction and termination, this provision resorts to the principle of proportionality to address and limit the choice of appropriate remedy for consumers. See also European Court of Justice, 16 June 2011 (cases C-65/09 and C-87/09), Gebr. Weber GmbH c. Jürgen Wittmer, and Ingrid Putz c. Medianess Electronics GmbH, *Giur. it.*, 2012, p. 534 seq.

[50] See art. 84, § 1, Brazilian Consumer Code: "Na ação que tenha por objeto o cumprimento da obrigação de fazer ou não fazer, o juiz concederá a tutela específica da obrigação ou determinará providências que assegurem o resultado prático equivalente ao do adimplemento. § 1° A conversão da obrigação em perdas e danos somente será admissível se por elas optar o autor ou se impossível a tutela específica ou a obtenção do resultado prático correspondente (…)".

[51] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), describing this situation as "mass harm situation".

[52] For references to the Brazilian Consumer Code, see above footnote 39 and corresponding text.

[53] Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests.

the decision and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement; (c) an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation for each day's delay or any other amount provided for in national legislation, with a view ensuring compliance with the decisions.

In order to facilitate access to justice a more recent initiative has been taken by the European Commission to address the issue of collective redress with special but not exclusive regard to consumer protection. In this case not only injunctive collective redress is considered but also compensatory collective redress: a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action[54]. Indeed, it had been highlighted that in mass harms the aggregation of individual claims for damages may add an important deterrent effect to the usual compensatory function of damages also in cases of individually low value claims[55].

This is an area in which the Commission sees the advantage of following a horizontal approach in order to avoid the risk of uncoordinated sectorial EU initiatives and to ensure the smoothest interface with national procedural rules, in the interest of the functioning of the internal market. For this purpose the European Commission recommends the adoption of horizontal common principles of collective redress in the European Union that should be complied with by all Member States[56]. Among these special attention should be paid to the principle concerning cross-border cases: on this aspect the Member States should ensure that a single collective action in a single forum is not prevented by na-

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[54] Communication from the Commission, *Towards a European Horizontal Framework for Collective Redress*, Strasbourg, 11.6.2013, COM(2013) 401 final. On the arguments based upon artt. 81, 114 and 169(2)(b) TFEU, pleading for EU competence to enact legislation on collective redress not limited to cross-border claims, see J. STUYCK, *Enforcement and Compliance*, cit., p. 527 seq.

[55] See F. CAFAGGI, *The Great Transformation*, cit., p. 517 seq.

[56] Communication from the Commission, *Towards a European Horizontal Framework for Collective Redress*, cit., p. 16.

tional rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems[57].

Further attention to rapid and consistent enforcement of consumer rules is envisaged by the European Commission with respect to online and digital purchases in the recent Communication on “A Digital Single Market Strategy for Europe”: clarification and development of enforcement authorities are expected as well as the improvement of coordination among their market monitoring activities and alert mechanisms so that infringements can be detected faster[58].

3.1. Consumer protection enforcement in the Italian legal framework

Subject to the continuous influence of European Union law, in the recent years the Italian consumer law has been regarded by important developments in the area of enforcement of consumer rights.

The more conventional path of consumer individual action before a court has been complemented by an array of instruments and enforcement mechanisms aimed at improving efficiency and, more particularly, effectiveness of consumer protection[59]. To what extent they have accomplished this mission is an issue resting outside the scope of this contribution[60].

Two important trends are explored here below:

- the increasing role played by the Competition Authority in the enforcement of consumer protection;

[57] Commission Recommendation of 11 June 2013, cit., p. 13 seq.

[58] See Communication from the European Commission, *A Digital Single Market Strategy for Europe*, cit., part. p. 6.

[59] See M. ASTONE, *Rimedi e contratti del consumatore nella prospettiva del diritto privato europeo*, in *Europa e Diritto Privato*, 1, 2014, p. 1 seq., observing the focus of the remedial system on the fulfilment of consumer interests more than on damages and restitution.

[60] For a critical view on this issue see A. SPADAFORA, *Tutela e sanzione nei rapporti consumeristici. prospettive* de iure condendo, in *Contratti*, 2014, p. 1158 seq., where the Author proposes legislative changes due to foster effectiveness and dissuasiveness of current enforcement mechanisms, also by enriching private enforcement with punitive elements.

- the role for consumers organizations or consumer groupings in bringing actions for the protection of collective or homogeneous interests.

I. The role for Competition Authority. In terms of authorities in charge of enforcement function, a major role has been assigned to the Competition Authority.

Since 2007 it has become competent for monitoring and taking measures against unfair commercial practices put into action by enterprises in detriment of consumers[61] and, since 2012, of micro-enterprises[62]. These powers include *ex officio* investigation functions, the adoption of injunctive measures as well as the imposition of fines. Specific fines are then provided for the case of violation of public injunctions to suspend or cease an unfair practice.

Since 2012, similar powers concern the assessment of unfair terms in standard contracts, whose use may be prohibited by an order of the Competition Authority, upon consultation of representative associations and chambers of commerce[63]. A very important aspect of this monitoring function is the existence of a double path. Indeed the Competition Authority control may arise: *ex post* (as just seen), or *ex ante*, being the interested enterprises enabled to submit their standard contracts to the Competition Authority for approval before being used in the relation with consumers[64].

This approval, if obtained, prevents any further inquiry and sanctioning measure by the same Authority. However, it is not binding should the case be brought before a court. In fact the court will be able to take the Competition Authority's arguments into account to the ex-

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[61] See art. 27, It. Cons. Code, as reformed by art. 1, sec. 1, leg. decree n. 146/2007, on which see L. ROSSI CARLEO, *Il* public enforcement, cit.

[62] See footnote 21 and corresponding text.

[63] See art. 37-*bis*, It. Cons. Code, as introduced by art. 5, sec. 1, law decree n. 1/2012, converted, con changes, by law n. 27/2012. See on complementarities of enforcement mechanisms and graduation of measures L. ROSSI CARLEO, *Il* public enforcement, cit.

[64] See art. 37-*bis*, cit., sec. 3. On this topic see E. BATTELLI, *L'intervento dell'autorità antitrust contro le clausole vessatorie e le prospettive di un sistema integrato di protezione dei consumatori*, in *Eur. Dir. Priv.*, 1, 2014, p. 207 seq.

tent that they conform with general legal principles to which the court is anyway subject to.

Upon transposition of the Consumer Rights Directive, the Competition Authority has also assumed enforcing powers in the area of information rights and, as far as distance and off-premises contracts area concerned, withdrawal rights[65]. Available measures are, again, injunctions and fines. Once again, this administrative enforcement does not exclude or reduce the consumer's right to access justice through courts.

The role of Competition Authority has been very relevant over the past few years. In only 2014 163 inquiry proceedings have been carried out in the field of unfair commercial practices, misleading and comparative advertising, unfair terms. In 107 cases violations have ascertained and measures been taken, mostly leading to a change in the business conduct of liable enterprises. The role for single consumers in signalling violations, also through the web-form, has been pivotal[66].

What should be highlighted in policy terms is the *complementarity* between administrative and judicial enforcement. Neither mode would play a sufficient role if used on exclusive basis[67]. Whereas the former has been traditionally conceived as aimed at securing the workability of the market and opposed to judicial enforcement as aimed at protecting individual market participants' interests, both these functions have in fact been gradually shared by courts and administrative enforcers though a new combination of roles and instruments[68].

II. Judicial enforcement and the protection of collective and homogeneous individual interests. With regard to judicial enforcement, two elements should be highlighted: (*i*) the role of consumer organizations

[65] See art. 66, It. Cons. Code, as introduced by leg. decree 21 February 2014, n. 21, art. 1, sec. 1.

[66] See *Yearly Report 2015* from the Italian Competition Authority, p. 186.

[67] This trend characterizes most legal systems in Europe and outside. See F. CAFAGGI, *The Great Transformation*, cit., p. 510 seq. For a comparative analysis developed through the lenses of law and economics, see F. WEBER, M. FAURE, *The Interplay between Public and Private Enforcement in European Private Law: Law and Economics Perspective* (2015) 23 *European Review of Private Law*, Issue 4, pp. 525-549.

[68] See F. CAFAGGI, H.-W. MICKLITZ (eds.), *New Frontiers of Consumer Protection*, cit.; H.W. MICKLITZ, *Administrative Enforcement*, cit., p. 564.

in bringing action before a court in order to request, in the interest of a number of consumers or users, injunctive relief (as "cease and desist", or corrective measures) and the publication of the court decision[69]; (*ii*) the possibility for a group of consumers, holding homogeneous rights or collective interests, to bring a so called "class action", with or without the mediation of associations in order to request declaratory judgements on enterprise liability, recovery of damages, restitution measures[70]. This latter instrument may be used in cases in which several consumers are victim of the same unfair practice or for the same unfair terms in standard contracts or for the use of the same type of defective product.

The role of consumer associations has been an important element of consumer rights enforcement in the Italian landscape comparatively with other European legal systems[71]. Indeed the monitoring function played by these organisations improves the effectiveness of enforcement with special regard to cases in which monitoring leads to collective complaints and aggregate claims concerning large classes of consumers[72]. This has been very important in respect of so called indivisi-

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[69] See art. 136 seq., It. Cons. Code.

[70] See art. 140-*bis*, It. Cons. Code. See S. CHIARLONI, *Appunti sulle tecniche di tutela collettiva dei consumatori*, in *Riv. trim. dir. proc. civ.*, 2005, 385; M. RESCIGNO, *L'introduzione della class action nell'ordinamento italiano - Profili generali*, in *Giur. Comm.*, 2005, I, 407; L. ROSSI CARLEO, *L'azione inibitoria collettiva: dalla norma sulle clausole abusive al nuovo codice dei consumatori*, in *Europa e dir. privato*, 2005, 847; A. SPADAFORA, *Tutela e sanzione*, cit.

[71] See F. CAFAGGI, *The Great Transformation*, cit., p. 505 seq., comparing under this respect Nordic European systems (namely Scandinavian and the UK) with Southern European systems (with special regard to France, Italy and Spain) and observing a major role of consumer organizations in the latter than in the former systems.

[72] See, however: Trib. Milan, 21 December 2009, *Foro it.*, 2010, I, 1627, with comments by F. BECHI and A. PALMIERI, where the judge concludes that a representative consumer association has standing to sue for the protection of consumer collective interests when single consumers are simultaneously and individually harmed regardless the limited number of affected consumers. On this aspect, see also the judgment of the European Court of Justice, released in the case C-470/12, *Pohotovosts. r. o./Miroslav Vašuta* on 27 February 2014, where the Court denied that a national legislation not providing for the consumer associations' right to intervene in a cause of action in the interest of a single consumer, does not violate Directive 93/13/CEE. See P. MICHEA,

ble claims for unfair terms invalidity (in either cases of declaratory judgements or injunctions) as well as for unfair commercial practices when consumer organisations have sought cease and desist orders applicable in favour of large classes of consumers[73]. To what extent associations will also be able to effectively and efficiently drive the different mechanisms for aggregating claims for damages in the framework of the Italian "class actions" is still an open issue[74].

In fact the Italian procedure for aggregate claims has in such shown many weaknesses, with special regard to the material access to the procedure by consumers, who may not be informed about a taken initiative and anyway be excluded from subsequent claims. Few procedures have been started since 2010, among which 3 of them successfully concluded between 2012 and 2013[75]. It may be critical to observe that in one of them, among 104 applicants, only 6 consumers found satisfaction whereas for the others the claim was denied mostly for procedural obstacles[76]. It is relevant to add that a reform proposal is currently under discussion at the Italian Parliament which would enable new applicants to seek the extension of released judgements in their favour[77].

Osservatorio comunitario - La Corte di giustizia valuta la legislazione nazionale che non consente l'intervento in giudizio di un'associazione per la tutela dei consumatori, in *Contratti*, 2014, 5, p. 508 seq.

[73] On the role of consumer organizations under this respect see F. CAFAGGI, *The Great Transformation*, cit., p. 532 seq., examining the case of conflicting interests within and outside the consumer organization in respect of the choice of claims (e.g. injunction v. damages) or type of enforcement (administrative v. judicial).

[74] See A. SPADAFORA, *Tutela e sanzione*, cit., observing that the role of consumer associations has been more important in mediation and out-of-court proceedings in general than in court-proceedings.

[75] For a comment about a decision in which the claim was rejected (for substantive, not procedural reason) see L. IACUMIN, *Tutela dei consumatori. Azione di classe e tutela degli azionisti*, in *Giur. it.*, 2015, 1, p. 89 seq.

[76] See the information provided at *http://www.classaction.it/index.php?option=com_content&view=article&id=171:class-action-vs-banca-intesa-altroconsumo-vittoria-amara-11-aprile-2014&catid=3:azioni-in-corso&Itemid=154*.

[77] See Atto Senato n. 1950, *Disposizioni in materia di azione di classe*, in the text already approved by the Deputee Chamber on 3 June 2015.

4. Concluding remarks

Common challenges are faced by both Brazilian and Italian Consumer Law. Defining the scope and the modes of consumer protection in the light of the digital revolution is among the most critical ones. In substantive terms the enormous potentials of the digital revolution need to be tackled: (*i*) not only to enable consumers to exploit the several opportunities brought in terms of increased accessibility to market, (*ii*) but also to adapt consumer protection to the speed and pervasiveness of possible abuses and risks of unfairness.

The creation of web-platforms as new models to organize supply and demand of goods and services generates important challenges to be tackled both in terms of substantive rules and enforcement mechanisms. The prototype of consumer as a natural person, still well rooted in the E.U. legislation, could be revisited in the light of the Brazilian consumer code, extending consumer protection to legal entities acting with the purpose of satisfying the needs of consumers as final users. The distinction between business-to-consumer and business-to-business regimes, still prominent in both the observed systems, could itself deserve renovated attention in the light of the digital revolution. The impact of this revolution could blur such a sharp division between consumer-users and business-users of web platforms or at least provoke, through private autonomy or default regimes, some limited extension of consumer protection rules in favour of businesses, and particularly small businesses. Internal differences between business-to-consumer and business-to-business contracts could be acknowledged within this framework.

Within an increasingly complex market, where new contracting models proliferate challenging the durability of long-standing legal concepts, the need to enforce consumers' rights through effective mechanisms remains pivotal. More and more in the European Union Member States' procedural autonomy in defining the modes of such enforcement is subject to a E.U.-driven scrutiny under the force of general principles, such as effectiveness and proportionality among the most important ones. This seems the best premise for an ongoing dialogue among law makers, courts, other enforcement authorities, both public and private ones: a dialogue that, being the market globalized,

cannot be confined at the European level but must be extended throughout the globe within the spirit of the Italo-Brazilian cooperation project envisaged by this volume.

USING COMPETITION LAW AND INTELLECTUAL PROPERTY LAW TO FOSTER INNOVATION: A PRELIMINARY STUDY

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TABLE OF CONTENTS: *1. Introduction - 2. Brazilian relevant data: understanding the Brazilian context - 3. The new Brazilian Competition Law - 4. Brazilian Intellectual Property Laws - 5. An overview on Intellectual Property Law: Why intellectual property? - 6. The tension between Competition Law and Intellectual Property Law - 7. Relevant issues to scale the tension between intellectual property and competition - 8. Preliminary data analysis - 9. Conclusions.*

1. Introduction

The main goal of this chapter is to set up the basis for a joint research between scholars from the Law Faculty of the Federal University of Minas Gerais and from the University of Trento. To achieve such a goal, we will provide an overview of the new competition law in Brazil, Law No. 12.529/11, and a panorama of the Brazilian legal institutions that currently protect intellectual property and innovation.

We shall also analyse some data on the application of the laws and legal institutions governing competition and intellectual property in Brazil. Those data will establish the foundations for joint research with Italian researchers on the potential uses of competition law and intellectual property as a method to achieve innovation and economic and social development.

We should assume, at least for these first steps into the research, that there is a relevant influence between the social-economic and the institutional (legal) environment. In other words, we should look into some social-economic data to try to find some influence of institutional

change and should look into the institutional structures to try and find signs of social-economic influences. Sections 2-6 describe the relevant aspects of the Brazilian institutional context. Section 7 presents a preliminary analysis of statistical data on the correlation between patents grants and economic growth. Section 8 proposes preliminary conclusions.

2. Brazilian relevant data: understanding the Brazilian context

The first fact that has to be observed is that Brazil is a country of very recent real capitalist industrialization. Until 1988, most of the relevant industries were owned by the State, from telecommunications[1] to mining and steel companies[2], banking[3] and even airplane construction[4]. The Brazilian Constitution of 1988 determined privatization of State-owned industries. Article 173 of the Constitution provided that "with the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed whenever needed to the imperative necessities of national security or to a relevant collective interest, as defined by law"[5]. Privatization took place in the following years, especially after Law 8.031/1990 established the National Privatization Program. This fact should be pointed out because we cannot treat data before privatization as if Brazil had a pure capitalist system. We assume that, due to the ownership of an

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[1] Federal Government and most of the member-States had its own telephone company. Those companies were known as "Teles".

[2] Such as Cia, Vale do Rio Doce, nowadays called only Vale (the third biggest mining company in the world), CSN (Companhia Siderúrgica Nacional), USIMINAS (Usinas Siderúrgicas de Minas Gerais) among many others.

[3] Almost every member-State had its own bank acting as a private bank. Besides, the Federal Government still has two banks acting as private banks: Caixa Econômica Federal and Banco do Brasil.

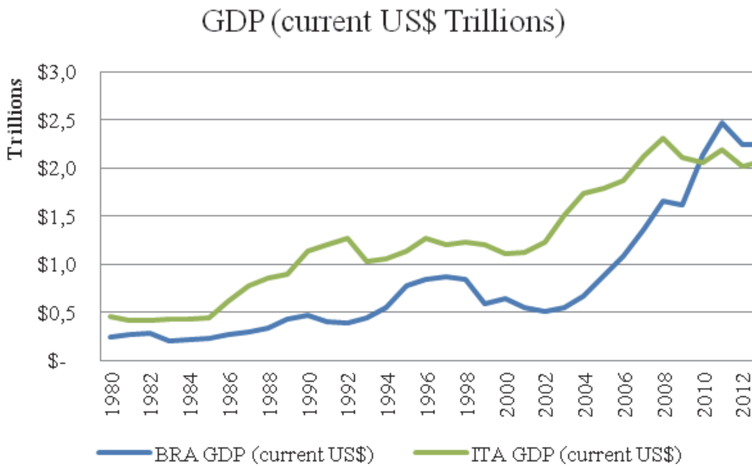
[4] State owned EMBRAER, an airplane manufacturer.

[5] The English version of the Constitution, as translated by the Supreme Court (*Supremo Tribunal Federal*) has been used, as if it were the official version. Available at *http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf*.

enormous number of companies, the Brazilian government altered substantially the competition and innovation environment. This should remain a mere assumption for now, and will not be converted into a deeper study.

It is also relevant to point out that in the last 12 years, Brazil has quintupled its GDP and, in the last 32 years, decupled the GDP, as shown in figure 1.

Figure 1



(Source: WORLD BANK, 2014)

According to the World Bank data, Brazilian GDP increased from practically half (US$235Billion) of Italy's GDP (US$475Billion) in 1980, to slightly surpassing (US$2.245Billion) Italy's GDP (US$ 2.149Billion) in 2013.

We can observe that, compared to Italy, Brazil has experienced a significant change in the growth rate of its GDP in recent years, although Brazil still has almost half of the Italian GDP per capita.

These facts show us the current and fast development in the Brazilian economy, which may imply some need to change institutions and institutional framework, especially regarding market institutions and market regulation, to keep growth rates high.

3. The new Brazilian Competition Law

On a general overview of the new regulatory landscape, Brazil is going through some changes of its Competition Law.

The first change came in 1994, just after the initial privatization and the start up of the "real" Brazilian industrialization, with Law 8.884/94. Law 8.884/94 established the independence of the Brazilian Competition Authority (*CADE – Conselho Administrativo de Defesa Econômica*), the Brazilian equivalent of the Italian *AGCM – Autorità Garante della Concorrenza e del Mercato*. CADE was, before that Law, a mere consulting office for the Ministry of Justice. The investigative powers were still dependent on the Ministry of Justice, the Brazilian equivalent of the Italian *Ministero della Giustizia*.

The recent Law 12.529/11 introduced significant changes, providing the current national structures of the antitrust and competition system.

At the administrative level, CADE remains with administrative autonomy (autarchy), having the status of a public agency, meaning that the decisions are taken without any possibility of direct interference by the Executive branch, just like the Italian AGCM.

But the investigative functions, previously carried out by the Secretariat of Economic Law of the Ministry of Justice (SDE), were internalized, being designated to the General Superintendence of CADE. In other words, it was only in 2011 that CADE gained independent investigative powers. The Brazilian Council for Economic Defence (*Conselho Administrativo de Defesa Econômica*) is the administrative tribunal in defense, primarily, of competition law. The Tribunal's decisions determine the final rulings in connection with anticompetitive practices and merger reviews.

There are 7 Commissioners, appointed by the President of the Republic and approved by the Senate, with a 4 year non-renewable mandate. These 7 Commissioners are the members of the Competition Tribunal.

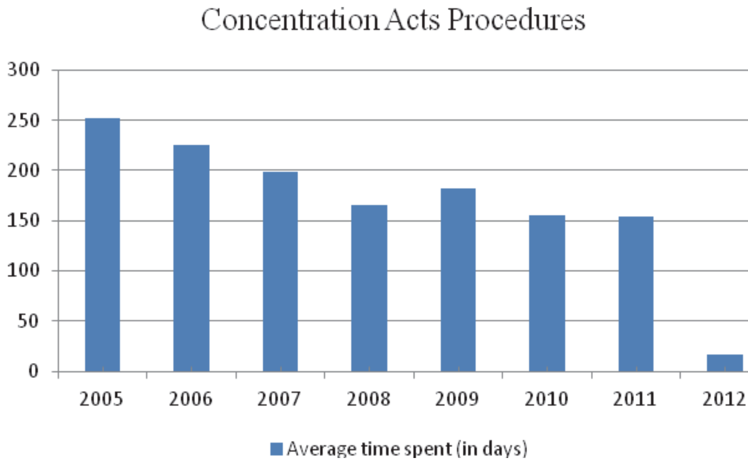
The General Superintendence of CADE has a similar structure to the Secretary General of AGCM. The Brazilian General Superintendent is also appointed by the President of the Republic and approved by the Senate, for a 2 years mandate, renewable for 2 more years. All the

working positions in the Antitrust Division of the Ministry of Justice were transferred to CADE (Art. 121, Par. Un.) and 200 working positions were added.

Law 12.529/11 aimed to accelerate judgments regarding concentration acts and anticompetitive practices complaints. Data provided by CADE show that it reached this goal after 2011.

According to CADE data, the average time spent in examining a concentration act went from 252 days in 2005 to 17 days in 2012, with the new legislation, as shown on figure 2.

Figure 2



(Source: CADE, 2014)

Also according to CADE, the fines imposed on anticompetitive conduct complaints increased significantly both in number and in importance.

We can confirm with the data provided by CADE a general trend of simplifying merger procedures and, on the other hand, increasing attention by the authority regarding anticompetitive practices.

4. Brazilian Intellectual Property Laws

Intellectual property has always been subject of institutional protection in Brazil. Before Brazil's independence, intellectual property has been the subject of legal recognition by Portuguese government.

Currently, intellectual property is protected by two laws: Law 9.279/96 and Law 9.610/98.

Law 9.279, issued in 1996, regulates patents, utility models, industrial designs, trademarks, geographic indications and devotes a chapter to the repression/prevention of unfair competition. Law 9.610, issued in 1998, basically regulates copyrights and related rights.

Also relevant are Law 9.609/98, which protects software; Law 11.484/07, that dedicates a chapter to the protection of integrated circuit topographies; and Law 9456/97, that establishes, regulates and protects the rights to Plant Varieties.

In short, these are the basic Intellectual Property Laws in Brazil.

5. An overview on Intellectual Property Law: Why intellectual property?

Technological innovation has a known effect on development and economic growth (Solow 1960; Romer 1990).

Solow's model may imply that growth can be a result of introduction of new technology (Solow 1960). Romer's model may imply that an increasing rate of investment in innovation produces sustainable growth (Romer 1990).

The stimulation of investment on innovation can assume two basic strategies: public ownership, with planned state action (e.g. USSR and the communist space program)[6], or private appropriation of investments, through intellectual property rights.

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[6] About planned economies and strategic planning, see M.W. PENG, P.S. HEATH (1996).

There may be some positive returns from state planned action, but there are clear limitations to the public ownership model, especially regarding long-run planning and re-planning.

On the other hand, intellectual property rights encourage creation of deadweight, which is, in essence, avoided by antitrust policies.

Schumpeter (1936, p. 66) states that development derives from the "new combinations of productive means", indicating that "it is not essential – though it may happen – that new combinations should be carried out by the same people who control the productive or commercial process which is to be displaced by the new". As he points out, this implies what he would later call "creative destruction", allowing social mobility or literally "the process by which individuals and families rise and fall economically and socially" (Schumpeter 1936, p. 67).

The Schumpeterian approach implies the existence of a legal and institutional environment that would allow appropriability of innovation. And such appropriability is the main goal of intellectual property rights system.

Traditionally intellectual property rights have been seen as an excluding right, meaning that it has the effect of creating a temporary monopoly over a useful productive mean. As a matter of fact, this monopoly would be economically proportional to its social utility.

The dynamic effects of intellectual property rights in development have been studied by Nelson (1982), Dosi (1982) and Penrose (1995).

6. The tension between Competition Law and Intellectual Property Law

Interesting studies have been made about the relationship between Competition and Intellectual Property, namely Jorde and Teece (1990) and Teece (1986).

In short, at the risk of oversimplifying this matter, we could state that monopoly powers imply the establishment of sub-optimal levels of production, creating considerable deadweight. At the same time, the simple possibility of the exercise of monopolistic powers by an agent can lead to under-investment in some sectors.

We should consider that the ultimate and essential foundation of competition law is to promote economic development and, therefore, social development. The expansion of competition policies only makes sense if aimed at economic and social development. We assume that this premise is reflected in the institutional changes in U.S. and Europe, following their economic contexts, and also in the Brazilian antitrust policies in its economic context.

Competition Policies are part of a set of policies that aim to stimulate economic development. Competition policies are not an end in themselves. They depend on the economic and social context.

7. Relevant issues to scale the tension between intellectual property and competition

The variety of judicial approaches to the relationship between Competition Law and Intellectual Property Law is not the result of "hesitation" by the courts. This variety echoes the variety of industrial policy. Changes in Competition Policies depend on the economic context. It is possible to imagine a dynamic scenario in which the existence of intellectual property will cause more harm to economic and social development than a scenario with no intellectual property.

In the Brazilian context, CADE admitted, theoretically, the existence of anticompetitive practices based on the abusive exercise of intellectual property rights on industrial designs, although it did not verify any harm in that specific case[7].

It should be noted that in Brazil, Intellectual Property and Competition Policy both aim to "ensure national development" (article 3, II, of the Constitution). In many ways they are complementary. There is no conflict of institutes, decisions should not be made taking into consideration each institute in itself, but the common goal of national development.

[7] Appeal in the Preliminary Investigation no. 08012.005727/2006-50, the case of aluminum profiles for doors and windows.

In conclusion, there should be some common ground of interest in regulation of competition and intellectual property amongst Brazil and Italy. The existence and scope of such ground should be subject to future common research.

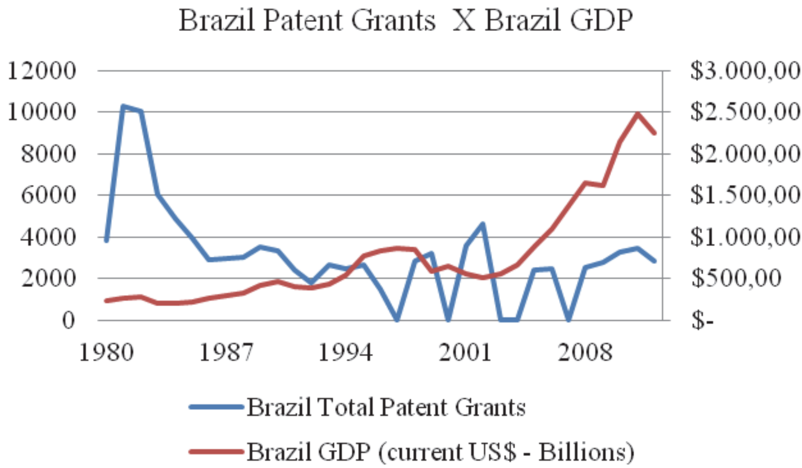
8. Preliminary data analysis

For the purposes of this first examination of preliminary data on Brazil and Italy, it is interesting to use China and the USA as a comparative point of reference. This means taking up two countries with very different legal institutions, but with a high level of sustainable growth in recent years. It shall be noted that some data could not be verified at this stage of the research, especially data retrieved from WIPO. Regarding the WIPO dataset analyzed, it also should be noted that for some years WIPO does not register any patents grants or applications for Brazil or Italy. We assumed that the missing data did not impair the study, although it should considered a preliminary analysis.

It should also be noted that, although the patent data should be taken cautiously, as observed by Basberg (1987), we use patent grants and patent application as proxies of innovation. It is fully known that patent grant or application is not necessarily a protected right. Nevertheless, it is used as a proxy because it can somehow show the impact of policies geared to innovation.

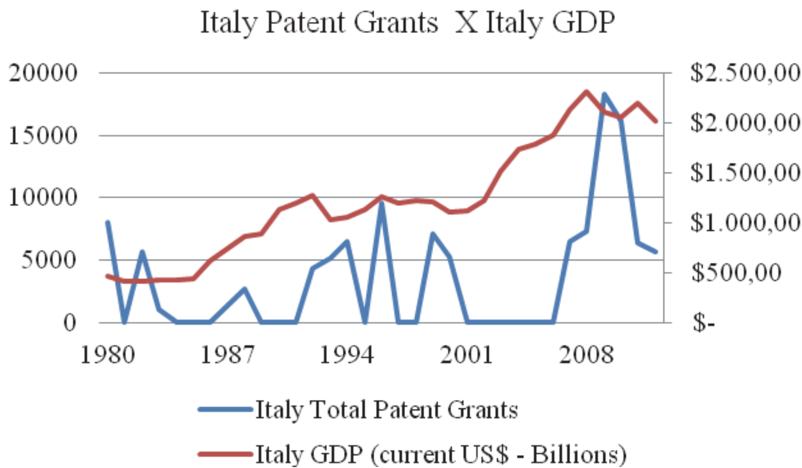
The first fact to be analyzed is the relation between patent grants and GDP, taken, in this context, as proxies of innovation and development. Preliminary data show a very interesting relation of patents granted x GDP:

Figure 3



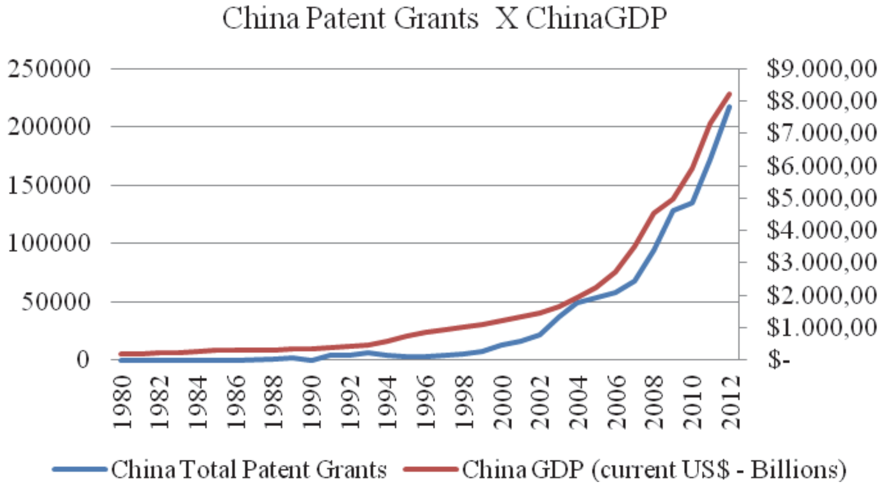
(Source: WORLD BANK, 2014; WIPO, 2014)

Figure 4



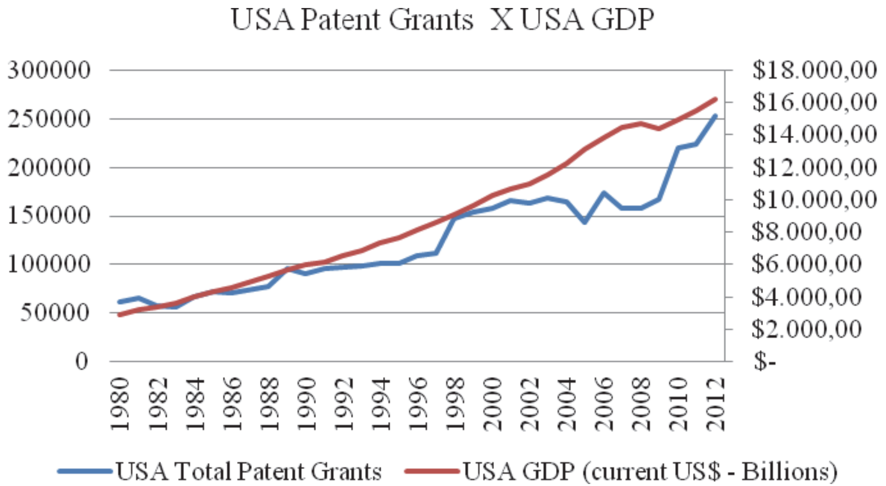
(Source: WORLD BANK, 2014; WIPO, 2014)

Figure 5



(Source: WORLD BANK, 2014; WIPO, 2014)

Figure 6



(Source WORLD BANK, 2014; WIPO, 2014)

Correlation tests of the Patent Grant x GDP show interesting results. It should be noted that we excluded every year that any country examined had an improbable 0, as we assume it was a problem in the dataset rather than that country actually did not produce any patent that year.

Table 1

Correlation between Total Patent Grant x GDP	
Brazil	-0,304644
Italy	0,053275
China	0,991405
USA	0,945371

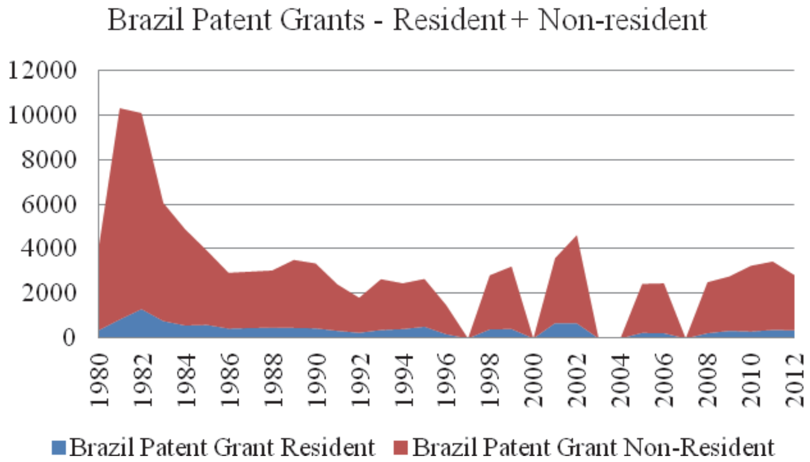
An expected strong correlation in China and U.S. is observable. As expected, there is a strong and positive correlation between patent grants and China and U.S. GDP, which implies that as their GDP grows, also the number of patent grants grows.

But, we observe an unexpected not so strong correlation in Italy, as well as a weak and negative correlation between Brazilian patent grants and GDP. We assume that these phenomena can be explained with the understanding of legal and institutional environments in Brazil and Italy.

We expect to be able to investigate and find the reasons why there isn't a strong correlation, although positive, in Italy and why there is a weak and negative correlation in Brazil when GDP x Patent Grants is considered.

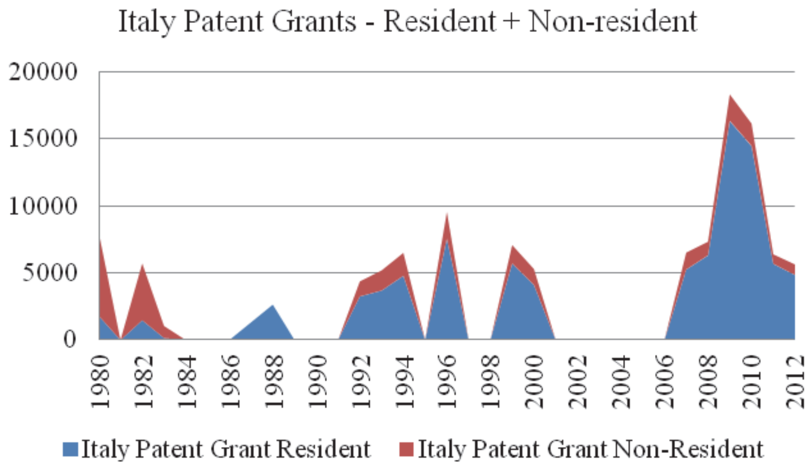
On the other hand, we can also observe interesting data on the ratio between patent grants to residents and non-residents. Brazil has a proportionally high level of non-resident patent grants, when compared to Italy, China or USA, as shown in the graphics below.

Figure 7



(Source: WIPO, 2014)

Figure 8



(Source: WIPO, 2014)

It can be observed that, regarding patent grants to residents and non-residents, the Italian profile was very similar to the Brazilian profile

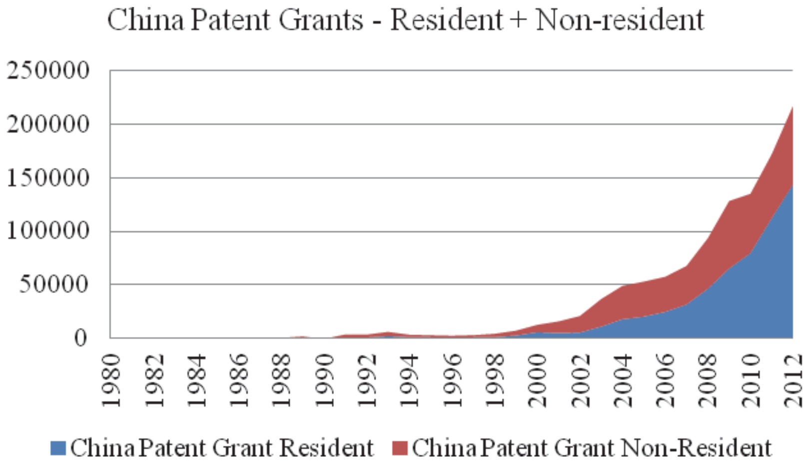
until around 1984. Afterwards, Italy shifted to a profile more similar to China's and U.S.'s.

Subject to further investigation, we should assume that some institutional or legal change occurred around 1984 in Italy, and that this change caused the shift of the Italian patent grant profile.

On the other hand, the ratio between patent grants to residents and non-residents seems more stable when China and U.S. are observed, as seen on figures 9 and 10.

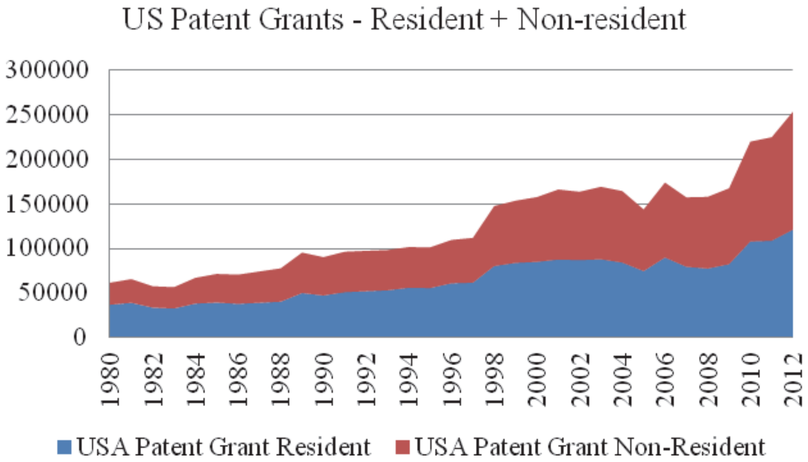
It is possible to observe that the increase in patent grants over the years in China and U.S. did not have a significant impact on the ratio between patent grants to residents and non-residents. This data should also be subject to further investigation, as we can assume long-run sustainable GDP increase would not rely on non-resident patents.

Figure 9



(Source: WIPO, 2014)

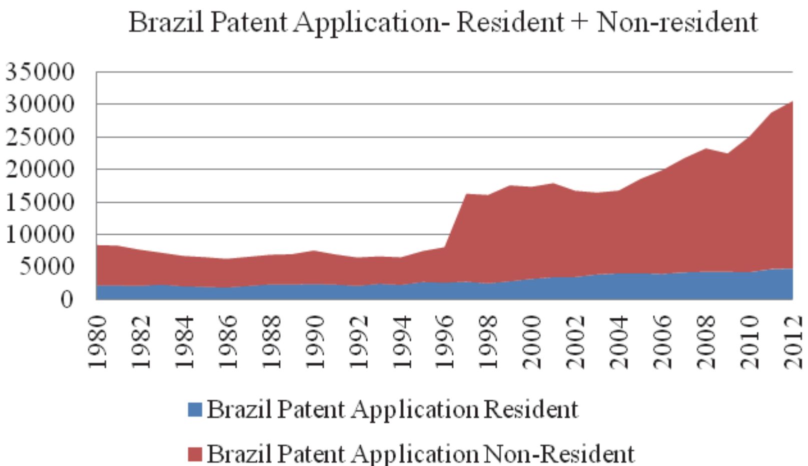
Figure 10



(Source: WIPO, 2014)

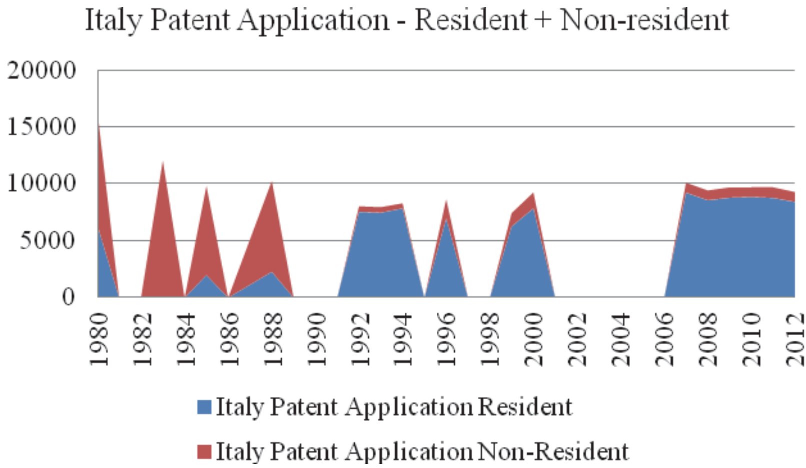
The same occurs when we take the patent applications data: Brazil has a high level of non-resident patent applications, when compared to Italy, or China or USA.

Figure 11



(Source: WIPO, 2014)

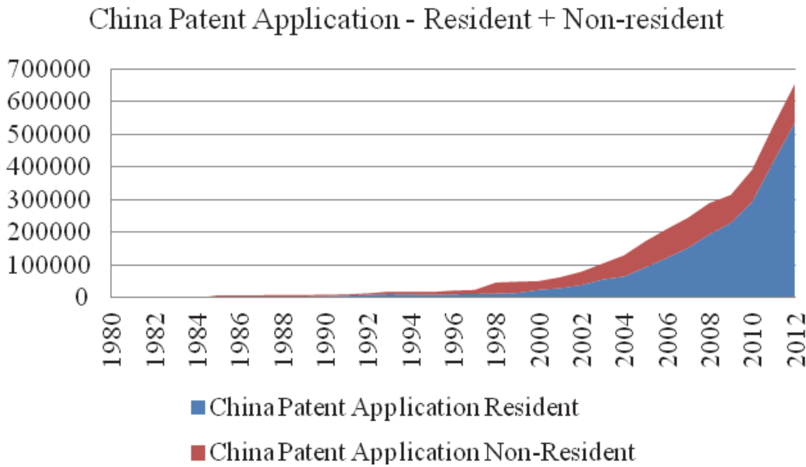
Figure 12



(Source: WIPO, 2014)

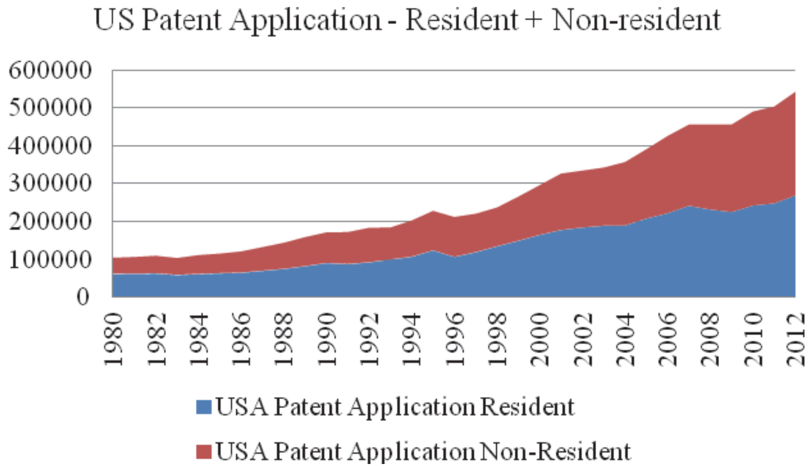
And the patterns of China and U.S. are somewhat similar to the grants, as follows.

Figure 13



(Source: WIPO, 2014)

Figure 14

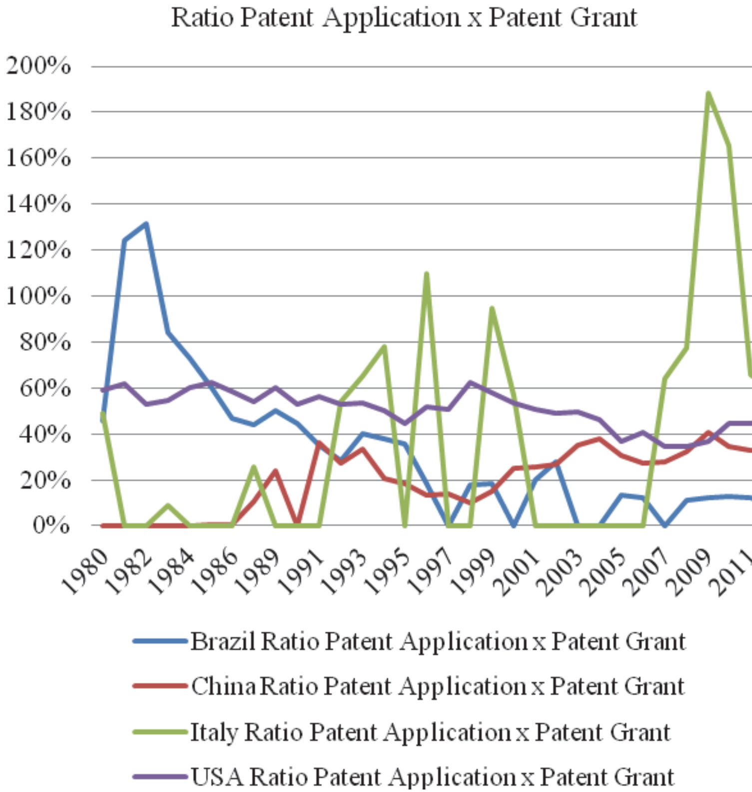


(Source: WIPO, 2014)

The data also show that Brazil has a low rate of patent grant, when patent applications for the same year are considered, compared to Italy, China or USA. This rate has been around 8% in the last 10 years.

This low rate of approval of the patent applications can have various meanings and causes, including legal or institutional causes, which could be more easily detected in a comparative study.

Figure 15



(Source: WIPO, 2014)

9. Conclusions

Preliminary data analysis on patent applications and grants in Brazil and in countries such as Italy and China suggests that some institutions and legal rules should be understood comparatively, in order to find the optimum institutional and legal framework to promote economic and social development in each context.

From this preliminary study we can deduce there are lots of coincidences and discrepancies in Brazilian and Italian contexts regarding

competition and intellectual property. These coincidences and discrepancies should also be looked at through the formal and material perspective of legal systems and institutions, in order to find causality and, in consequence, the design of better policies.

These institutions and legal rules should be subject to further investigation in cooperation.

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CONSIDERATIONS ON THE EVOLUTION OF THE *AUDI ALTERAM PARTEM* PRINCIPLE IN CRIMINAL PROCEDURE

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TABLE OF CONTENTS: *1. Historical overview - 2. The* audi alteram partem *principle in the Democratic State of Law - 3. The adversarial system as a constitutionally secured guarantee - 4. Conclusion.*

1. Historical overview

The evolution of the constitutional right of defence follows the development of historical civilization[1]. Its origin dates back to over five centuries before the Christian Age, being uncertain the exact date of its emergence.

The Bible's Old Testament, when referring to Adam's trial – which, according to biblical scriptures, was the first trial to occur on Earth – presents what can be understood as the seed of the right of resistance, for God did not convicted Adam without first giving him the right to manifest[2].

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[1] The analysis is developed from the European point of view, which divides the development of the human kind in five stages: Pre-history, Ancient times, Middle Age, Modern Age and Contemporary Age. The Pre-history initiates with the appearance of men circa 3,5 million years ago and goes till the beginning of writing, in 4.000 b.C, when History begins. The present study restrains itself to the search for the origin of the Right of Defence in the Historical period, because in previous ages, due to the non existence of written registries, the reconstruction of facts and situations depended on archeological findings, which would reduce the precision of the data obtained.

[2] Genesis: 3,**[9]** But the Lord God called to the man and said to him, "Where are you?" **[10]**And he said, "I heard the sound of you in the garden, and I was afraid, because I was naked, and I hid myself." **[11]**He said, "Who told you that you were naked? Have

In Ancient Greece, in Athens, by the year of 441 b.C., Sophocles' play Antigone[3] hit the stage, written in reference to Natural Law, and emblematic on the discussion of the origin of the right of defence, represented in the trial of the character Antigone, who formulates her own defence questioning the validity of the written law against the unwritten law, thus manifesting the right of resistance, kernel of the right of defence.

Going further, more technically and precisely into the development of the right of defence, the analysis from ancient times, in Republican Rome and Greece, shows that the procedure was purely accusatory, establishing the defence in an irrefutable right of the accused who, since the beginning of the prosecution, knew the imputation formulated against him, therefore standing on an equal juridical plan with the prosecutor. The defendant, who at first responded personally, in a second moment received the assistance of an eloquent orator and specialist, who possessed all the liberty to exercise the defence of his clients[4].

Subsequently, the imperial regime imposed restrictions characteristic of the new system: the secrecy and the proceduralization of the instruction acts. The defence was extremely mitigated in the first procedural stage, reacquiring its strength in the oral debates[5].

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you eaten of the tree of which I commanded you not to eat?" **12**The man said, "The woman whom you gave to be with me, she gave me fruit of the tree, and I ate."

[3] Oedipus, when discovered that his 4 children were conceived from his relationship with his own mother, Jocasta, in a gesture of self-flagellation, gouged out his own eyes and started to wander around Greece, guided by his daughter Antigone. After his death, two of his sons started a dispute for political power in Thebes, one brother being killed by the other. Creon, the dead brother's uncle, took over the city's govern. As his first act as governor, he prohibited the burial of Polynices, one of the dead Brothers – that way, according to Greek beliefs, stopping his spirit from reaching eternal peace, on the argument of treason, a crime punished with the death of the offender.

Antigone, disobeying to King Creon, buried Polynices, giving him the proper funeral service, and, for this reason, was taken to the King to be punished. Once in front of the King, Antigone, in her defence, invoked the eternal laws that regulate the world, with universal character, whose origins got lost in the perspective of time and should prevail against the written laws. SÓFOCLES, *Édipo Rei – Antígona*, trans. Jean Melville, São Paulo, 2004. p. 81 – 137.

[4] A.V. MARICONDE, *Derecho procesal penal*, Buenos Aires, 1969, p. 373.

[5] *Ibidem*, p. 373-374.

With the fall of the Roman Empire, the Barbarians imposed their rules regarding the defence of the accused. With the exception of the ordeals (a trial before God)[6], in which there was no possibility of vindication, the guarantee of defence was kept once the accused was allowed to appear before the court accompanied by its relatives and acquaintances. However, the possibility to elect a patron or an attorney wasn't always present[7].

From the establishment of the medieval inquisitorial model, the procedure became written and marked by internal and external confidentiality, since the access to procedural acts was prohibited, not only for people in general who did not integrate the procedural relation, but for the own defendant[8], who had lost the condition of party and was converted into a mere object of the procedure. The right to a defence had lost its content and become a simple formality[9].

The defender had no access to the instructive procedural acts[10] and his defence was entrusted to a group of two or three attorneys from the own court, who had the primordial function to elucidate the accused of his position and the risks he was exposed to, compelling him to speak the truth[11], which meant, in fact, to confess the imputation that started the inquiry.

There was a concentration of the tasks of accusation and judgment in the same person, who possessed a wide freedom to investigate the evidences (*ex officio)*, beyond other extended powers, in notorious disparity with the situation of complete desertion in which the accused was found, to whom was predicted a preventive imprisonment, which lasted long enough for the prosecuting judge to collect elements of proof[12].

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[6] It consisted in submitting the accused to a certain and determined test, believing that God wouldn't let him survive it if he was guilty. This kind of trial is present in almost every primitive civilization. On the subject: H.TORNAGHI, *Instituições de processo penal*, Vol. IV, Rio de Janeiro, 1959, p. 210-211.

[7] A.V. MARICONDE, cit., p. 374.

[8] G. LOZZI, *Lezioni di procedura penale*, 5th ed., Turin, 2002, p. 5.

[9] A.V. MARICONDE, cit., p. 375.

[10] A.V. MARICONDE, cit., p. 375.

[11] R.G. CÁRCE, *L'inquisizione*, Milan, 1994, p. 37.

[12] G. LOZZI, cit., p. 5.

Once the French Revolution occurred and the Declaration of the Rights of Man and of the Citizen was introduced, the modifications that followed converged to the necessity of the annulment of the restrictions imposed to the defence of the accused.

In Brazil, the first Constitution, promulgated in 1824, brought some limitations to the State's *jus puniendi*: the principle of natural justice, the principle of anteriority of criminal law and the prohibition of special courts. However, regarding the regulation of the procedural acts, such task was delegated to the infra-constitutional legislation[13].

In 1891, the first Republican Constitution of Brazil was officially published. Its basis was North American constitutionalism, being elaborated according to the principles of the 1787's American Constitution, the latter in turn being decisively influenced by the idea of Natural Law[14]. Both constitutional texts were supported by the separation of political powers and the judicial control of the public authorities[15]. Furthermore, the Constitution of 1891 explicitly stated the necessity to grant the accused a wide defence along with its essential resources, inserting a note of guilt as a component of the referred principle[16].

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[13] Art. 179 Brazilian Const. 1824. (...)

(...)

XI - *Ninguém será sentenciado, senão pela Autoridade competente, em virtude de lei anterior e na fórma por ella prescripta.*

(...)

XVII - *A excepção das Causas, que por sua natureza pertencem a Juízos particulares, na conformidade das Leis, não haverá Foro privilegiado, nem commissões especiais nas causas cíveis ou crimes.*

[14] The idea of natural law was developed by two English authors: Justice Sir Edward Coke (1552-1634) and the philosopher John Locke (1632-1704).

[15] A.F. MACIEL, *O devido processo legal e a constituição brasileira de 1988*, *Revista de processo*, 1997, 22, p. 176.

[16] Art. 72 Brazilian Const. 1891. (...)

(...)

§ 16. *Aos accusados se assegurará na lei a mais plena defesa, com todos os meios essenciaes a ella, desde a nota de culpa, entregue em vinte e quatro horas ao preso e assignada pela autoridade competente, com os nomes do accusador e das testemunhas.*

The Constitution of 1934[17] kept the guarantee of a full defence without, however, approaching the specificity of the note of guilt, contrary to the previous text.

The Constitution of 1937 had an authoritarian imprint and did not include procedural constitutional guarantees, which gained back a constitutional support in the Constitution of 1946[18], motivated and influenced by the ideas brought by the 1945's Civil Procedural Code Project by Eduardo Couture, which installed a reformist inclination in Latin America. It is important to remember that the Constitution of 1946 introduced the principle of full defence (now called plain defence) and, connected to it, rules on the emission of the note of guilt[19].

In 1948, the Universal Declaration of Human Rights[20] was elaborated, deeply strengthening human Rights the guarantee of individual

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[17] Art. 113 Brazilian Const. 1934. (...)

(...)

XXIV - *A lei assegurará aos acusados ampla defesa, com os meios e recursos essenciaes a esta.*

[18] Art. 141 Brazilian Const. 1946. (...)

(...)

§ 25. *É assegurada aos acusados a plena defesa, com todos os meios essenciais a ela, desde a nota de culpa, que, assinada, pela autoridade competente, com os nomes do acusador e das testemunhas, será entregue ao prêso dentro de vinte e quatro horas. A instrução criminal será contraditória.*

[19] Art 141 Brazilian Const. 1946 - *A Constituição assegura aos brasileiros e aos estrangeiros residentes no País a inviolabilidade dos direitos concernentes à vida, à liberdade, a segurança individual e à propriedade, nos termos seguintes:*

§ 25 - É assegurada aos acusados plena defesa, com todos os meios e recursos essenciais a ela, desde a nota de culpa, que, assinada pela autoridade competente, com os nomes do acusador e das testemunhas, será entregue ao preso dentro em vinte e quatro horas. A instrução criminal será contraditória.

[20] Art. IX Universal Declaration of Human Rights.

Ninguém será arbitrariamente preso, detido ou exilado.

Art. X

Toda pessoa tem direito, em plena igualdade, a uma audiência justa e pública por parte de um tribunal independente e imparcial, para decidir de seus direitos e deveres ou do fundamento de qualquer acusação criminal contra ele.

Art. XI

1. Toda pessoa acusada de um ato delituoso tem o direito de ser presumida inocente até que a sua culpabilidade tenha sido provada de acordo com a lei, em

rights and the imposition of limits to the State's *jus puniendi*, granting the accused forceful defence instruments.

The Constitution of 1967 reaffirmed the rights to a full defence and to adversarial proceedings, tying them to the principle of prohibition of special courts and the principle of the anteriority of the criminal law[21]. The Constitutional Amendment nº 1 from 1969, considered by many as a new Constitution, kept in its article 153 the rules of the previous constitutional text.

Also in 1969, on 22 November, the Interamerican Human Rights Specialized Conference, in San Jose of Costa Rica, opened to signature the Pact of San Jose of Costa Rica, which, among several fundamental rights, highlighted judicial guarantees[22]. It is important to emphasize that Brazil only ratified it on 25 September 1992.

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julgamento público no qual lhe tenham sido asseguradas todas as garantias necessárias à sua defesa.

[21] Art. 150 Brazilian Const. 1967 (...)

(...)

§ 15. A lei assegurará aos acusados ampla defesa, com os recursos a ela inerentes. Não haverá foro privilegiado nem tribunais de exceção.

§ 16. A instrução criminal será contraditória, observada a lei anterior quanto ao crime e à pena, salvo quando agravar a situação do réu.

[22] Art. 8 Pact of San Jose - *Garantias Judiciais*

1. *Toda pessoa terá o direito de ser ouvida, com as devidas garantias e dentro de um prazo razoável, por um juiz ou Tribunal competente, independente e imparcial, estabelecido anteriormente por lei, na apuração de qualquer acusação penal formulada contra ela, ou na determinação de seus direitos e obrigações de caráter civil, trabalhista, fiscal ou de qualquer natureza.*
2. *Toda pessoa acusada de um delito tem direito a que se presuma sua inocência, enquanto não for legalmente comprovada sua culpa. Durante o processo, toda pessoa tem direito, em plena igualdade, às seguintes garantias mínimas:*
   a. *direito do acusado de ser assistido gratuitamente por um tradutor ou intérprete, caso não compreenda ou não fale a língua do juízo ou tribunal;*
   b. *comunicação prévia e pormenorizada ao acusado da acusação formulada;*
   c. *concessão ao acusado do tempo e dos meios necessários à preparação de sua defesa;*
   d. *direito ao acusado de defender-se pessoalmente ou de ser assistido por um defensor de sua escolha e de comunicar-se, livremente e em particular, com seu defensor;*

The Constitution of 1988, the Nation's most important legal instrument of the juridical order in modern days, introduced a brand new posture from the Brazilian State, centered on the assurance of the exercise of individual fundamental rights, increasing the guarantees to adversarial procedures and to a full defence, ascertaining, without restrictions, the observance of both in every procedure, judicial and administrative, as well as to every accused in general[23].

2. The audi alteram partem *principle in the Democratic State of Law*

In the 19th century, a definition for the right to adversarial procedures was developed, influenced by the classical liberal conception. That conquest was limited to the introduction of official rules, for, concretely, it had a merely formal character, just like practically every guarantee in the Liberal State, with no plain effects in juridical practice. In this period, the adversarial procedures were conceived as the procedural guarantee of hearing and being heard, expressed in the Latin say-

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e. direito irrenunciável de ser assistido por um defensor proporcionado pelo Estado, remunerado ou não, segundo a legislação interna, se o acusado não se defender ele próprio, nem nomear defensor dentro do prazo estabelecido pela lei;

f. direito da defesa de inquirir as testemunhas presentes no Tribunal e de obter o comparecimento, como testemunhas ou peritos, de outras pessoas que possam lançar luz sobre os fatos;

g. direito de não ser obrigada a depor contra si mesma, nem a confessar-se culpada; e

h. direito de recorrer da sentença a juiz ou tribunal superior.

3. A confissão do acusado só é válida se feita sem coação de nenhuma natureza.

4. O acusado absolvido por sentença transitada em julgado não poderá ser submetido a novo processo pelos mesmos fatos.

5. O processo penal deve ser público, salvo no que for necessário para preservar os interesses da justiça.

[23] Art. 5° Brazilian Const. 1988. (...)

(...)

LV - *aos litigantes, em processo judicial ou administrativo, e aos acusados em geral são assegurados o contraditório e ampla defesa, com os meios e recursos a ela inerentes*.

ing *audiatur et altera pars*. Important to consider, the *audi alteram partem* principle, in the Liberal State version, fulfilled its mission for it expressly recognized the need for a valid procedural instruction.

However, nowadays, the formal adversarial system, without pretense of effectiveness, does not offer adequate answers to the most urgent needs. Therefore, the lasting influence of the individualistic liberal ideas on procedural law, especially on criminal procedural law, has been directly responsible for countless irreparable injustices.

Andrea Proto Pisani, when criticizing the inequality of opportunities given to the procedural adversaries informed by liberal ideals, concluded that

> The juridical relationship presupposes that the formal equality of the parties corresponds to the substantial equality: only then it is possible to deduct that the free confrontation of the parties always results in a fair composition of the controversy[24].

With the rise of the Democratic State of Law, the parameters concerning rights and guarantees of the individuals changed. Freedom and dignity of the human person remained crucial values in the juridical order. However, the State abandoned its static posture and started to seek the affirmation of certain fundamental values of the human person, as well as the strategic direction of the organization and functioning of the State machinery contemplating the protection and effectiveness of such values.

Thereby, an essentially guarantist State cannot simply grant rights to the governed, without ensuring the fulfillment of the referred rights, for:

> In juridical means, it is necessary to always seek guarantees and securities. It is not enough that a right be recognized and declared; it must be

[24] A. PROTO PISANI, *Lezioni di diritto processuale civile*, 2nd ed., Napoli, 1996, p. 224.

granted, for there will come occasions in which it is discussed and violated[25].

Furthermore, the democracy, as structural axis of a State, is not restricted, solely, to the selection of political agents, but consists in a criterion for the exercise of the State's power in each of its layers.

Before this conjuncture, the democratic order transposes itself to the procedural system which, whilst a component of the State's power, opens the development of its work to the participation of the individuals, whose rights will be affected by the symmetrical parity of juridical positions, delivering them the same opportunities in the course of the procedural *iter*.

The extension of the democratic guidelines to the procedural field is covered by a transcendental importance, being an instrument of attainment of rights and an effective mechanism of restraint and control of the government power, providing a legitimation of the State, since it allows the improvement of the juridical order with the opening to the claims of the governed.

In order to perform the relevant part that it represents in the structure of the Democratic State of Law, the procedural system needs efficacy and validity, which can only be obtained through mechanisms that can guarantee its concrete accomplishment[26].

Among the instruments that grant validity and efficacy to the juridical order, the constitutional *audi alteram partem* principle is the master beam that allows the equal confrontation between the parties.

To fulfill such purpose, the adversarial system must be plain and effective. Plain because the principle must inform every preparatory act of the final judgment and effective because, besides the formal provision, the presence of means that provide concrete conditions so that the parties can act in the procedural instruction in symmetrical parity is indispensable.

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[25] M. HAURIOU, *Principios de derecho público y constitucional*, trans. Carlos Ruiz del Castillo, Madrid, s.d., p. 120.

[26] J.A. DE OLIVEIRA BARACHO, *Processo constitucional*, Rio de Janeiro, 1984, p. 130.

As already mentioned, the procedure, as the output of the Democratic State of Law, must be conducted in a way to accomplish the guarantees now laid down in the constitutional text. Therefore, it is indispensable to ensure the parties the permanent and concrete opportunity to participate in the instruction of procedural acts, because "the respect to the adversarial system assumes the value of a constitutional legitimacy condition of the procedural law"[27].

3. The adversarial system as a constitutionally secured guarantee

The adversarial system, inserted in Title II of the Federal Constitution of 1988, which regulates the fundamental rights and guarantees, was elevated from the status of a mere right to the level of constitutional guarantee and begun to grant the people the possibility to a full and effective defence over every incriminating law restraining one's freedom and restricting rights and goods.

In the quality of guarantee, the *audi alteram partem* principle is essential not only to the litigants and, more specifically in the criminal field, to the accused in criminal procedures, but to all and every individual, even if one never needs to assert, concretely, its defence rights, or if one is never involved in a judicial or administrative prosecution.

The adversarial system, as a fundamental guarantee placed at the highest rank of the normative pyramid, informs every State activity, constraining the promulgation of norms which can put at risk the right of defence and the individual liberty, limiting the police activity, restricting the jurisdictional activity of the State, fighting arbitrariness and power abuses.

It is important, though, to enlighten a point that frequently induces mistakes in the juridical practice: the right of defence, ensured by the Constitution through the *audi alteram partem* principle, holds a double face, for it reverberates as a State's duty who, necessarily, must provide concrete conditions to enable the plain and effective exercise of the right of defence.

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[27] T. LIEBMAN, *Manuale di diritto processuale civile*, Milan, 1957, v. I, p. 229.

On the other hand, from an individual perspective, the exercise of the right of defence is not a duty, but an onus. The juridical category of the procedural onus dictates the correct direction and the fair measurement of the consequences of the parties' possible omissive behaviors[28].

The procedural onus derives from the necessity of the litigants to expose to the judge the elements they consider relevant to assist them in the construction of the final provision, in a strictly personal appreciation.

Therefore, the procedural onuses are: the accused's attendance to the interrogation, the previous defence, the presentation of the list of witnesses and the final allegations. It is important to note that the procedural onus do not represent a right of the other party or the State. They are a necessity to satisfy the own burdened party's interest who, if he does not disentangle from the procedural onuses, will have the perspective of procedural injuries that can culminate in a unfavorable sentence.

Hence, the accused cannot be compelled to practice any procedural act. As for the acts concerning the proof of the accusation's claims, the accused can be excused from participating in virtue of his right to not produce evidence against himself – *nemo tenetur se detegere*.

As for the acts destined to instruct the defence, the accused does not have the duty to participate, but the onus to make so in order to protect his interests and his will. The Jurisdictional State has the obligation to provide the situations of defence and to grant equal opportunities to the parties, but it is up to the accused to exercise or not his right, not being possible for him to be forced to do so[29].

The impossibility for the accused to be compelled to defend himself in the procedure has, also, a ground in logical coherence, as the efficacy of the defence depends strictly of the contribution and dedication of the accused, impossible to attain when he is disinterested.

From these ideas, the accused does not have the obligation to make a statement, or to participate to the confrontation or the expert exams. This non-participation cannot only obstruct the construction of one's

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[28] C.R. DINAMARCO, *A instrumentalidade do processo*, 11th ed., São Paulo, 2003, p. 245.

[29] F. MARQUES, *Instituições de direito processual civil*, 4th ed., Rio de Janeiro, vol. II, 1971, p. 98.

own defence, but it can also corroborate to a conviction, because the means of evidence able to dismantle the elements of accusation may have not be integrated into the procedural sphere by the own accused's inertia.

The non-contribution of the accused to the procedural debate may bring him the risk of an unfavorable sentence, because, in the procedural dispute, the accusation will not have its reasons questioned, neither will it be counter-attacked with evidences and arguments of defence.

However, the refusal to participate in the procedural acts and to defend himself cannot, in any hypothesis, be interpreted to the accused's detriment, because the native procedural structure, in synchrony with the Brazilian State's guarantist bias, brings limits to the *persecutio criminis*, in a way that the principle of presumption of innocence[30], grants the suspect, the accused, the defendant or the convicted by a reviewable sentence the status of innocent, which will only end after the final decision becomes, in fact, final.

As a derivation of the presumption of innocence, the burden of proof lies with the accusation who, in case of failure in the search of probational elements, cannot sustain the accusatory statement, leading to an inevitable absolutory sentence.

On this premise, the accused, even when not contributing to the instruction of criminal prosecution and refusing the possibilities of defence he was ensured, could, and will be absolved when the accusation cannot prove the authorship and materiality of the crime in discussion.

4. Conclusion

1. Lawyers must interpret and re-interpret, day after day, the opaque vision of the Law obtained by its nude application, being conscious of the ambiguities derived from the usage of the literal content of the normative precept and understanding the role of the principles, especially the constitutional principles, as a legislative, political, and administra-

[30] Art. 5 Brazilian Const. 1988 (...)

LVII - *ninguém será considerado culpado até o trânsito em julgado de sentença penal condenatória.*

tive jurisdictional directive, as well as a mechanism of evolution of the juridical order in synchrony with the modifications felt by the society, with no need for the alteration of its word, for the normative precept possesses the nature of an open work, not having static definitions which could stifle its content.

2. Over the course of History, the accused has clearly received distinct treatments, in many moments suffering violations in his rights, in the name of a blind need to punish, or because of a distorted and misinterpreted use of the criminal procedure as an instrument of domination. Thus, depending on historical circumstances, the criminal procedure provided more or less instruments of defence and mechanisms of guarantee to the accused. The bigger the State's authoritarianism, the more the prosecuted was a victim of the most intense arbitrariness.

3. The criminal procedural installed in Brazil nowadays is the result, not yet completed, of a complex historical evolution that advances from a private vision to a public dimension.

4. Before such a change of perspective, it is imperative to adapt the criminal procedural model to the guarantees inherent to the Democratic State of Law, since the criminal prosecution empowers the *jus libertatis*, right of extreme importance and, by that, it must be covered of all possible guarantees, in an effective way.

5. The *audi alteram partem* principle, more than a mere right to be heard in the procedure, is the procedural mechanism that allows the penetration of the democratic order in the exercise of jurisdictional activities.

THE SECOND REVOLUTION: LEGALITY IN CRIMINAL LAW WITHIN THE EUROPEAN PROCESS OF INTEGRATION

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TABLE OF CONTENTS: *Introduction - 1. The Europeanisation of Criminal Law and the Human Rights path - 2. The Evolution of Legality - 3. Conclusion. The Second Revolution of Legality.*

Introduction

Criminal law is the most 'incisive' branch of the law, affecting highly valuable human rights, such as personal liberty and life. Because of its peculiar effects, it is subjected to limitations, aiming at protecting citizens from the whim of public authorities. In contemporary Western legal systems, the limits to the punitive powers of the State are expressed by the principle of legality, in its substantial and procedural facets.

The present contribution aims at outlining the effects of the European process of integration on the principle of substantial legality in criminal law (hereinafter, principle of legality). These effects imply a reshaping of the notion of legality prevailing in modern legal systems. It is argued that this reshaping is a revolution comparable to the Enlightenments, insofar as the European integration process includes the emergence of a 'human rights path', sharing with the Enlightenments similar aims. This revolution, however, is not comparable to the Enlightenments as to the effects it is producing, which are mostly negative in terms of democracy and equality.

The first section outlines the effects produced by the European process of integration on criminal law, and describes the birth and development of a 'human rights path' within the integration process.

The second section deals specifically with the principle of legality. It briefly introduces the principle as elaborated during the Enlightenments. Then, if focuses on the principle of legality as elaborated within the European process of integration, describing its dimension as a human right.

In the final part, conclusions are reached as to the main effects of the Europeanisation process on legality in criminal law, and as to the differences between the principle elaborated during the Enlightenments, and legality as human right emerging from the European process of integration.

1. The Europeanisation of Criminal Law and the Human Rights path

1.1. The effects of the European Process of Integration on Criminal Law

Since its origins, the European process of integration was bound to have an impact over criminal law. At a factual level, the creation of new subjects (the Communities first, and the EU later) gives birth to new interests, sometimes requiring criminal law protection. Furthermore, the abolition of internal frontiers facilitates transnational crime. At a normative level, this factual evolution gives birth to the need to enforce effectively (if need to be, through criminal instruments) Communities/EU law, as well as to the need to combat crimes affecting the interests of the Communities/EU, and the need to coordinate the criminal law systems of the Member States in order to tackle more effectively crimes having a transnational dimension. The normative evolution concerning all these aspects is still ongoing[1].

At the very beginning, the European process of integration focused only on economic interests, and the European Communities did not

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[1] For a detailed and up-to-date analysis of this evolution see: M. ROZMUS, I. TOPA, M. WALCZAK, *Harmonisation Of Criminal Law In The EU Legislation – The Current Status And The Impact Of The Treaty Of Lisbon*, *http://www.ejtn.eu/Documents/Themis /THEMIS%20written%20paper%20-%20Poland%201.pdf, retrieved 20 May 2015*.

have any competence in criminal law[2]. Nevertheless, the aforementioned needs were already self-evident: thus, international agreements on mutual legal assistance in criminal matters were signed[3].

Subsequently, the Treaty of Maastricht established the European Union and a direct competence of the EU in the area of ‘Justice and Home Affairs’ (the so-called third pillar)[4]. This included judicial cooperation in criminal matters, customs co-operation and police co-operation for the purposes of preventing and combating terrorism, drug trafficking and other serious form of international crime, as well as the establishment of a European Police Office (Europol)[5]. On the one hand, this evolution allowed an important shift, from cooperation between governments to direct cooperation between judicial authorities in criminal matters[6]. On the other hand, the powers given to the EU to exercise its competence in criminal matters remained limited and unclear[7].

The turning point was represented by the Treaty of Amsterdam, entered into force on the First of May 1999[8]. The Treaty introduced the notion of an ‘area of freedom, security and justice’. The creation and realization of this area is now one of the principal goals of the EU[9], to be achieved, *inter alia*, through closer police cooperation, judicial cooperation and, where necessary, through approximation of rules on criminal matters in the Member States[10], The approximation of rules on

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[2] W. PERRON, *Perspectives of the Harmonisation of Criminal Law and Criminal Procedure in the European Union*, in E.J. HUSABØ, A. STRANDBAKKEN, *Harmonisation of Criminal Law in Europe*, Antwerpen, 2005, p. 5.

[3] E.g.: European Convention on Mutual Assistance in Criminal Matters (20 April 1959, ETS 30, in force 12 June 1962) and its first Additional Protocol (17 March 1978, ETS 99, in force 12 April 1992).

[4] Treaty of Maastricht, OJ 1992 C 191.

[5] Art K. 1 Treaty of Maastricht.

[6] On the instruments of mutual legal assistance in criminal matters, see: J.A.E. VERVAELE, *Mutual Legal Assistance in Criminal Matters to Control (Transnational) Criminality*, in G. FORNASARI, D. SARTORI (eds.), *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*, Napoli, 2014, p. 139 ff.

[7] V. MITSILEGAS, *EU Criminal Law*, Oxford: Portland, 2009, p. 11.

[8] Treaty of Amsterdam, OJ 1997 C 340.

[9] Article 3(2) TEU; Article 11 TEU.

[10] Article 29 TEU.

criminal matters is to be pursued by adopting 'measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking'[11].

In order to do this, Article 34 TEU (in its ante-Lisbon formulation) gave the Council certain powers, including the adoption of Framework Decisions (FD) for the purpose of approximation of the laws concerning criminal matters. On the basis of this provision, numerous Framework Decisions have been adopted, concerning instruments of mutual recognition[12], the fight against fraud and other illegal acts affecting the interests of the EU[13], the fight against organized crime and terrorism[14],

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[11] Article 31 (1) (e) TEU.

[12] Council Framework Decision 2002/584/JHA on the European Arrest Warrant and Surrender Procedure between Member States of 13 June 2002, OJ 2002 L 190; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the Purpose of Obtaining Objects, Documents and Data for Use in Proceedings in Criminal Matters, 2008, OJ L 350/72.

[13] E.g.: Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, 2000/383/JHA, OJ L 140 of 14 June 2000; Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 329/3 of 14 December 2001; Framework Decision of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment, 2001/413/JHA, OJ L 149 of 2 June 2001.

[14] Framework Decision of 24 October 2008 on the fight against organized crime 2008/841/JHA, OJ L 300/42 of 11 November 2008 (it repealed previous Joint Action 98/733/JHA); 2002/475/JHA, OJ L 164 of 22 June 2002. See also: Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9 December 2008; Framework Decision of 24 February 2005 on attacks against information systems, 2005/222/JHA, OJ L 69/67 of 16 March 2005.

the fight against human trafficking, labour and sexual exploitation[15], the fight against drug trafficking[16].

These instruments were binding upon Member States as to the results to be achieved, and not as to the means[17]. The imposed results may include the introduction of specific offences or of penalties whose minimum is determined by the same FD. Notwithstanding the considerable impact that they could exercise on domestic criminal law, Framework Decisions have proved to bear relevant flaws in their ability to approximate domestic legal systems.

First of all, there was no method of executing the obligation to introduce in the domestic legal system the provisions of a FD. Unlike Directives, FDs cannot have 'direct effect' in the legal systems of the Member States. Second of all, the jurisdiction of the European Court of Justice (ECJ) over legality and interpretation of FDs was facultative, thus depending on the consent of the single Member State[18]. What is more, even when the State had accepted jurisdiction of the ECJ, no provision regulated the legal effects of proclaiming a FD null and void. Lastly, FDs were often formulated in very broad terms, because they need to apply to very different legal systems. This broadness, however, affected their ability to actually approximate domestic criminal laws, leaving too much room for discretion[19].

Another relevant flaw of Framework Decisions is to be underlined. The legislative process provided by the Amsterdam Treaty was affected by a serious 'democratic deficit', because the role of the European Parliament was merely consultative. The power to enact FDs was exclusively in the hand of the Council (thus, of EU Member States' govern-

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[15] Framework Decision of 19 July 2002 on combating trafficking in human beings 2002/629/JHA, OJ L 203 of 1 August 2002; Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography, 2004/68/JHA, OJ L 13/44 of 20 January 2004.

[16] Framework Decision of 11 November 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking 2004/757/JHA, OJ L 335.

[17] Art 34 TUE pre-Lisbon.

[18] Art 35 TUE pre-Lisbon.

[19] M. ROZMUS, I. TOPA, M. WALCZAK, *op. cit.*, p. 6.

ments), who were not bound by the opinion of the European Parliament[20].

All these flaws have been addressed by the Lisbon Treaty, entered into force in 2009. The Treaty abolished Framework Decisions as instruments for the approximation of domestic laws in criminal matters[21], while introducing a ground-breaking provision: Article 83 of the Treaty on the Functioning of the European Union (TFUE). The provision reads as follows:

> 1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crim.
> 2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76[22].

Apart from extending the areas of crime in which the EU has competence to approximate domestic laws, the provision has produced a true revolution. Under its first paragraph, the EU powers of approximation in criminal matters are now subjected to the so called ‘community

[20] The democratic deficit has been vastly debated by the literature. With specific regard to criminal law, see, inter alia: B. SCHÜNEMANN, *Alternative Project for a European Criminal Law and Procedure*, *Criminal Law Forum*, 2007, 227-251.

[21] Under Article 9 of the Protocol on Transitional Provisions, the legal effects of the previously adopted FDs are going to be preserved until the FDs are going to be repealed, annulled or amended.

[22] Article 83 (1) (2) TFUE.

method', thus taking the form of Directives. Accordingly, the European Parliament is involved in the procedure[23], the ECJ has jurisdiction, and the 'minimum rules concerning the definition of criminal offences and crimes' might produce direct effects in the domestic legal system of the Member State which does not timely comply with its obligation to transpose the Directive in domestic law[24]. Admittedly, all these consequences are somehow limited by the presence of emergency brakes for the ordinary procedure[25], and opt-outs allowing Member States to choose whether to be bound by the provisions concerning criminal matter[26]. However, the provision is still revolutionary, as the usual intergovernmental method is abandoned. Similarly, the second paragraph gives to the EU power to produce Directives aiming at ensuring 'the effective implementation of a Union policy'. This is a brand new legislative provision, anticipated only by the ECJ case law[27].

Indeed, the case law of the European Court of Justice has provided a relevant contribution to the evolution discussed here. Already by the 1980s, the ECJ held that the principle of loyal cooperation (Article 10 TEC) requires Member States to enforce Community law through effective, proportionate and dissuasive procedures and penalties[28]. This principle has been reaffirmed by subsequent case law, assessing that Member States have the duty to take all effective measures to sanction conducts affecting the financial interests of the Community, and that such measures may include criminal penalties even where Community

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[23] Article 249 TFUE.

[24] Case C-8/81, Ursula Becker v Finanzamt Münster-Innenstadt, Judgment of the Court of 19 January 1982; Case C-91/92, Paola Faccini Dori v Recreb Srl., Judgment of the Court of 14 July 1994.

[25] Art 83 (3) TUE.

[26] Thus, for instance, Denmark does not participate, while Ireland and United Kingdom have opt-in positions.

[27] C-176/03, Pupino, Judgement of the Court (Grand Chamber) of 16 June 2005; C-440/05 Commission of the European Communities v Council of the European Union, Judgement of the Court (Grand Chamber) of 23 October 2007.

[28] Case C-68/88, Commission v Greece, Judgment of the Court of 21 September 1989.

legislation only provides for civil sanctions[29]. Later on, the ECJ hold that, even if the European Community did not have competence to regulate criminal substantial law and criminal procedure[30], it had competence to establish criminal rules necessary to increase the level of effectiveness of its policies[31]. Thus, even before Lisbon, the community method was deemed to be applicable to the approximation of criminal law in areas of crime infringing common policies.

1.2. The Human Rights Path

The development of a human rights path within the European process of integration has been mainly promoted by the case law of the European Court of Justice. Since the 1960s, the ECJ has considered human rights as 'general principles of Community law', thus counterbalancing the initial focus of the Communities on mere economic interests[32]. On this basis, it has acknowledged a considerable number of fundamental rights, not only of an economic nature[33].

Initially, these rights were drawn by the ECJ from the 'constitutional traditions common to the Member States'[34]. Subsequently, the ECJ de-

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[29] C-186/98 (reference for a preliminary ruling from the Tribunal de Círculo do Porto): criminal proceedings against Maria Amélia Nunes, Evangelina de Matos, 1999/C 333/16.

[30] Case 203/80, Casati [1981] E.C.R. 2595, Case 186/87, Cowan [1989] E.C.R. 195, Case C-226/97 Lemmens [1998].

[31] Case C-176/03, Commission v Council, judgement of September 13, 2005.

[32] Case 29/69 Stauder v. Stadt Ulm [1969] ECR 419; Case 11/70 Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel [1970] ECR 1125. On this evolution, see e.g.: L. BETTEN, N. GRIEF, *EU law and human rights*, London-New York, 1998, p. 53 ff, 124 ff; A. ARNULL, *The European Union and its Court of Justice*, Oxford, 1999, p. 190 ff.

[33] E.g.: freedom to practise one's religion: Case 130/75 Prais v Council [1976] ECR 1589; freedom of expression: Case 100/88 Oyowe and Traore v. Commission [1989] ECR 4285, Case 34/79 R. v. Henn and Darby [1979] ECR 3975; the right to an effective judicial remedy: Case 222/84 Johnston v. RUC [1986] ECR 1651, Joined Cases C-402 and 415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I-6351

[34] Case 11/70 Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel [1970] ECR 1125.

cided to rely, also, on 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories', particularly the European Convention on Human Rights, as interpreted by the ECtHR[35].

The ECHR has always played a fundamental role in the protection of human rights within the areas dominated by the Communities/EU. All EU Member States are also Parties to the Convention and, under Article 1 ECHR, they have the duty to secure to everyone within their jurisdiction the rights and freedoms protected by it. The ECtHR has famously assessed that the duty applies regardless of whether the State is acting because of the necessity to comply with international legal obligations[36]. Thus, European States have the duty to guarantee the rights and freedoms protected by the European Convention, even when they are implementing/acting upon Community/EU law. The impact of this conclusion is more theoretical than practical, because the ECtHR has created a presumption that Community law complies with the ECHR standards[37]. However, the presumption can be rebutted and all Member States are in any case bound by the obligations descending from the European Convention. In addition, the ECJ's jurisprudence has always been prone to interpret human rights and freedoms applied within the Community/EU legal order in accordance with the case law of the European Court of Human Rights[38]. This means that the ECHR has always been playing a considerable indirect role in the areas affected by the Europeanisation process.

The relationship between EU and ECHR has been strengthened by the Lisbon Treaty, with the aim of providing a coherent and workable fundamental rights regime within Europe[39]. Article 6, paragraph 2 TUE proclaims that '[t]he Union shall accede to the European Convention

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[35] Case 4/73 Nold v. Commission [1974] ECR 491.

[36] Bosphorus Hava Yollari Turizm v Ireland, App. No. 45036/98 (ECtHR 30 June 2005), par. 153.

[37] *ibid*, par. 156.

[38] Cfr. the case law recalled in: A. REINISCH, *op. cit.*, p. 99-120.

[39] W. WEIß, *Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon*, *European Constitutional Law Review*, 2011, p. 64-94, at 66.

for the Protection of Human Rights and Fundamental Freedoms'. The accession has not been finalized yet[40]. In the meanwhile, the ECJ's jurisprudence has been codified in paragraph 3 of the same Article. The provision now reads as follows:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law[41].

Furthermore, paragraph 1 counts among the sources of human rights within the EU the Charter of Fundamental Rights (CFR)[42]. The Charter, in turn, provides the following:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection[43].

On the one hand, this means that the rights and freedoms protected under the ECHR system (including the case law of the Strasbourg Court, organ in charge of determining 'meaning and scope' of the ECHR provisions) must be taken into account when interpreting and applying correspondent CFR provisions. On the other hand, both the

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[40] The accession has not been finalized yet. In 2010, Protocol 14 amended Article 59 ECHR, whose second paragraph now allows the accession, and in 2013 negotiators from the European Union and the Council of Europe finalised a draft agreement. However, on 18 December 2014, the ECJ issued a negative opinion (Opinion 2/13 [2014]), thus bringing the accession to a halt. On the topic of the accession there is an intense academic debate. See, inter alia: P. GRAGL, *The Accession of the European Union to the European Convention on Human Rights*, Oxford, 2013.

[41] Article 6 (3) TUE.

[42] European Union, Charter of Fundamental Rights of the European Union, 18 December 2000 (2000/C 364/01). The Charter lists a range of civil, political, economic and social rights of EU citizens and residents, and, under Article 6, paragraph 1 TUE, it has 'same legal value as the Treaties', being thus a legally binding instrument of primary EU law.

[43] Article 52, par. 3, CFR.

Charter of Fundamental Rights and the European Convention are meant to provide a minimum threshold, which may well be overcome by provisions of EU law determining a more extensive protection for human rights.

It is to be noted a fundamental difference between the Charter of Fundamental Rights and the ECHR. Under Article 51, paragraph 1 CFR, the Charter provisions bind Member States 'only when they are implementing EU law'. Conversely, the ECHR applies to any law, act or omission 'falling within the jurisdiction' of the Member Parties (presently, only States; in the future, perhaps, also the EU).

2. The Evolution of Legality

2.1. The Traditional Notion of Legality

The notion of substantial legality prevailing in contemporary Western legal systems states that no person can be held criminally liable, nor convicted for a crime, unless his/her conduct has violated a pre-existent and clearly drafted prohibition constituting criminal law, enacted by representatives of the people's will and applied restrictively (or, at least, not analogically) by the judge.

Notwithstanding the debates on its far origins[44], it is generally accepted that this notion was developed in the historical and cultural

[44] According to some authors, the principle of legality informed the ancient Attican legal order: N. SARIPOLOS, *Systēma tēs en Helladi ischyousēs ponikēs nomothesias*, Athēnēsi, 1868; P. VIZOUKIDES, *Hē dikē tou Sōkratous*, Berlin, 1918. Others believe that legality operated in the II century B.C. Roman legal system, in the context of the criminal proceedings related to the quaestiones perpetuae, and that it was dismissed during the Imperial era: B. PETROCELLI, *Appunti sul Principio di Legalità nel Diritto Penale*, in ID., *Saggi di Diritto Penale*, Padova, 1965, p. 189; G. VASSALLI, *Nullum Crimen Sine Lege*, *Giurisprudenza Italiana*, 1939, p. 59-62. Historically, one of the first written provisions containing guarantees that are now considered part of the legality principle was the due process clause of the 1215 Magna Carta Libertatum. However, it is disputed whether this clause had, or had not, a mere procedural dimension. For a mere procedural dimension of this clause: R. MERLE, A. VITU, *Traité de droit criminel*, Paris, 2001, p. 225 n. 3, with references to the opposite position held by JIMENEZ DE

background provided by the Enlightenments[45], Fundamental contributions were Beccaria's and Montesquieu's books, published around the middle of the eighteenth century[46]. This definition of legality is clearly related to democratic ideals, as it encompasses the notion that only representatives of the people's will are entitled to define the cases in which liberty of person can be legitimately restricted. This feature can be traced, also, in common law jurisdictions, where the guarantees of legality have historically been expressed by the rule of law[47].

The rule of law is a complex notion, and its definition is debated by the literature[48]. However, it bears (at least) two strong similarities with the principle of legality: both grant citizens against the arbitrary exercise of powers by state officials and, in modern times, both grant the political value of having the limits of criminal sanctions determined by an elected legislature rather than by the judiciary[49].

ASUA. Contra, see also: G. VASSALLI, *Nullum Crimen Sine Lege*, *Giurisprudenza Italiana*, 1939, p. 65-70.

[45] On this conclusion, both European and non-European scholars agree. E.g.: C. DEDES, *L'origine del principio nullum crimen nulla poena sine lege*, in *Studi in memoria di Pietro Nuvolone*, Milano, 1991, p. 158; JC. JEFFRIES JR, *Legality, Vagueness, and the Construction of Penal Statutes*, *Valaparaiso Law Review*, 1985, p. 190; G. VASSALLI, *op. cit.*, p. 70-71.

[46] C. BECCARIA, *De' Delitti e delle Pene*, Livorno, 1764; MONTESQUIEU, *De L'Esprit des Loix*, Genève, 1748.

[47] The only 'pure' common law jurisdiction within Europe is the British legal system. General considerations on the rule of law within this system can be found in: A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, London, 10th ed., 1959, p. 183-184; D. FELDMAN (ed.), *English Public Law*, Oxford, 2009, p. 7

[48] E.g. the two diverging visions on the rule of law expressed by F.A. VON HAYEK, *The Constitution of Liberty*, Chicago, 1960 and J. RAZ, *The Authority of the Law: Essays on Law and Morality*, Oxford, 1979. See also the traditional Dyceian notion, in A.V. DICEY, *op. cit.*, p. 202.

[49] A. ASHWORTH, *Interpreting criminal statutes: a crisis of legality?*, *Law Quarterly Review*, 1991, p. 419.

2.2. The Principle of Legality as a Human Right within the EU

Article 49 of the EU Charter of Fundamental Rights acknowledges, *inter alia*, the principle of legality of criminal offences and penalties. Its first paragraph reads as follows:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

Apparently, it does not differ from most domestic formulations of the legality principle, except for the fact that it allows criminal liability grounded on international law. Its 'meaning and scope', however, is to be determined in accordance with the ECHR notion of legality, as assessed by the case law of the ECJ and by the same EU Charter of Fundamental Rights[50].

Legality in criminal law is codified in Article 7, paragraph 1 ECHR. The provision is similar to Article 49 CFR, reading as follows:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Again, the provision does not seem to differ from most domestic formulation of the legality principle; and it does not differ, either, from Article 49 CFR, except for the fact that it does not explicitly include *lex mitior* for penalties[51]. The actual extent of Article 7, paragraph 1 ECHR, however, is determined by the Strasbourg case law, and, partic-

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[50] Supra, text to n. 41 and n. 46.

[51] The principle has been included by subsequent ECtHR case law: Scoppola v Italy (no 2) App no 10249/03 (ECtHR, 17 September 2009).

ularly, by the autonomous notion of 'criminal law' developed by the European Court of Human Rights[52].

The autonomous notion of criminal law was not created by the ECtHR as such. It is the sum of two autonomous definition: that of 'criminal charge' (originally created for assessing the ambit of application of Article 6 ECHR on the right to fair trial), and that of 'law' (originally created for verifying the respect of the legality requirement incorporated in Articles 8-11 ECHR). The autonomous notion of 'criminal charge' has been elaborated by the ECtHR in the famous *Engel* case[53]. On that occasion, the ECtHR assessed that the qualification given by the State to a certain charge has 'only a formal and relative value', constituting 'no more than a starting point', and that what must be taken into account is 'the very nature of the offence', and 'the degree of severity of the penalty that the person concerned risks incurring'. Subsequent case law has extended this autonomous notion to the interpretation of Article 7 ECHR[54]. Accordingly, in order to verify whether a domestic law falls within the ambit of application of the *nullum crimen sine lege* principle, the ECtHR applies the so called 'Engel criteria': legal classification of the offence under national law, very nature of the offence, degree of severity of the penalty attached to the offence.

[52] The creation of autonomous notions is an interpretative tool used by the ECtHR to grant effective protection to the Convention rights. The creation of an autonomous notion of 'criminal law' is the means by which the Court assesses, with a high degree of effectiveness, whether State Parties states comply with Article 7 ECHR. On this topic, see: G. LETSAS, *The Truth in Autonomous Concepts: how to interpret the ECHR*, *European Journal of International Law*, 2004, p. 279 ff.

[53] Engel and Others v the Netherlands (1976) Series A no 22.

[54] The case law on this is wide. See, inter alia: Welch v UK (1995) Series A no 307-A; Sud Fondi Srl et Autres c Italie Appl no 75909/01 (ECtHR, 20 January 2009); Jamil v France (1995) Series A no 317-B; Van Droogenbroeck v Belgium (1982) Series A no 50; M v Germany App no 19359/04 (ECtHR, 17 December 2009); Mautes v Germany App no 2008/07 (ECtHR, 13 January 2011); Kallweit v Germany, App no 17792/07 (ECtHR, 13 January 2011); Schmitz v Germany App no 30493/04 (ECtHR, 9 June 2011); OH v Germany App no 464/08 (ECtHR, 24 November 2011); Maszni v Romania App no 59892/00 (ECtHR, 21 September 2006); Mihai Toma v Romania App no 1051/06 (ECtHR, 24 January 2012); Gurguchiani c Espagne, Appl no 16012/06 (ECtHR, 15 December 2009).

The autonomous notion of 'law' has been elaborated progressively by the ECtHR, starting from the famous *Sunday Times* case[55]. The notion is autonomous in a double sense. First, when the ECtHR verifies the existence of a domestic legal basis, it is satisfied by a 'substantial notion' of law, which does not refer to strict formal criteria with respect to its institutional origins[56]. Second, the law must comply with qualitative standards: it must be 'adequately accessible' and 'formulated with sufficient precision to enable the citizen to regulate his conduct'[57]. This last requirement 'depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed'[58].

Today, according to the case law of the European Court of Human Rights, 'law' is 'a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability'[59]. This concept is unitary, because it bears the same meaning throughout all the Convention: thus, it is applied in all fields of the law, including criminal law. The ECtHR holds that 'when speaking of law, Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term'[60]. Furthermore, it is applied both to civil law and common law jurisdictions, independently from the theory of the sources of law adopted by each legal system[61].

The combination of the autonomous notions of 'criminal' and of the autonomous notion of 'law' means that, under the Strasbourg system, 'criminal law' is a concept which refers to any accessible and foreseeable norm, prescribing, for a certain act or omission, consequences that

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[55] Sunday Times v UK (No 1) (1979) Series A no 30.

[56] G. LAUTENBACH, *The Rule of Law Concept in the Case Law of the European Court of Human Rights*, Oxford, 2013, p. 112.

[57] Sunday Times v the UK (No 1), para 49.

[58] Cantoni v France, 11.11.1996, para. 35; Groppera Radio AG and Others v. Switzerland, 28.3.1990, para. 68).

[59] ECtHR, case of CR v UK, 22 November 1995, para 33.

[60] CR v UK (1995) Series A no 335-C.

[61] Among the first judgements applying the autonomous notion of criminal law: Jamil v France (1995) Series A no 317-B; G v France (1995) Series A no 325-B; Cantoni v France, ECHR 1996-V.

have criminal nature according to the Engel criteria. This is the ambit of application of the guarantees enshrined in Article 7, paragraph 1 ECHR. It remains to be ascertained whether it is also the ambit of application of the legality principle protected under the Charter of Fundamental Rights.

In favour of such a conclusion, it is to be noted that the notion of legal certainty as 'accessibility and foreseeability' of the law is a well-entrenched part of the ECJ's case-law[62]. In addition, the ECJ has adopted the Engel criteria in two recent decisions concerning the application of the *ne bis in idem* principle outside areas formally designated as criminal law[63]. These judgments confirm that the European Court of Justice refers to the ECtHR's case law when interpreting the provisions of the Charter of Fundamental Rights 'which correspond to the rights guaranteed by the Convention', in accordance with its previous jurisprudence and with Article 52 (3) CFR.

3. Conclusion. The Second Revolution of Legality

The Europeanisation of criminal law is reshaping the notion of legality prevailing in modern legal systems. The first and most evident change concerns the production of criminal norms. The second change concerns their quality. A third, but not less important, change concerns the same substance of legality.

As previously recalled, the principle of legality establishes that only Parliaments are entitled to produce criminal laws, and this is a feature now present both in civil law and in common law jurisdictions. The European process of integration is undermining this achievement. Since the 1980s, the principle of loyal cooperation has been interpreted as imposing upon Member States the duty to legislate in criminal matters, in order to protect the interests of the European Community. This already implied a partial limitation of the sovereignty of national Parlia-

[62] J. RAITIO, *The Principle of Legal Certainty in EC Law*, Helsinki, 2001, p. 125, 130; T. TRIDIMAS, *The General Principles of EU Law*, Oxford, 2006, p. 4.

[63] C-489/10, Sąd Najwyższy v. Łukasz Marcin Bonda, nyr; C-617/10, Åklagaren v Hans Åkerberg Fransson, nyr.

ments, asked to legislate without having the possibility to freely evaluate whether it is necessary / appropriate / correct to use criminal law. Subsequently, this limitation has become even more stringent. In order to approximate domestic criminal laws in certain areas, Framework Decisions not only impose the introduction of specific offences: they also establish 'minimum rules relating to the constituent elements of criminal acts', sometimes determining penalties in their minimum. National Parliaments are thus required to criminalize certain behaviours, and to do that in accordance with certain standards.

After the adoption of the Lisbon Treaty, the situation is going to evolve even further. The use of Directives establishing minimum rules for the definition of criminal offences and sanctions in certain areas implies that the role of national Parliaments might (in the future, and under certain circumstances) be completely nullified. This is because Directives might produce direct effects, and whenever this happens, national Parliaments do not play any role at all.

Furthermore, even if the Lisbon Treaty allegedly addressed the 'democratic deficit' by subjecting the production of minimum rules and sanctions to the Community method (in which the European Parliament plays a role), the problematic absence of transparency and democratic control over the production of criminal norms is still intact, because most of the decisional powers are still in the hands of the Council, representing the Governments, and not the Parliaments, of the Member States. Claims that the democratic deficit is only apparent, because the Governments are democratically legitimated, do not take into consideration that the guarantees of legality concerning the production of criminal norms have been elaborated precisely with the intent of excluding the role of the executive power, notwithstanding its democratic legitimation.

Closely related to this, it is worth recalling that the notion of legality adopted by the Charter of Fundamental Rights and by the ECHR includes international law among the legitimate sources of criminal liability. In addition, the notion of legality elaborated by the European Court of Human Rights is a 'substantial' notion, not referring to any formal criteria as regards its origins. Thus, according to the ECtHR, a valid criminal norm might well be the result of judicial decisions, provided

that they are accessible and foreseeable. If this notion of law is going to be adopted by the ECJ, it will determine a further blow to the sovereignty of national Parliaments.

In addition to the production of criminal norms, the European process of integration is affecting, also, their quality. In its traditional formulation, legality includes the principle of legal certainty, or *lex certa*, requiring the legislator to create precisely drafted and unambiguous criminal statutes. This principle has a double purpose: its 'institutional' aim is that of preserving the separation of powers, by limiting the possibility of judicial discretion in the interpretation and application of the criminal norm; its 'individual' aim is that of granting the right of individuals to foresee the criminal consequences of their actions.

If legal certainty is reduced to foreseeability, as it is in the case law of the ECJ and of the ECtHR, then the institutional aim of *lex certa* is completely annulled, and this implies dangerous consequences. Reducing legal certainty to foreseeability and eliminating the need for precision means that the focus is not on whether the law is certain, but on whether individuals can foresee the results of their actions. This justifies unduly bad legislation, allows discretion by part of the judiciary, and it has already proved to be source of disequalities. Indeed, the European Court of Human Rights makes the evaluation of foreseeability depend on elements such as the addressee of the criminal provision, and this has led to judgements where the scarce quality of a criminal provision has been deemed not to infringe legality only because the provision addressed individuals (e.g., lawyers) who allegedly possess the necessary skills to interpret a vague provision of law[64]. As wisely underlined by Judge Zupančič, if the powerful objective guarantees entrenched in the legality principle are reduced to a 'subjective right to advance notice of what is punishable under positive law', the risk is that the criminal actor is made a 'legislator in casu proprio'[65].

Lastly, a relevant change in the notion of legality concerns its same substance. From a principle (abstract and general), legality within the

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[64] Michaud v France. For a critique of the case, see: D. SARTORI, *Michaud v France: a step forward into the Bosphorus Doctrine, or a Step Backwards into Subjective Foreseeability?*, Strasbourg Observers, 2012.

[65] Streletz, Kessler and Krenz v Germany, ECHR 2001-II (Judge Zupančič).

European process of integration is transforming into a human right (concrete and individual). The consequences might be dangerous, as human rights can be balanced with other rights of equivalent (or superior) value. The case law of the ECtHR has already demonstrated that legality as a human right can give way to the right to life[66]. This is not acceptable, because it means that the judiciary has the power to decide, on a case-to-case basis, when legality should be respected, thus eliminating any pretence of foreseeability.

The progressive emersion of changes in the notion of legality is not surprising. The traditional notion of legality was elaborated during the Enlightenments, and its guarantees were meant to apply within the boundaries of the national State. The European process of integration is loosening the legal and physical boundaries of the State: therefore, it is unavoidable that legality is going to be affected by the process. From this point of view, the emersion of legality within the human rights path is a revolution comparable to the Enlightenments, because it is a process aiming at providing limitations to previously unrestrained powers. It expresses the need to provide limitations to the new (and different) powers arising from the progressive loss of the national State. However, unlike the Enlightenments, the effects of this 'second revolution' of legality are proving to be negative in terms of democracy and equality. This is, also, not surprising. The notion of legality as a human right, although representing a courageous attempt made by the 'European judiciary' to restrain the wide powers of the authorities operating within the EU, is still a partial attempt from the point of view of the system. It is an attempt not democratically legitimated, and it is an attempt not grounded on the elaboration of general principles.

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[66] See the famous 'Berlin Wall' cases, where a retroactive application of the criminal law was accepted, in consideration of the 'intrinsic' criminal nature of gross violations of the right to life: K.-H. W. v Germany, ECHR 2001-II; Streletz, Kessler and Krenz v Germany, ECHR 2001-II.

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