UNIVERSITÀ DEGLI STUDI DI TRENTO
Facoltà di Giurisprudenza

LEGAL CONVERSATIONS BETWEEN ITALY AND BRAZIL

a cura di

Giuseppe Bellantuono
e
Fabiano Lara

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FOREWORD

Durval de Noronha Goyos Junior[1]

This volume is the result of a five-year long intensive co-operation project between scholars of the Faculty of Law of the University of Trento, in Italy, and of the Faculty of Law of the Federal University of Minas Gerais, in Brazil. That process also led to a series of conferences and some exchanges of students. The substantial studies herein inserted were written in English, Italian or Portuguese, by ten different professors of law from Italy or Brazil. The project was co-ordinated by professors Giuseppe Bellantuono, in Italy, and Fernando Lara, in Brazil and cover, basically, some processes of legal change and specificities concerning different branches of law.

Brazilian legal doctrine has closely followed Italian legal developments for many decades in areas such as constitutional, civil and criminal substantive law, as well as procedure. More recently, regulatory developments in multilateral fora, such as the World Trade Organisation, and in the United States of America have exerted an influence in both Italy and Brazil. Regional trade pacts have also been the source of law change in both countries: the European Union in the case of Italy and The Common Market of the South (MERCOSUR), with respect to Brazil. Of course, the large contingents of Brazilians descending from Italian immigrants have always contributed for a close co-operation between the two countries in many human activities. This project is only one more meritorious example of this reality.

The studies inserted in the volume *Legal Conversations between Italy and Brazil* cover different areas of the law and legal philosophy. One theme, in particular, that of the legal prevention and repression of corruption, is treated by Marcelo Andrade Féres of Brazil, and by Nicoletta

[1] Lawyer qualified in Brazil, Portugal, England and Wales. President of Noronha-Advogados, a global Brazilian firm. Law professor. WTO and CIETAC arbitrator. President of the Brazilian Writer's Union (UBE).

Parisi of Italy. In these two papers, the authors analyse the relevant laws on the subject in both countries, their inherent problems and future perspectives.

Leonardo Parentoni writes about the neutrality of the Internet and how the changes in its legal framework will affect the lives of millions of persons in the years to come. The fascinating topic of e-commerce, a growing economic activity, is covered with competence by Marcelo de Oliveira Milagres, who does not fail to address relevant aspects of consumer protection and certain issues pertaining to traders.

Fabiano Lara addresses the issue of mechanism design for legal institutions, with a view to building structures that foster economic and social development. Also in the area of legal philosophy, the chapter by Alexandre Travessoni Gomes Trivisonno deals with the theme of obedience to authority and the relation between law and moral in Kant. On the same field, Mônica Sette Lopes wrote on the experience, history and memory of the unwritten law.

An important theme, with which Italian scholars will have little familiarity, is the one examined by Girolamo Domenico Treccani: the enforcement and deconstruction of rights of the traditional or native population of the Amazon region. At last, Giuseppe Bellantuono addresses the strategic issue of legal development in domestic law of different countries, with a view towards achieving the Sustainable Development Goals adopted by the UN General Assembly in 2015.

The book *Legal Conversations between Italy and Brazil*, which I read with both delight and great interest, is a very important by-product of the Italian-Brazilian cooperation and will interest not only the legal community in both countries, but also their policymakers, as well as the respective business sectors.

PREFACE

Giuseppe Bellantuono and Fabiano Lara

This volume is the latest product of a long-term collaboration between the Faculty of Law of the University of Trento and the Faculty of law of the Federal University of Minas Gerais. When the collaboration started in 2013, we thought it could help deepen our understanding of processes of legal change going on in both Europe and Brazil. After five years, we have to acknowledge that the scope of our collaboration has become much broader. Amidst the dramatic economic and political events that both the European Union and Brazil are facing in the present decade, we came to realize that our research interests in different branches of law led us to put into question traditional methodologies, consolidated interpretations and legal concepts widely employed in global debates. To put it bluntly, the conversations we engaged in made us acutely aware that our reciprocal understanding of each other's legal system was grounded on several unstated assumptions. Some of these assumptions were also misleading or utterly false. Thus, the most important contribution of this collaboration so far has been to set out on a learning process.

The essays collected in this volume, discussed at the conference held in Trento in December 2017, reflect such process. Each author tries to make sense of his/her own research questions while at the same time comparing and contrasting the analysis of a specific topic with his/her perception of the debates taking place elsewhere. From anticorruption legislation to legal theory, from consumer law to law and development, what the authors strive to accomplish is not only an informed analysis of legal problems, but a reflection on how problems are defined and whether current legal methodologies are fit for their purposes.

Besides a cross-cutting learning process, the collaboration between Trento and Minas Gerais has had many other tangible results: two

books and a special issue, three conferences, two visiting professors' teaching modules, several lectures in Master and Ph.D. programs, one agreement on student and staff exchange, and of course countless hours of phone calls and videoconferencing. More than twenty senior and junior researchers have been involved on both sides of this collaboration. For this volume, we also had the opportunity to add insightful contributions from the Italian Anticorruption Authority (Parisi) and from the Federal University of Parà (Treccani). We gratefully acknowledge their efforts, as well as the enthusiastic support we received by our two Faculties. Without them, none of the above mentioned activities would have been possible. We also thank the Trentino-Alto Adige Autonomous Region for the financial support it gave to this volume and to one of the previous conferences.

Learning processes never stop. Therefore, in the coming years we plan to find new ways to engage in insightful legal conversations between Italy and Brazil.

LA LEGGE BRASILIANA ANTICORRUZIONE E LA RESPONSABILITÀ DELLE PERSONE GIURIDICHE: PROBLEMI E PROSPETTIVE

Marcelo Andrade Féres

SOMMARIO: *1. Introduzione. 2. Antecedenti della Legge 12.846/2013. 3. La Legge Anticorruzione: panoramica, problemi e prospettive. 3.1. La responsabilità oggettiva civile e amministrativa delle persone giuridiche. 3.2. Gli atti lesivi contro l'amministrazione pubblica nazionale e straniera. 3.3. I mezzi amministrativi e giudiziali di responsabilizzazione delle persone giuridiche. 3.4. L'accordo di clemenza (collaborazione). 3.5. L'ultra-territorialità della Legge Anticorruzione. 4. Considerazioni finali.*

1. Introduzione

Pochi lo sanno, ma il 9 dicembre è la Giornata Internazionale contro la Corruzione, secondo quanto dichiarato dall'Organizzazione delle Nazioni Unite.

Che sia una coincidenza o no, nei seminari giuridici Italia-Brasile, tenutisi a Trento nel dicembre 2017, abbiamo cercato di dialogare sul grave problema della corruzione che affligge il mondo contemporaneo e, in modo significativo, i nostri due Paesi.

È noto che il Brasile sta vivendo il più grande scandalo di corruzione della sua storia, con epicentro nella più importante società nazionale, la Petróleo Brasileiro S/A - Petrobras, una società a economia mista controllata dal governo federale.

Il Pubblico Ministero Federale e la Polizia Federale del Brasile stanno portando alla luce questo scandalo. L'operazione è chiamata *Lava Jato* (autolavaggio) e si dispiega in decine di fasi, per lo più derivanti da accordi di collaborazione, firmati dagli indagati e dal Parquet (organi inquirenti), nei quali ci sono indizi di nuove prove e di nuovi implicati nei fatti.

A causa delle gigantesche proporzioni assunte dal caso *Lava Jato*, il Pubblico Ministero Federale ha creato un sito con le informazioni es-

senziali per la comprensione delle indagini in corso. Si legga, in proposito, il seguente estratto:

> L'operazione Lava Jato è la più importante indagine sulla corruzione e sul riciclaggio di denaro che il Brasile abbia mai condotto. Si stima che il volume delle risorse distratte dalle casse della Petrobras, principale società a controllo pubblico del Paese, ammonti a miliardi di Reais. Si aggiungano a questo le conseguenze economiche e politiche dei sospetti di partecipazione allo schema di corruzione che coinvolge la società.
> Dalle prime indagini, svolte a partire dal marzo 2014, dinanzi alla Giustizia Federale a Curitiba, sono state indagate e sottoposte a processo quattro organizzazioni criminali capeggiate da «doleiros», ossia operatori del mercato parallelo del cambio. In seguito, il Pubblico Ministero Federale ha raccolto le prove di un immenso schema criminale di corruzione che coinvolge la Petrobras.
> In questo schema, che dura da almeno dieci anni, grandi imprese d'appalto organizzate in cartello pagavano delle tangenti ad alti dirigenti dello stato e ad altri agenti pubblici. L'ammontare delle tangenti variava dall'1% al 5% dell'importo totale di contratti miliardari con fatture gonfiate. Tali importi erano distribuiti mediante operatori finanziari dello schema, compresi doleiros indagati nella prima fase[1].

Le risorse dello schema di corruzione erano condivise tra dipendenti della Petrobras, intermediari del mercato finanziario, politici e i loro partiti e, in questo ultimo caso, anche con apporti economici travestiti da donazioni lecite per campagne elettorali, situazione che si trova anch'essa sotto indagine e analisi da parte del Potere Giudiziario. Dal lato pubblico, i principali partiti politici del Paese e i loro agenti, sia della maggioranza sia dell'opposizione, si rivelano coinvolti nel caso. Dal lato privato, le principali imprese nazionali, specialmente del settore edilizio, si trovano anch'esse coinvolte.

Si noti la vastità dell'operazione *Lava Jato* e delle conseguenze per il Paese. Da quanto informa il sito del Pubblico Ministero Federale, soltanto in prima istanza (ci sono persone sotto processo anche presso il Supremo Tribunale Federale e altri fori speciali, a seconda degli incarichi ricoperti), sono stati instaurati 1675 procedimenti, eseguiti 881 mandati di cattura e arresti, 101 mandati di arresto preventivo e 111

[1] BRASIL. Ministério Público Federal. Caso Lava Jato. http://lavajato.mpf.mp.br.

mandati di arresto temporaneo[2]. In termini economici, si stima che ci sia stato un pagamento di tangenti pari a R$ 6,5 miliardi[3].

Lo sviluppo criminale dell'operazione *Lava Jato* è stato paragonato all'operazione italiana «Mani Pulite», degli anni '90 del secolo passato[4]. L'ampio uso di accordi di collaborazione con i criminali ha permesso la progressiva scoperta di persone coinvolte negli atti di corruzione.

Oltre alla somiglianza tra i casi *Lava Jato* e «Mani Pulite», possiamo segnalare che i nostri Paesi detengono posizioni prossime in relazione alla percezione della corruzione nell'indice della Trasparenza Internazionale. Secondo il rapporto del 2016, l'Italia si trova in 60ª posizione (sessantesima) e il Brasile in 79ª (settantanovesima). Nei nostri due Paesi esiste un'indiscutibile percezione del fatto che la corruzione impregna gli ingranaggi dello Stato.

Per fortuna, nei grandi casi di corruzione c'è di norma l'attività illecita di grandi imprese dei più svariati mercati, strutturate come persone giuridiche. Nell'incessante ricerca del lucro, alcune imprese possono

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[2] BRASIL. Ministério Público Federal. Caso Lava Jato. http://lavajato.mpf.mp.br.

[3] BRASIL. Ministério Público Federal. Caso Lava Jato. http://lavajato.mpf.mp.br.

[4] «In Italia, negli anni successivi alla inchiesta giudiziaria denominata 'Mani Pulite' la quale, nei primi anni Novanta, portò alla luce un vasto sistema di corruzione estremamente diffuso nel mondo politico e finanziario, fondato su accordi stabili che assicuravano un flusso constante di finanziamenti illeciti ai partiti da parte delle imprese che entravano in contatto con le pubbliche amministrazioni, attraverso la pratica delle tangenti, si è manifestato un atteggiamento tendente a sottovalutare la gravità del fenomeno corruttivo, a restringerne la portata economica alla dimensione patrimoniale della tangente, allo scambio illecito tra corrotto e corruttore, trascurando il danno effettivo che, come più volte sottolineato, ne deriva per l'intero apparato economico, politico e sociale. In Italia, oggi, come dimostrano le recenti vicende di cronaca giudiziaria, il sistema della corruzione è profondamente radicato nei più diversi settori della vita politico-amministrativa, ma anche nella società civile, nel mondo delle professioni, imprenditoriale e della finanza. Dall'esame delle vicende di corruzione venute alla luce emerge in modo evidente che i patti scellerati avvengono secondo meccanismi stabili di regolazione, che assicurano l'osservanza di una serie di regole informali, di diverse tipologie a seconda del ruolo predominantemente svolto dai diversi centri di potere (politico, burocratico, imprenditoriale o mafioso» (R. RAZZANTE, *La nuova fisionomia del delitto di corruzione nel diritto italiano*, in ID. (a cura di), *La nuova regolamentazione anticorruzione*, Torino, 2015, p. 5-6).

nascondere un'indole nefasta. In certi casi, superano i limiti dell'etica e del lecito, e mettono in atto pratiche di corruzione, sia nel contatto con lo Stato, sia nei confronti di altri agenti privati. In questo modo, l'impresa non nutre soltanto i leciti ingranaggi economici della società, ma anche quelli clandestini, dissimulati e criminali della corruzione.

Questo fenomeno di corruzione imprenditoriale ha generato negli ultimi decenni un movimento mondiale di reazione. La lotta alla corruzione, nelle sue varie manifestazioni, è diventata un obiettivo globale.

In questo capitolo si desidera condividere la recente novità legislativa brasiliana, specificatamente per quanto riguarda la responsabilità delle persone giuridiche nella Legge Anticorruzione (Legge n. 12.846/2013) e segnalare alcuni dei suoi problemi e prospettive.

2. Antecedenti della Legge 12.846/2013

Prima di trattare la Legge n. 12.846/2013, chiamata comunemente Legge Anticorruzione, è necessario tracciare l'evoluzione più recente del diritto brasiliano in materia di lotta contro la corruzione.

Il Codice Penale del Brasile prevede i reati di corruzione passiva e attiva negli artt. 317[5] e 333[6]. Oltre a questi reati specifici, l'ordinamento brasiliano conta su una serie di altre norme volte alla lotta alla corruzione. A titolo illustrativo, possiamo ricordare la Legge n. 8.666/93, che stabilisce diversi reati in materia di licitazioni; la Legge n. 8.429/92, chiamata Legge di Responsabilità Amministrativa e la Legge n. 9.613/98, che tratta del riciclaggio di denaro.

Per quanto riguarda l'inserimento nello scenario internazionale di opposizione alla corruzione, il Brasile è firmatario della Convenzione sulla Lotta alla Corruzione di Pubblici Dipendenti Stranieri in Transazioni

[5] "Art. 317 - Solicitar ou receber, para si ou para outrem, direta ou indiretamente, ainda que fora da função ou antes de assumi-la, mas em razão dela, vantagem indevida, ou aceitar promessa de tal vantagem: Pena – reclusão, de 2 (dois) a 12 (doze) anos, e multa".

[6] "Art. 333 - Oferecer ou prometer vantagem indevida a funcionário público, para determiná-lo a praticar, omitir ou retardar ato de ofício: Pena – reclusão, de 2 (dois) a 12 (doze) anos, e multa".

Commerciali Internazionali dell'Organizzazione per la Cooperazione e lo Sviluppo Economico (OCSE) del 1997 (Decreto n. 3.678/2000), della Convenzione Interamericana contro la Corruzione del 1996 (Decreto n. 4.410/02) e della Convenzione delle Nazioni Unite contro la Corruzione del 2003 (Decreto n. 5.687/06).

Come tutti sappiamo, dall'avvento del *Foreign Corrupt Practices Act* 1977 negli Stati Uniti d'America, il cui contenuto ha ispirato le convenzioni internazionali, soprattutto quella OCSE del 1997, c'è stata una rivoluzione nell'obiettivo della lotta alla corruzione. Si è passati ad avere particolare preoccupazione per l'agente privato che alimenta economicamente i canali della corruzione, indirizzandogli norme più severe[7]. Questa tendenza, senza alcun dubbio, costituisce una caratteristica importante nel contesto internazionale anticorruzione.

Altra caratteristica rilevante dell'ambiente internazionale è la responsabilizzazione della persona giuridica, oltre alla responsabilità penale della persona naturale o fisica che pratica la corruzione. Date le limitazioni di questo testo e solo per fare un esempio, ricordiamo l'art. 2 della Convenzione OCSE, che dispone: «Ogni Parte dovrà prendere tutte le misure necessarie nello stabilire le responsabilità di persone giuridiche per la corruzione di pubblico dipendente straniero, in accordo ai suoi principi giuridici».

Più avanti, in materia di sanzioni, la stessa Convenzione, nell'art. 3, prevede: «2. Nel caso in cui la responsabilità criminale, secondo il sistema giuridico della Parte, non si applichi a persone giuridiche, la Parte dovrà assicurare che le persone giuridiche siano soggette a sanzioni non criminali effettive, proporzionali e dissuasive contro la corruzione di pubblico dipendente straniero, comprendenti anche sanzioni economiche».

Dall'analisi delle norme riferite, così come da altre, ugualmente presenti nelle convenzioni internazionali firmate dal Brasile, si constata che i meccanismi nazionali indicati finora non sarebbero sufficienti. Sarebbe imprescindibile la creazione di mezzi di responsabilizzazione di persone collettive implicate in casi di corruzione, cosa che si è con-

[7] T. KREVER, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33(1) *North Carolina J. Int. L. and Comm. Reg.* 83 (2007).

cretizzata con l'avvento della Legge n. 12.846/2013[8], comunemente conosciuta, in Brasile, come Legge Anticorruzione o Legge dell'Impresa Pulita[9].

Tale disciplina legale è stata adottata da parte del governo federale in risposta a diversi movimenti popolari, che avevano occupato le strade del Paese a metà del 2013, soprattutto durante gli eventi della Coppa delle Confederazioni. Si era creato un clima di insoddisfazione popolare nei confronti dei costanti scandali di corruzione e dei voluminosi investimenti nella costruzione e ristrutturazione di stadi per i giochi della Coppa del Mondo, a svantaggio di stanziamenti di fondi economici negli scarsi e inefficienti servizi pubblici essenziali, quali sanità, trasporto, educazione e sicurezza.

Vale la pena ricordare che l'operazione *Lava Jato* sorge subito dopo l'avvento della Legge Anticorruzione. Non esiste fra queste una relazione di causa ed effetto ma, certamente, la nuova legislazione comincia a essere già applicata a varie imprese coinvolte nello scandalo (solamente in relazione a fatti avvenuti dopo l'inizio della sua vigenza).

3. La Legge Anticorruzione: panoramica, problemi e prospettive

3.1. La responsabilità oggettiva civile e amministrativa delle persone giuridiche

La responsabilità delle persone giuridiche è la grande novità della Legge Anticorruzione. Fino al suo avvento, soltanto le persone naturali (gli esseri umani) rispondevano, e solo nei termini della legislazione penale, per le condotte in essa descritte.

La nuova legge tratta della responsabilità amministrativa e civile delle persone giuridiche. Non solo, tratta anche di responsabilità oggettiva. Questo tipo di responsabilità è stato ampiamente criticato da settori della dottrina brasiliana, con un giudizio di azione diretta di incostituzionalità pendente dinanzi alla Corte Suprema. Si sostiene che la re-

[8] La Legge Anticorruzione è stata attuata dal Decreto Presidenziale n. 8.520/2015.

[9] J. HAGE SOBRINHO, *Lei da Empresa Limpa*, in *Revista dos Tribunais*, v. 947, p. 37-55, 2014.

sponsabilità determinata dalla Legge Anticorruzione sarebbe travestita da civile o amministrativa. Pertanto, non potrebbe esserci responsabilità penale oggettiva.

Vari fattori hanno contribuito alla generalizzazione della responsabilità oggettiva di persone giuridiche nella Legge n. 12.846/2013: la sua diffusa applicazione nei campi del diritto civile e amministrativo (in questo caso, in materia di responsabilità dello Stato); la decisione di allontanarsi dal regime di diritto penale di responsabilità delle persone giuridiche, senza tradizione nazionale e in cui ci sono tante e tante discussioni sull'elemento soggettivo nella imputazione di responsabilità a enti collettivi; infine le difficoltà che un'eventuale responsabilità soggettiva genererebbe in casi di corruzione, che, in genere, si esprimono mediante mezzi dissimulati, rendendo difficile la prova inequivocabile dell'elemento psicologico.

Anzi, il Gruppo di Lavoro sulla Corruzione in Transazioni Commerciali Internazionali dell'OCSE, in occasione della relazione della Tappa 3, del 2014, ha sottolineato i vantaggi dell'opzione brasiliana per la responsabilità oggettiva[10].

Ovviamente, la responsabilità oggettiva inserita nella Legge Anticorruzione non genera sorpresa se si pensa esclusivamente al campo del diritto civile. La responsabilità della persona giuridica per la riparazione integrale del danno è perfettamente naturale e corrispondente con l'evoluzione del diritto civile.

[10] "Nonetheless, panellists almost unanimously supported Brazil's pragmatic decision to opt for the administrative liability of legal persons for foreign bribery (and other economic offences covered by the law). The main reason invoked was that because of a number of inefficiencies in Brazil's judicial system, including lengthy proceedings and multiple appeals (see Section 5f), holding a legal person criminally liable for foreign bribery would take significantly more time with a lower chance of success. This situation is illustrated by the almost total lack of enforcement of environmental offences with respect to legal persons.34 The CGU, the prosecutors and the lawyers at the on-site visit also stressed that a standard of liability as broad as the strict liability contemplated under the CLL would not have been feasible under a criminal statute, which would have required proof of fault or intent of the legal person and afforded narrower possibilities to hold companies responsible" (OECD, *Phase 3 – Report on Implementing The OECD Anti-Bribery Convention in Brazil*, 2014, p. 17, http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf).

La sorpresa sorge talvolta quando si riflette sulla responsabilità amministrativa oggettiva creata dalla Legge.

Su questo punto, la novità è veramente significativa e domanda attenzione nel trattamento della fattispecie, ma non esiste nulla che tolga legittimità al nuovo regime introdotto dalla Legge Anticorruzione.

Passati alcuni anni dall'entrata in vigore della Legge, pare che la tendenza sia il superamento dei dubbi teorici, che non dovrebbero comunque compromettere la sua applicazione.

3.2. Gli atti lesivi contro l'amministrazione pubblica nazionale e straniera

Per quanto riguarda gli atti considerati lesivi della amministrazione pubblica nazionale e straniera, è necessario evidenziare che né nel testo né nei suoi dispositivi la Legge n. 12.846/2013 parla espressamente di corruzione. Tratta semplicemente di atti lesivi contro l'amministrazione pubblica, il che conferma in un certo modo la correttezza delle scelte legislative. Come insegnano Jan Wouters, Cedric Ryngaert e Ann Sofie Cloots, classificare la corruzione in modo esauriente costituisce un compito impossibile, sia per il diritto internazionale, sia per le legislazioni domestiche. La varietà di significati che assume la corruzione nei diversi popoli e l'infinità dei mezzi attraverso i quali si manifesta finiscono per portare gli ordinamenti a disciplinare i suoi modi, ma non a definirla[11]. La maggior parte delle legislazioni regola in pratica le conseguenze della corruzione (*bribery*), che è solo una modalità di corruzione, e non si confonde con essa.

La Legge Anticorruzione brasiliana ha finito per regolare di fatto atti di corruzione, come si osserva nell'art. 5:

> Art. 5. Costituiscono atti lesivi della pubblica amministrazione, nazionale o straniera, per i fini di questa Legge, tutti quelli praticati dalle persone giuridiche menzionate nel paragrafo unico dell'art. 1, che attentino contro il patrimonio pubblico nazionale o straniero, contro principi

[11] J. WOUTERS, C. RYNGAERT, A.S. CLOOTS, *The Fight Against Corruption in International Law*, Leuven Centre for Global Governance Studies Working Paper No. 94. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274775. 12.01.2016, p. 34-35.

della amministrazione pubblica o contro gli impegni internazionali assunti dal Brasile, così definiti:

I - promettere, offrire o dare, direttamente o indirettamente, vantaggio indebito ad agente pubblico, o a terza persona a questi relazionata;

II - alla presenza di prove, finanziare, pagare, patrocinare o in qualche modo sovvenzionare la pratica di atti illeciti previsti nella Legge;

III - alla presenza di prove, fare uso di interposta persona fisica o giuridica per occultare o dissimulare i propri reali interessi o l'identità dei beneficiari degli atti praticati;

IV - per quanto riguarda appalti pubblici e contratti:

a) frustrare o defraudare, mediante accordi, combinazioni o qualsiasi altro mezzo, il carattere competitivo di gare d'appalto pubbliche;

b) impedire, perturbare o defraudare la realizzazione di qualsiasi atto di procedimento pubblico;

c) allontanare o cercare di allontanare il partecipante, per mezzo di frode o offerta di vantaggio di qualsiasi tipo;

d) defraudare gara d'appalto pubblica o contratto da questa decorrente;

e) creare, in modo fraudolento o irregolare, persona giuridica per partecipare ad appalto pubblico o stipulare contratto amministrativo;

f) ottenere vantaggio o beneficio indebito, in modo fraudolento, da modifiche o proroghe di contratti stipulati con l'amministrazione pubblica, senza autorizzazione legale, nell'atto di convocazione del procedimento pubblico o nei rispettivi strumenti contrattuali; o

g) manipolare o defraudare l'equilibrio economico-finanziario dei contratti celebrati con la pubblica amministrazione;

V - ostacolare attività di indagine o controllo di organi, entità o agenti pubblici, o intervenire nella sua attuazione, anche nell'ambito delle agenzie regolatrici e degli organi di controllo del sistema finanziario nazionale.

Come si vede, la Legge Anticorruzione possiede un elenco esteso di condotte considerate lesive della amministrazione pubblica nazionale e straniera. Cioè, la Legge n. 12.846/2013, in materia di tutela della amministrazione straniera, possiede una tipicità molto più estensiva di quanto esigono i trattati internazionali.

3.3. I mezzi amministrativi e giudiziali di responsabilizzazione delle persone giuridiche

La Legge Anticorruzione regola due mezzi di responsabilizzazione della persona giuridica per atti lesivi dell'amministrazione. Il primo è la responsabilizzazione amministrativa, il secondo quella giudiziale.

Nel primo caso, mediante un processo amministrativo di responsabilizzazione - PAR[12], con rispetto al contradditorio e all'ampia difesa, la persona giuridica può soffrire l'applicazione, cumulativa o no, di due sanzioni: a) multa; e b) pubblicazione della decisione dell'autorità amministrativa[13].

In accordo con l'art. 7 della Legge, nel fissare la sanzione, l'autorità deve prendere in considerazione:

> I - la gravità dell'infrazione; II - il vantaggio conferito o preteso dal trasgressore; III - la consumazione o no della infrazione; IV - il grado di lesione o pericolo di lesione; V - l'effetto negativo prodotto dall'infrazione; VI - la situazione economica del trasgressore; VII - la cooperazione della persona giuridica per la verifica delle infrazioni; VIII - l'esistenza di meccanismi e procedimenti interni di integrità, auditing e incentivo alla denuncia di irregolarità e l'applicazione effettiva di codici di etica e di condotta nell'ambito della persona giuridica; IX - il valore dei contratti mantenuti dalla persona giuridica con l'organo o entità pubblica lesi.

Questi criteri di fissazione delle sanzioni sono estremamente soggettivi[14] e alcuni sembrano pure confondibili tra di loro. Nell'elenco, intan-

[12] Alcuni studiosi sostengono la natura penale del PAR, nel quale dovrebbero essere applicati i principi del processo penale, come ad esempio il principio *in dubio pro reo* (P.E. LUCON, *Procedimento e Sanção na Lei Anticorrupção*, São Paulo: RT. Revista dos Tribunais, vol. 947/2014, p. 267-279, Set / 2014).

[13] "Art. 6º Na esfera administrativa, serão aplicadas às pessoas jurídicas consideradas responsáveis pelos atos lesivos previstos nesta Lei as seguintes sanções: I - multa, no valor de 0,1% (um décimo por cento) a 20% (vinte por cento) do faturamento bruto do último exercício anterior ao da instauração do processo administrativo, excluídos os tributos, a qual nunca será inferior à vantagem auferida, quando for possível sua estimação; e II - publicação extraordinária da decisão condenatória".

[14] S. BITTENCOURT, *Comentários à Lei Anticorrupção.* São Paulo: RT, 2015, p. 108.

to, merita attenzione il comma VIII, che dispone sull'effetto della *compliance*[15]. Ad esempio di quanto succede nell'ambito del *Foreign Corrupt Practices Act – FCPA*, la *compliance* funziona come significativa attenuante delle sanzioni applicate nel PAR[16].

Senza alcun dubbio, il sistema internazionale e i sistemi nazionali di lotta contro la corruzione hanno modificato il modo di fare affari nel mondo globalizzato. L'adozione di meccanismi di *compliance*, compresi i mezzi di *due diligence* in contesti di fusioni e acquisti, sono stati incorporati nelle pratiche commerciali. Questa è una delle grandi ripercussioni concrete della Legge Anticorruzione nel mercato brasiliano. Sono sorti consulenti specializzati, studi, seminari e tutto un ambiente di prevenzione alla pratica della corruzione aziendale.

Quanto al Processo Amministrativo di Responsabilizzazione, deve essere instaurato dalla suprema autorità dell'organo dell'amministrazione coinvolto nei fatti o anche, nell'ambito del Governo Federale, dal Ministero della Trasparenza e Controllo fiscale - Generale dell'Unione[17] (che sarà chiamato soltanto CGU in questo testo), che è un organo di controllo fiscale dell'amministrazione pubblica federale.

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[15] La CGU ha pubblicato manuali per le imprese sulla *compliance*. Controladoria-Geral da União, *Programa de Integridade: Diretrizes para empresas privadas* (http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/programa-de-integridade-diretrizes-para-empresas-privadas.pdf. 18.11.2015); Controladoria-Geral da União, *Integridade para Pequenos Negócios* (http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/integridade-para-pequenos-negocios. 18.11.2015).

[16] Secondo l'articolo 18 del Decreto n. 8.420/2015, la *compliance* può ridurre la sanzione amministrativa per l'impresa ("um por cento a quatro por cento para comprovação de a pessoa jurídica possuir e aplicar um programa de integridade, conforme os parâmetros estabelecidos no Capítulo IV").

[17] "Art. 8º A instauração e o julgamento de processo administrativo para apuração da responsabilidade de pessoa jurídica cabem à autoridade máxima de cada órgão ou entidade dos Poderes Executivo, Legislativo e Judiciário, que agirá de ofício ou mediante provocação, observados o contraditório e a ampla defesa. § 1º A competência para a instauração e o julgamento do processo administrativo de apuração de responsabilidade da pessoa jurídica poderá ser delegada, vedada a subdelegação. § 2º No âmbito do Poder Executivo federal, a Controladoria-Geral da União - CGU terá competência concorrente para instaurar processos administrativos de responsabilização de pessoas jurídicas ou para avocar os processos instaurados com fundamento nesta Lei, para exame de sua regularidade ou para corrigir-lhes o andamento".

Ricordiamo che la Legge Anticorruzione è di ambito nazionale e che si applica a tutti gli enti della federazione, ossia, all'Unione (governo federale), Stati e Municipi. Ciò genera una serie di problemi di ordine strutturale e politico.

In termini strutturali, nell'ambito federale, c'è la CGU, organo preesistente alla Legge e con relativa esperienza nell'aerea del controllo, almeno nell'ambito interno della propria amministrazione. Tuttavia, con la Legge Anticorruzione, la CGU è passata ad avere più funzioni, senza aumento proporzionale di risorse personali e finanziarie, il che, in certo modo, compromette le attività dell'organo.

Per Stati e Municipi, la questione strutturale è ancora più grave. Molti di questi non possiedono nemmeno organi specializzati di controllo e nemmeno personale in grado di condurre processi amministrativi di responsabilizzazione.

Rispetto ai problemi d'ordine politico, solo per fare un esempio con la situazione del governo federale, si noti che il Capo della CGU è Ministro di Stato, esonerabile in qualsiasi momento dal Presidente della Repubblica. La CGU finisce per essere un organo del Potere Esecutivo federale, senza autonomia né indipendenza, caratteristiche necessarie per portare a termine il compito di applicare la Legge n. 12.846/2013 a persone giuridiche.

Per farsi un'idea dell'instabilità istituzionale (e, pertanto, politica) dell'Organo di Controllo-Generale dell'Unione, si ricordi che, dall'entrata in vigore della Legge Anticorruzione nel 2013, l'organo ha avuto sei Ministri diversi (Jorge Hage, Valdir Simão, Luiz Navarro, Fabiano Silveira, Torquato Jardim e, attualmente, Wagner Rosário).

Senza dubbio, questi stessi problemi di ingerenza politica si ripetono, con maggior gravità, in Stati e Municipi, il tutto in modo da ridurre, significativamente, l'efficacia della Legge Anticorruzione.

Un altro mezzo di responsabilizzazione per la Legge Anticorruzione è quello giudiziario, che seguirà il rito processuale dell'azione civile pubblica, regolata dalla Legge n. 7.347/1985.

Nel processo giudiziario si potranno stabilire le seguenti sanzioni:

I - perdita dei beni, diritti o valori che rappresentano vantaggio o profitto direttamente o indirettamente ottenuti dall'infrazione, fatto salvo il

> diritto della parte lesa o del terzo in buona fede; II - sospensione o interdizione parziale dalle attività; III - dissoluzione forzata della persona giuridica; IV - divieto di ricevere incentivi, sussidi, sovvenzioni, donazioni o prestiti da organi o entità pubbliche e da istituti finanziari pubblici o controllati dal potere pubblico, dal termine minimo di 1 (uno) e massimo di 5 (cinque) anni.

3.4. L'accordo di clemenza (collaborazione)

La Legge Anticorruzione regola anche l'accordo di clemenza e vale la pena citare l'art. 16:

> Art. 16. L'autorità massima di ogni organo o entità pubblica potrà stipulare un accordo di clemenza con le persone giuridiche responsabili per la pratica degli atti previsti nella Legge che collaborino effettivamente con le indagini e il processo amministrativo, sempre che da questa collaborazione risulti:
> I - l'identificazione dei soggetti maggiormente coinvolti nell'infrazione; e
> II - l'ottenimento celere di informazioni e documenti che comprovino l'illecito sottoposto a indagine.

Adempiuti i requisiti della Legge, è possibile firmare l'accordo con le imprese coinvolte, che resteranno in questo caso esenti dalla sanzione di pubblicazione straordinaria della decisione amministrativa e potranno vedere ridotto fino ai due terzi il valore della multa applicabile alla fattispecie.

In termini di incentivi affinché le persone giuridiche responsabili firmino accordi di clemenza, la Legge n. 12.846/2013 è molto povera. Soprattutto, questa ammette solo la clemenza parziale, cioè, non comporta la possibilità di totale esenzione da sanzioni, cosa che non sembra essere il miglior percorso legislativo.

Parimenti, l'accordo di clemenza della Legge Anticorruzione ingloba solo le persone giuridiche responsabili e non si interessa delle questioni penali. Perciò, diventa poco attraente perché espone le persone fisiche a eventuali sanzioni penali, senza risolvere la questione.

Inoltre, dato che la Legge Anticorruzione conferisce al Pubblico Ministero e agli enti pubblici legittimità per responsabilizzazione giudiziaria, e questi, per la stessa Legge, non partecipano all'accordo di cle-

menza, la sua stipulazione non garantisce al privato la piena soluzione delle conseguenze della pratica degli atti lesivi da parte di persona giuridica.

Si prenda nota, a conclusione di questo argomento, che gli accordi di collaborazione dell'operazione *Lava Jato*, menzionati all'inizio di questa esposizione, sono di indole penale, e non accordi della Legge n. 12.846/2013. Questi di fatto non si sono mostrati convenienti per i privati.

3.5. L'ultra-territorialità della Legge Anticorruzione

Bisogna ancora sottolineare l'ampio campo di applicazione ultra-territoriale della Legge Anticorruzione. L'art. 28 prevede che la Legge «si applica agli atti lesivi praticati da persona giuridica brasiliana contro l'amministrazione pubblica straniera, anche se commessi all'estero».

Come succede con il *FCPA* e con le determinazioni emanate dalla Convenzione OCSE, la lotta anticorruzione assume, nel campo normativo, un aspetto ultra-territoriale. Tuttavia, la Legge brasiliana è ben più ampia del *FCPA* e della Convenzione OCSE in materia di condotte sanzionate. Infatti non tratta solo di subordinazione a servitore pubblico straniero in operazioni commerciali internazionali. Dispone in merito ad altre pratiche di corruzione, ad esempio l'atto di ostruzione di indagine (art. 5, V). È più elevato il numero di condotte sanzionate dalla Legge Anticorruzione sul piano ultra-territoriale e, così, il Brasile fa un passo oltre gli impegni internazionali assunti. La sua legislazione anticorruzione passa a essere, su questo punto, una delle più severe, almeno nel campo testuale della Legge.

Di fianco al menzionato art. 28, il paragrafo unico dell'art. 1 prevede che la Legge Anticorruzione incide sulle «società straniere, che abbiano sede, filiale o rappresentanza sul territorio brasiliano, costituite di fatto o di diritto, anche se temporaneamente». Con questo, si pone in evidenza la possibilità che imprese straniere operanti in Brasile subiscano le sanzioni della Legge n. 12.846/2013.

Ovviamente il Brasile, per il limitato apparato dei suoi organi di controllo, non possiede risorse per indagare attuazioni di livello internazionale. A rigore, l'ipotesi della ultra-territorialità sarà applicata solo

in quei casi in cui altri Stati condannino imprese straniere (o con queste firmino accordi) per la pratica di corruzione.

Queste sono, in una visione panoramica, le principali caratteristiche della nuova legislazione brasiliana, creata per la lotta contro la corruzione praticata da persone giuridiche.

4. Considerazioni finali

Come considerazioni finali, vale la pena menzionare alcuni numeri. In una ricerca realizzata insieme al Catasto Nazionale di Imprese Punite - CNEP, che riunisce dati del governo federale e dei governi degli Stati, fino al 20 novembre 2017, erano state registrate soltanto 16 condanne amministrative della Legge Anticorruzione. Quanto agli accordi di collaborazione firmati dalla CGU, apparentemente ce ne sono soltanto due. In particolare, i numeri non sono conosciuti con certezza, perché gli accordi possono essere segreti.

Nello Stato di Minas Gerais, dove si trova la nostra UFMG, soltanto nel primo semestre del 2017 si è avuta la prima condanna amministrativa. Questa è la realtà brasiliana per quanto riguarda la responsabilità di persone giuridiche per la pratica di atti di corruzione.

Tutto lo scenario che è stato riportato dalla stampa nazionale e straniera in relazione alla lotta alla corruzione in Brasile, in realtà, si sviluppa negli ambienti del Pubblico Ministero, della Polizia Federale e del Potere Giudiziario, e relativamente alla responsabilizzazione penale e patrimoniale di persone fisiche. Ci sono diversi politici e imprenditori in stato di arresto e altrettanti nell'imminenza di esserlo.

Senza alcun dubbio, l'esistenza di una legislazione rigorosa e la certezza di una sua applicazione a persone giuridiche funzionerebbero come scudo di protezione per le imprese e per i canali di corruzione. Con questo, esse potrebbero emanciparsi dai meandri della corruzione, rifiutando pagamenti illeciti e sentendosi persino a proprio agio per denunciarli. È in questa direzione che dobbiamo camminare.

In qualunque modo, tornando all'inizio di questo discorso, forse ora diventa chiara l'opzione di affrontare la cosiddetta "recente esperienza legislativa brasiliana", visto che mancano ancora grandi passi perché la

Legge Brasiliana Anticorruzione diventi pienamente efficace nel controllo di infrazioni praticate da persone giuridiche. Ci vorrà del tempo e richiederà una maturazione da parte delle istituzioni di controllo, così come del mondo imprenditoriale. Saranno anche necessarie alcune modifiche legislative puntuali.

Infine, la Legge del 2013 è ancora giovane e si spera si possano commemorare molti 9 dicembre (Giornata Internazionale contro la Corruzione), ogni volta con meno corruzione nei nostri Paesi e nel mondo.

ANAC AND THE ITALIAN MODEL FOR THE PREVENTION OF CORRUPTION: BEST PRACTICES, CHALLENGES AND GAPS*

Nicoletta Parisi

1. Background information

By way of introduction, allow me to provide some general information about the Italian anticorruption system on a preventive level and from a legal point of view.

The Italian Anticorruption Authority (from now on: ANAC) was created on the foundation of the previous Authority (the *Commissione indipendente per la valutazione, la trasparenza e l'integrità delle amministrazioni pubbliche* or CIVIT), with the aim to implement article 6 of the United Nations Convention Against Corruption (UNCAC). Law 190 of 2012 had initially limited the mandate of ANAC to the drawing of a preventive strategy against corruption, the supervision of its implementation by each public entity (through the adoption of Three Year Plans for integrity and transparency), the supervision over transparency of public bodies, the integrity of civil servants, as well as the dissemi-

* I wish to thank Dr. Francesco Clementucci (adviser at the Italian Anticorruption Authority - ANAC) for his helpful comments and supervision in translation.

nation of a culture of integrity and legality. No powers were (and still are not) granted to ANAC on the prevention of political corruption.

Subsequently, the Decree Law 90 of 2014 (converted into Law 114 of 2014) introduced new anticorruption measures by anchoring the supervision of public contracts (already performed by the then Authority for the Supervision of Public Contracts – in Italian AVCP) to the system of corruption prevention. Thus article 19 of Law 114 has terminated the AVCP and transferred its functions and resources to ANAC, with the objective to monitor more effectively and holistically the entire domain of corruption prevention[1].

This legislative framework is the expression of the Legislator's choice to concentrate the whole strategy of corruption prevention in the hands of one single institution. The creation of an independent Authority for both the protection of legality in the public sector and the supervision on public procurement is an attempt to control a highly economic and strategic sector, exposed more than others to the risk of illegality and maladministration. The Authority pursues its goals through a regulatory activity, an advisory function and a supervisory activity, along with some inspection and (sometimes mild) sanctioning powers.

These competences are accompanied by an important monitoring activity through the collection of data on public tenders: for this purpose an Observatory for public contracts is operational within ANAC. This wide database is made public through an institutional website, in order to increase the transparency of the market.

In addition, ANAC is charged with reporting to the Italian Parliament on its activities as well as exercising an advocacy function though a specific role of impulse and proposal to both Parliament and Government.

In each sector, the Authority operates, essentially, on three different levels: a) monitoring (and reporting to the competent authorities) irregularities or illegal situations in the public sector through inspections and sanctions; b) interpretation of the law through the issuing of acts of

[1] Decision No. 143 of 30th September 2014, "Revisione dell'organizzazione e individuazione dei centri di responsabilità in base alla missione istituzionale dell'ANAC ridefinita con l'entrata in vigore del decreto legge 24 giugno 2014, n. 90, convertito nella legge 11 agosto 2014, n. 114, nelle more della presentazione e approvazione del piano di riordino".

general scope (like guidelines) in order to direct public bodies, and advise (the so-called "pre-litigation" opinions) in order to prevent disputes; c) information gathering and continuous monitoring of the awarding and implementation of public contracts[2].

2. Good and best practices stemming from the functioning of the Authority

In the past few years, ANAC has been very active on many different fronts concerning both the implementation of anticorruption measures in the Italian Public Administration and the oversight on public contracts.

In order to effectively perform its supervisory and regulatory functions, ANAC puts in place practices often stemming from the necessity to cope with emergencies. These practices have often inspired and anticipated future legislation on anticorruption matters. I will try to briefly illustrate what I mean with some examples.

2.1. The "collaborative supervision"

The establishment of the so-called "collaborative supervision" is very representative thereof.

Introducing Article 4 into its 2014 Regulation[3], ANAC began to use the so called "collaborative supervision" as a particular form of preventive verification of the tendering processes: it is aimed at fostering a profitable collaboration with the contracting authorities and thus guaranteeing the correct functioning of the tender operations and the contract execution, at the same time as preventing attempt of criminal infiltration in the tenders.

In fact, instead of sanctioning illicit behaviour *ex post* (after the fact occurred), ANAC's intervention aims at preventing issues *ex ante* (be-

[2] About the genesis of ANAC and its role and competences see R. CANTONE, *La prevenzione della corruzione e il ruolo dell'ANAC*, in M. D'ALBERTI (ed.), *Combattere la corruzione: analisi e proposte*, Soveria Mannelli, 2016, p. 25 ff.

[3] Regulation of 9th December 2014, "in materia di attività di vigilanza e di accertamenti ispettivi".

fore facts occur) by guiding the administration towards better and more transparent choices.

Stemming from the positive experience of "EXPO 2015", the "collaborative supervision" could be systematically introduced in the organization of other major events, initiatives and works of national or strategic interest in order to guarantee the transparency, accuracy and high quality of administrative choices from the very beginning. To this end, several MoUs for the implementation of "collaborative supervision" had been signed up between the ANAC and several contracting authorities.

After two-year practice the "collaborative supervision" is finally enshrined in Article 213, para. 3, lett. h, of the New Code of Contracts adopted by the Legislative Decree No. 50/2016; ANAC has also adopted a specific regulation in the matter[4].

2.2. The "extraordinary and temporary management of contractors"

The same goes for the so-called "extraordinary and temporary management of contractors". This tool was initially used on the occasion of the "EXPO 2015" event, with the support of the Organization for Economic Co-operation and Development (OECD), on the basis of article 30 of the Law 114 of 2014 and a Memorandum of Understanding signed between the OECD and the ANAC on 3rd October 2014.

Following that positive experience, this practice has been applied to other instances. According to article 32 of the aforementioned Law (No. 114/2014), in the event that illegal behaviours or corruption crimes attributable to a company which has been awarded a contract for the construction of public works, services or supplies occur or are being prosecuted by a judicial authority, the President of ANAC can suggest to the local Prefect, either: to order the renewal of the company's corporate bodies; or, if the company does not abide by the established terms, to engage in the extraordinary and temporary management of the

[4] Regulation of 28th June 2017 "sull'esercizio dell'attività di vigilanza collaborativa in materia di contratti pubblici". On the topic lastly see M.C. ROMANO, *Il ruolo e le competenze dell'ANAC sui contratti pubblici*, in M. D'ALBERTI (a cura di), *Corruzione e pubblica amministrazione*, Naples, 2017, p. 778 ff.

contracting company limited to the complete execution of the single contract subject to criminal proceedings; or the support and monitoring of the company with the appointment of experts tasked with supporting the company's organizational and management audit activity[5].

This innovative measure allows for an immediate intervention against corruption phenomena and is also a strong deterrent against corruption-oriented behaviours.

2.3. ANAC active judicial locus standi in the interest of law

As a result of his credibility gained on the field, article 211 of the new Public Contract Code (the Code) gives ANAC a new competence aimed at preserving the integrity of public contracts.

ANAC is entitled to judicially appeal general acts and measures relating to contracts of significant impact, issued by any contracting authority, if it deems that they violate the rules on public contracts relating to works, services and supplies[6].

In addition, if ANAC considers that a contracting authority has adopted a measure in breach of the new Code, it issues an opinion (within sixty days of the violation), indicating the specific flaws that were found. The opinion is then transmitted to the contracting authority, for compliance; if the contracting authority fails to comply (within sixty days maximum), ANAC may file an action before the administrative judge (within the following thirty days). Moreover, if ANAC identifies the existence of irregularities, it transmits the documents and its remarks to the contracting authority, demanding the removal of the violating dispositions[7].

In a way, this new competence of ANAC (established in article 211, co. 1-*bis* and -*ter* of the new Code) appears to be included into a trend

[5] On the website of ANAC (www.anticorruzione.it) see the five guidelines for the implementation of Art. 32. On this topic M. ARENA, *Le misure di straordinaria e temporanea gestione dell'impresa per fatti corruttivi*, in www.filodiritto.it, 16th September 2014; F. TESTI, *Il commissariamento delle imprese appaltatrici ex art. 32*, *d.l. n. 90/2014*, in M. D'ALBERTI (ed.), *Corruzione e pubblica amministrazione*, cit., p. 689 ff.

[6] Art. 211, par. 1-bis.

[7] Art. 211, par. 1-ter.

that recognizes to the independent administrative authorities the responsibility to act upon the protection of common goods and interests in an objective sense, be it competition (in case of the Antitrust Authority), or the legality of public contracts (for ANAC)[8].

2.4. The regulatory function stemmed from practice: from recommendation to "binding soft law"?

In the past ANAC had often fulfilled its regulatory mandate using instruments of general scope, such as determinations, guidelines, standard tender-notices and advisory opinions[9]. All these instances of soft law proved to be essential not only in the sector of public contracts, but also to provide interpretative guidelines on corruption prevention and the strengthening of integrity in the public sector. Many of these guidelines served the immediate purpose of interpreting and/or integrating the Italian legislation on different topics. In addition, and perhaps most importantly, such regulation laid down the foundation for future legislation on important anticorruption matters.

Good examples of ANAC's regulatory function are represented by its guidelines on whistleblowing[10]: firstly, they were useful to integrate Law 190 of 2012, by establishing a more detailed discipline of the whistleblower protection. Finally they have been inspired the contents of Law 179 of 30th November 2017[11]: some of its rules reproduce the recommendations contained in those guidelines. The same happened, for example, in the matter of SOEs[12], transparency[13], and, as said, "ex-

[8] See B. MARCHETTI, *Il giudice amministrativo tra tutela soggettiva e oggettiva: riflessioni di diritto comparato*, in *Dir. proc. amm*., 2016, p. 74 ff.

[9] For these last ones see specifically *infra*, para. 2.5.

[10] Decision No. 6 of 28th April 2015 "Linee guida in materia di tutela del dipendente pubblico che segnala illeciti (c.d. whistleblower)".

[11] "Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato".

[12] Decision No. 8 of 17th June 2015, «Linee guida per l'attuazione della normativa in materia di prevenzione della corruzione e trasparenza da parte delle società e degli enti di diritto privato controllati e partecipati dalle pubbliche amministrazioni e degli enti pubblici economici», updated with Decision No. 1134 of 8th November 2017, "Nuove linee guida per l'attuazione della normativa in materia di prevenzione della

traordinary and temporary management of contractors"[14]. The adoption of the National Anticorruption Plan is a good example of the exercise of guidance and administrative coordination competences ascribed to ANAC[15].

In the area of public procurement, this regulatory function has grown in importance and effectiveness due to requests coming from the awarding administration and from the economic operators in need of a consistent interpretation of the complex legislation. ANAC's guidelines on standard tenders provided an essential support to the tendering or-

corruzione e trasparenza da parte delle società e degli enti di diritto privato controllati e partecipati dalle pubbliche amministrazioni e degli enti pubblici economici". About the prevention of corruption in SOEs and the Italian new rules and ANAC guidelines thereof see: R. CANTONE, *Prevenzione della corruzione nel sistema delle società pubbliche: dalle linee guida dell'ANAC alle norme del D.lgs. 175/2016*, in F. AULETTA (ed.), *I controlli nelle società pubbliche*, Bologna, 2017, p. 17 ff.; A. MASSERA, *Gli statuti delle società a partecipazione pubblica e l'applicazione delle regole amministrative per la trasparenza e l'integrità*, *ibid.*, p. 45 ff.; M.C. LENOCI, D. GALLI, D. GENTILE (eds.), *Le società partecipate dopo il correttivo 2017*, Rome, 2017; M. LACCHINI, C.A. MAURO (eds.), *La gestione delle società partecipate pubbliche alla luce del nuovo Testo Unico. Verso un nuovo paradigma pubblico-privato*, Turin, 2017; S. FORTUNATO, F. VESSIA (eds.), *Le "nuove" società partecipate e in house providing*, in *Quaderni di giurisprudenza commerciale*, no. 408, Milan, 2017; V. SARCONE, *L'applicazione delle misure di prevenzione della corruzione e sulla tutela della trasparenza (L. N. 190/2012 e decreti attuativi) alle società pubbliche*, in F. CERIONI (ed.), *Le società pubbliche nel Testo Unico*, Milan, 2017, p. 220 ff.; G. MATTIOLI, *La nuova disciplina della trasparenza e le società pubbliche. Alcuni spunti di riflessione critica*, in *Il dir. dell'ec.*, 2017, p. 459 ff.

[13] In particular see: Decision No. 1310 of 2016, "Prime linee guida recanti indicazioni sull'attuazione degli obblighi di pubblicità, trasparenza e diffusione di informazioni contenute nel d.lgs. 33/2013 come modificato dal d.lgs. 97/2016"; Decision No. 1309 of 28th December 2016, "Linee guida recanti indicazioni operative ai fini della definizione delle esclusioni e dei limiti all'accesso civico di cui all'art. 5 par. 2 del d.lgs. 33/2013" - Art. 5-bis, comma 6, del d.lgs. n. 33/2013 recante «Riordino della disciplina riguardante il diritto di accesso civico e gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni»; Decision No. 1134 of 8th November 2017, cit.

[14] *Supra*, footnote 5.

[15] N. PARISI, *Assessment of the effectiveness of anti-corruption measures for the public sector and for private entities*, in *Rule of Law and Anti-Corruption Journal*, 2018:2, para. 4.

ganizations, at the same time reducing disputes among the parties. This important practice has been incorporated in the New Contract Code (Legislative decree No. 50 of 2016), according to which ANAC's second-level rules (in particular guidelines) can be also binding[16].

As a matter of fact, speaking in a very technical manner, binding guidelines do not fall in the realm of soft law: as the Italian State Council (i.e. the highest administrative Court) has declared in its advisory opinions[17]. The use of guidelines shows a new approach in the implementation of the Code: not throughout a ministerial decree (as in the past) but with second-level acts adopted by specifically dedicated authorities. These rules – when binding – are to be implemented by each public body, which can deviate from them only a) by using residual margins of technical discretion and b) based on solid justifications[18].

2.5. The pre-litigation competence

Acts of general scope are also the advisory opinions delivered by ANAC in the carrying out of the so called pre-litigation competence: it consists in the right for contracting authorities and bidders to address the Authority asking for an advisory opinion, in order to settle disputes during the tendering procedure[19]. With this Alternative Dispute Resolution system, the Legislator aims at introducing a mechanism to simplify

[16] Art. 213, par. 2.

[17] No. 855/2016 and 1273/2016, in particular point 4.4. that states: «4.4. The binding nature of the guidelines leaves no evaluative powers in the implementation phase for the contracting authorities and entities, which are obliged to implement them effectively. It is good to point out that *the "binding" nature of the measures in question does not always exhaust the executive "discretion" of the administrations*. It is necessary, in fact, to evaluate from time to time the nature of the precept to determine whether it is *compatible with a further development by the individual contracting authorities of their own evaluation and decision-making activities*» (italic added).

[18] On this novelty see S. VALAGUZZA, *Nudging pubblico vs. pubblico: nuovi strumenti per una regolazione flessibile di ANAC*, in *Rivista della regolazione dei mercati*, 2017/1; of the same Author, *Governare per contratto*, Naples, 2018, p. 156.

[19] Art. 211, para. 1. On the topic see C. BENETAZZO, *I nuovi poteri "regolatori" e di precontenzioso dell'ANAC nel sistema europeo delle Autorità indipendenti*, in *federalismi.it*, n. 5, 28th February 2018.

litigations in tender procedures and reducing the number of cases in front of the administrative judge.

It was practiced also in the past, according to the old Code of Public Contracts (legislative decree 163 of 2006); and it showed all its utility. So the new Public Contracts Code uses this tool more pervasively. The novelty is that, according to the newest Code, this tool can be also binding between agreeing parties.

The advantages achieved by using this competence are clear: decrease of legal disputes; clear saving of time, costs, human resources; possibility to obtain an opinion (aimed at removing and/or correcting the possible violations claimed by the parties) at an early stage[20].

2.6. Advocacy initiatives

ANAC has an important role in the dissemination of information related to a) illegal behaviours (criminal, administrative or financial illegalities) or b) legislative gaps or deficiencies.

The relationship between ANAC and criminal institutions has been set up through a national framework agreement (signed with the national general prosecutor at the Court of Cassation) and, accordingly, twenty-six "regional" MoUs (with local prosecutor offices) were then signed.

At the moment, the information mechanism is based on a network of horizontal and vertical, each bi-directional, communication channels. Firstly, should ANAC considers there are infringements of criminal relevance, it must transmit the documents and its remarks to the competent public prosecutor's office; similarly, each public prosecutor must inform ANAC's President on the initiation of prosecution related to corruption[21]. Furthermore, with the objective to ensure a wide and complete cognitive framework of the criminal judge, the President of the Authority has suggested that, in very technical matters such as public contracts, the members of ANAC (either Council members or high-

[20] Regulation of 5th October 2016 "per il rilascio dei pareri di precontenzioso di cui all'art. 211 del decreto legislativo 18 aprile 2016, n. 50".

[21] Art. 129, para. 3, "implementing, coordinating and transitional rules of the code of criminal procedure", as amended by art. 7 Law 69 of 2015.

rank officials) may be considered «testi esperti» (expert witnesses) within a criminal procedure[22]. The said agreement set up also the transmission of information where a whistleblowing situation is involved. Finally, one cannot forget the aforementioned relationship established by article 32 of the legislative decree 90 of 2014.

As to the administrative level of compliance, ANAC has signed an agreement with the Court of Auditors to settle mutual relationship in the matter of illegality in public finance. If ANAC concludes that the implementation of a single public contract produces a detriment to the public finance, the relevant documents and remarks are transmitted to the interested parties and to the general office of the Court of Auditors. Conversely, each administrative judge must inform ANAC of on-going proceedings in which the principle of transparency is involved and at risk[23].

According to law 114 of 2014, the National Anti-corruption Authority receives news and reports from each lawyer of the State who becomes aware of violations of provisions of law or regulation or of other anomalies or irregularities related to contracts that fall under the Code[24].

It is clear that these efforts are put in place in order to create an accurate and thorough wealth of information, within a framework of mutual inter-institutional collaboration, which is crucial as to deal with illegal situations from all possible perspectives,

Additionally, we must remember that on several occasions ANAC has used its power to submit to the Government and Parliament issues that concern criticalities from the point of view of the interpretation and implementation of the discipline concerning the whole matter of prevention of corruption[25].

[22] Nevertheless, this figure is still not foreseen within the Italian procedural system. See speech held during the hearing held before the Sixth Commission of the Superior Council of Magistrates (2017).

[23] Art. 8 Law 69 of 2015.

[24] Art. 5.

[25] Specifically in the matter of public contracts see art. 213, par. 3, lett. c and e, of the Code of Public Contracts; on other practices see the *ANAC, Annual report to the Parliament 2017*, Rome, 2018, p. 14-22.

3. Challenges and gaps

Notwithstanding these improvements, we must not ignore the challenges ahead of us due to the novelty of the preventing approach in fighting corruption, its "young age", and the cultural context.

3.1. The "cascade" planning model for preventing corruption in the public administration

The anticorruption framework envisaged by Law 190 of 2012 revolves around a "cascade" planning model structured on two levels[26].

On the first level there is the National Anticorruption Plan (aka PNA): it provides the basic regulation to prevent corruption and to improve transparency and integrity in the central and local governments. The PNA ensures the coordination of national and international strategies for the prevention of corruption and provides the guidelines to be followed by public administrations, their subsidiaries and State-fully controlled companies.

While the PNA provides systematic guidance and is intended to ensure a uniform approach at local level, each public administration is required to adopt its specific plan to implement the PNA. At this second level, each aforementioned body adopts, based on the PNA, its *Three Year Plan for the Prevention of Corruption and Transparency* (in Italian PTPCT). The PTPCT is required to identify the specific risks of corruption for each administration and the measures deemed necessary to prevent, manage, and low them.

The PTPCTs are supposed to be updated every year, as the PNA[27]. Unfortunately, the first two years of implementation of the system have

[26] About the two-level planning see N. PARISI, *Assessment*, cit.; and A. BARONE, *La prevenzione della corruzione nella "governance" del territorio*, in *Il dir. dell'ec*., 2018, p. 571 ff., specific. para. 6.

[27] On the topic see N. PARISI, *Assessment of the effectiveness of anti-corruption measures for the public sector and for private entities*, in *Rule of Law and Anti-Corruption Journal*, 2018:2; F. CLEMENTUCCI, *Comparative analysis of criminal law, procedures and practices concerning liability of entrepreneurs*, https://rm.coe.int/16806d8140.

not been entirely successful. Too often the implementation of the PTPCT has been regarded as a purely bureaucratic task, lacking the requested in-depth risk assessment and consequent appropriate remedies.

However, ANAC approved three Italian Anti-Corruption Plans, entirely prepared and approved by itself, according to Law 114 of 2014. The structure of these new Plans (and the 2018 one, in preparation) is totally different from the previous Plan adopted in 2013. Following a brief section on general issues (such as the role and duties of the responsible person in charge of the prevention of corruption and transparency in each administration), each PNA focuses on the identification of corruption risks in the most vulnerable sectors (health, education, cultural heritage, etc.) or inside single kind of public bodies (Port authorities, universities, fiscal authorities, etc.), providing clear guidance and suggestions to face, manage, and low those risks[28].

ANAC is confident that this new approach will support each Public Administration in better designing and implementing the PTPCT, as a recent successful collaboration between ANAC and the public Authority in the health sector showed[29].

3.2. Other problematic issues: Culture, Whistleblowing, Transparency and IT

Preventing corruption requires a cultural shift which is hard to achieve.

ANAC places a great deal of efforts towards promoting a culture of public administration integrity, through personnel training, workshop, events and different forms of collaboration with the civil society, first

[28] Decision No. 12 of 28th October 2015, "Aggiornamento 2015 al Piano Nazionale Anticorruzione"; Decision No. 831 of 3rd August 2016, "Piano Nazionale Anticorruzione 2016"; Decision No. 1208 of 22th November 2017, "Aggiornamento 2017 al Piano Nazionale Anticorruzione".

[29] This collaboration is set up in accordance with the Protocol signed with the Ministry of Health and Agenas of 21st April 2016, from which stemmed: PNA (2016), chapter VII, and the guidelines "per l'adozione dei codici di comportamento negli enti del Servizio Sanitario Nazionale".

of all with universities. But changing culture is a long-term and not very linear process.

One of the most evident needs for this cultural shift is the difficulty to incorporate the institute of whistleblowing in the Italian legal system. Here, too, ANAC has anticipated some best practices regarding the intake process and the protection of confidentiality, adopting the mentioned guidelines[30]. However, administrative bodies are reluctant to accept the disclosure of inside information and, consequently, to protect anyone who reports[31].

As for transparency the Italian Legislator has introduced some innovation in the ways the citizens can obtain information, under the principle that public information is common goods[32]. According with legislative decree No. 33/2013, as modified by legislative decree No. 97/2016, ANAC adopted some guidelines[33].

One way is for the citizen to access directly the P.A. website where information, which is compulsory, can be retrieved from the section called "Transparent Administration"[34]. Another possibility is to obtain all the unpublished information by writing to the P.A.: this way is called "generalized access"[35].

ANAC is aware that its information technology capacity is essential to pursue transparency in the public sector and better supervision of public contracts. ANAC is working at improving its IT capacity by empowering its data-base on contracts, implementing also the platforms to manage the books of contracting authorities, economic operators, arbitrators, and so on; and establishing a new platform for the intake and management of whistleblowers' complaints. The whole Italian system

[30] *Supra*, footnote 13.

[31] See the results mentioned in the ANAC's monitoring Reports 2016, 2017, 2018, in www.anticorruzione.it.

[32] On the topic see G. GARDINI, *Il paradosso della trasparenza in Italia: dell'arte di rendere oscure le cose semplici*, in *federalismi.it*, 11st January 2017; A. CORRADO, *Conoscere per partecipare: la strada tracciata dalla trasparenza amministrativa*, Naples, 2018 (being published).

[33] Decision No. 1310 of 2016, cit.

[34] Annex I to the Decision No. 1310, "Sezione Amministrazione trasparente - Elenco obblighi di pubblicazione".

[35] Decision No. 1310 of 2016, cit.

of transparency in public administration and in public contracts has to be computerized; as ANAC is the governance authority of these two different but connected areas, it is at the heart of this challenging (even financially) and long process.

IT could also allow coping with the vast supervisory powers concerning codes of conduct, conflict of interest, and administrative transparency. At the moment, the whole Public Administration's supervision of the compliance with the obligations established by the law with regards to these matters is difficult because of the large number of involved entities. Once again, the computerization process would help the effectiveness of the ANAC's activity.

4. Looking ahead

One could wonder why in 2012 Italy felt the strong need to build an administrative independent authority for the prevention of corruption, that is usually a step made by States of new democracy, aiming at demonstrating their commitment towards the principle of the rule of law; and why the Legislator's choice fell on a preventive tool, and not prosecuting or repressive one.

In 2012 a series of determining events occurred, namely: i) a serious emergency in public procurement system, also related to the organization of "EXPO Milano 2015"; ii) a high and widespread perception of corruption in citizens, companies as well as analysts at the same time; iii) the need to implement international agreements and the recommendations of international bodies; iv) the need to give stability to the legislative decree 150 of 2009 which, inter alia, set rules on transparency.

Several and strong powers have been gradually awarded to a single authority but – in accordance with the principle of the rule of law – these powers are purely administrative, as opposed to judicial ones.

Additionally, a particular attitude inspires the Italian action for the prevention of corruption, i.e. the firm belief that the fight against this kind of conducts cannot be performed in isolation. In other words, in order to be able to tackle this transnational phenomenon, anti-corruption bodies do need coordinated and harmonized legislation, at the in-

ternational and European level; this is clearly confirmed by several international conventions that, with use of different wording, suggest or demand Countries to be internationally pro-active[36].

To this end, ANAC has taken very seriously this commitment at the international level, in accordance with article 6, par. 3, of the United Nations Convention against corruption. Indeed, ANAC is engaged internationally through its participation to different anticorruption and transparency *fora*, such as UNODC, G20, G7, OECD, OSCE, Council of Europe (and GRECO), European Union, World Bank as well as Open Government Partnership: it participates – as a technical body – inside many of the diplomatic governmental delegations working into these international organizations committed to fighting corruption; and it also has an intense bilateral activity (with States and other peer foreign authorities).

About this demanding and extensive commitment, I would like to draw attention on ANAC's most recent initiative that differs from the traditional methods and the established channels of international cooperation. ANAC has put on the table some proposals[37].

First of all, we consider the building of a network of national preventive authorities with objective to: establish models of cooperation and mutual assistance; creating working groups for the development, implementation and monitoring of their functions; elaborate common positions and sectorial standards and propose them to the attention of multilateral institutions, thus actively feeding the advancement of international law; harmonize, deepen and foster domestic rules on corrup-

[36] About the outcome of an international model to fight corruption and the international inspiration of the Italian practice see, please, N. PARISI, *Verso l'emersione di un modello internazionale di prevenzione della corruzione*, in *federalism.it*, *Focus*, *America latina*, I, 22nd December 2017; and (of the same author) *Il contrasto alla corruzione e la lezione derivata al diritto internazionale: non solo repressione, ma soprattutto prevenzione*, in *Diritto com. scambi int*., 2016, p. 185 ff.

[37] For this purpose the Authority adopted the experimental project on "Construction of a system of systematic collection and organized reading of measures to prevent corruption in public administrations with subjects with, in Europe, powers and powers similar to those of the National Anti-Corruption Authority", from September 2017 to August 2020 (ANAC Council's Decision of 26th October 2016).

tion prevention by, for example, exchanging domestic practices and information.

Secondly, a more ambitious task is the institution – within the European Union – of a European authority for the prevention of corruption in a sort of two-tiered (European and national) mechanism[38].

The first proposal is soon going to be achieved: in October 2018, in Sibenik (Croatia) the "Declaration for the corruption prevention agencies' network" will be official signed by national authorities (agencies, departments, units) involved in the prevention of corruption, in accordance with the plan initially proposed by ANAC.

Concerning the second proposal, on the EU administrative authority for the prevention of corruption, it is worth recalling that similar outputs are already mentioned in some European initiatives. Let us consider for a moment, for example, the whistleblowing regulatory scheme. On January 2016, the Committee of Ministers of the Council of Europe adopted the Recommendation No. 2073(2015): based on the principles established in Recommendations Nos. (2014)7 and (2015)5, it suggested «to continue to support the promotion and implementation» of these principles by the Member States of the Council of Europe. GRECO – in its Comments (October 2015) to the Recommendation of the Council of Europe's Parliamentary Assembly No. 2073(2015) – suggests that «it might be preferable to focus on (...) initiatives to exchange good practices» (para. 3). Starting from these acts, the European Parliament then presented a very significant proposal to the EU Commission providing also for the institution of a European Authority for the protection of whistleblower[39]. Its main mission could be: to provide advices to the domestic Authorities regarding anticorruption issues; to provide to the other European institutions opinions on rules in anticorruption area; to promote an harmonized application of best practices in all the Member States.

The institution of a European body has not been accepted by the Commission that adopted a proposal of directive on the protection of

[38] About the competence of the European Union in administrative matters see M.P. CHITI, *Diritto amministrativo europeo*, Milan, 2011, 4th ed., p. 125 ff.

[39] Art. 7: Doc. 3 May 2016, http://bit.ly/1rQJtRy.

persons reporting on breaches of Union law[40], not even providing for the establishment of a European administrative body to guide domestic ones.

There is no doubt that the Commission proposal is noble: it takes credit for trying to harmonize the different national rules in this sector, and aims at creating a levelled European playing field for those who report illegality committed against the European Union law.

However, establishing a specifically devoted and stable European entity, tasked with proposing and monitoring the implementation of this field law, would undoubtedly guarantee a greater effectiveness in the harmonizing process.

Furthermore, this institutional solution aimed at building a "two-level administration" is well anchored into the European Union legal system, since its adoption is already foreseen in other European sectors, such as: those related to privacy of personal data[41], the protection of competition[42], the electronic communication government[43]; finally, it is suggested for fighting money laundering[44].

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[40] European Commission proposal of directive 23rd April 2018, COM(2018) 218 final.

[41] Directive 95/46/EC of the European Parliament and of the Council of 24th October 1995 *on the protection of individuals with regard to the processing of personal data and on the free movement of such data*.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016 *on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*.

[42] Council Regulation (EC) No 1/2003 of 16th December 2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* (The new framework for the enforcement of Community antitrust law provides for close cooperation between the Commission and the competition authorities of the Member States within the European Competition Network).

[43] Directive 2002/21/EC of the European Parliament and of the Council of 7th March 2002 "on a common regulatory framework for electronic communications networks and services (Framework Directive)". On 7th May 2018, the updated version of the market analysis guidelines and the assessment of significant market power (SPM), which had been adopted by the European Commission in 2002, was published in the Official Journal of the European Union in implementation of Article 15 of Directive

Let us think to the so-called "European Data Protection Supervisor (EDPS)", established pursuant to article 29 of the Directive 46 of 1995 and now ruled by regulation (EU) 2016/679[45]. This body – whose official name is *Group for the protection of persons with regard to the processing of personal data* – is composed of a) a representative of each national authority established on the subject, b) a member of the European Commission and c) a representative of each of the EU authorities linked to the matter involved[46]. The European body works closely with the national counterparts, in Italy for example the administrative independent Authority for privacy[47]. The Group examines all questions related to the national implementing legislation, in view to assure uniformity in interpretation and implementation; it formulates, for the Commission's use, an opinion on the level of protection of the Union and in third Countries; it advises the Commission on any project to amend this Directive, any draft of additional or specific measures to be taken to protect the rights and freedoms of natural persons with regard to the processing of personal data, as well as any other project Community measures affecting these rights and freedoms; it formulates opinions on codes of conduct developed at Community level. In addition, in case the Supervisor deems that divergences between the laws or practices of the Member States are likely to affect the equivalence of the protection of individuals with regard to the processing of personal data in the Community, s/he shall inform the Commission. Lastly, it may make recommendations on its own initiative on any matter concerning the protection of individuals with regard to the processing of personal data in the Community.

2002/21/EC. The new guidelines reflect the latest developments in the electronic communications market.

[44] D. MASCIANDARO, *Un'autorità europea contro il riciclaggio*, in *Il Sole 24 Ore*, 16 July 2018.

[45] 27th April 2016, so called GDPR.

[46] Art. 30 of the Directive, cit.

[47] The *Garante per la protezione dei dati personali* is an independent administrative body settled by Law 31st December 1996, No. 675, and also ruled by the Code on the protection of personal data (Legislative Decree 30th June 2003, No. 196).

It is undeniable that the lack of a modelled entity in the field of the prevention of corruption can be very detrimental. Matter of fact, the capacity in fighting corruption of the European Union is currently very limited in that, among other reasons, it established only a partial response; and this even if there is no doubt about the need to combat corruption in a functional way to the creation of a European legal and economic area, through both substantive and procedural rules (including coordination among State administrations and between them and the European administration), both at the prevention and repression level. In sum, the «comprehensive EU anticorruption policy» set up on 2003[48] seems somehow lost, and what is left is the initiative to adopt a two-year report on the state of corruption in each Member State of the Union (whose first edition dates back to February 2014)[49], while the EU membership to GRECO remains stalling. In fact, only the repressive lever has been principally activated[50] (after Lisbon Treaty using articles 82-86 TFEU), employing bodies such as OLAF, EUROJUST, EUROPOL and, in the near future, EPPO for investigation and prosecution purposes. In conclusion, in the EU still too little exists for the prevention of corruption and the existing repressive instruments are limited to fighting corruption and fraud committed against EU financial interests[51], as opposed to European corruption *tout court*.

Far more ambitious is the project – of which the Italy could be the promoter – to set up an integrated administrative body, based for example on the model of the European Union's external action Service, composed by members from the General Secretariat of the Council, the Commission, and the Member States. The currently functioning Service aims to achieve the goal of uniting three different cultures into a single

[48] COM(2003) 317 final; COM(2011) 308 final.

[49] "EU anti-corruption Report", 3rd February 2014, COM(2014) 38. About the negative implications of that decision see https://euobserver.com/institutional/136775.

[50] See the framework decision 2003/568/JHA of 22nd July 2003 "on combating corruption in the private sector".

[51] Directive (EU) 2017/1371 of 5th July 2017 "on the fight against fraud to the Union's financial interests by means of criminal law". On the topic see N. PARISI, D. RINOLDI, *"Economia lecita" e protezione del bilancio dell'Unione europea tramite il diritto penale*, in *Il diritto penale della globalizzazione*, 2017/3-4.

body: the Community (inherited from the European Commission's Directorate-General for External Relations and Development); that derived from the political unit and crisis management structures of the Directorate General of the Council Secretariat of the Union; and that of the national diplomacies of the twenty-eight Member States. This is an example of integrated administration between the two levels of administrative governance at stake: that of the Union and those of the States.

It is clear that this type of composite institution – without undermining the national authorities – would more effectively regulate, supervise and organize the fight against European corruption which, by its very nature, requires a multi-levelled response, i.e. one characterized by a combination of different strategies, such as the economic level and the administration of justice.

In conclusion, Italy, ANAC and European Union have a lot of work to do to better implement the Merida Convention in that it indicates that «corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential» and, consequently, «the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective»[52].

[52] Fourth and tenth paragraphs of the Convention preamble.

OBEDIENCE TO AUTHORITY AND THE RELATION BETWEEN LAW AND MORAL: KANT AS LEGAL POSITIVIST?*

Alexandre Travessoni Gomes Trivisonno

1. Introduction

The question about the relation between law and morality is not merely theoretical. It is a part of the debate about the concept of law, which has practical consequences for legal application. In this essay, I want to investigate how Kant's position regarding the right to revolution or, in more general terms, the right to disobey political authority, reflects on his concept of law. Kant defended, at least in the *Doctrine of Right*, a connection between law and morality. Yet, Jeremy Waldron has advocated that Kant was a positivist, for he denied the existence of any form of resistance from the people on the basis of a supra-positive or natural law. According to Waldron, Kant 'has set out the advantages of positive law and given an indication of what we stand to lose if we

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abandon it'[1]. On the other hand, Robert Alexy accomplishes that Kant advocated a duty to obey political authority, but defends that this is not enough to consider someone a legal positivist[2]. In order to have a full picture of the relation between law and moral in Kant I will begin investigating whether, according to Kant, one must indeed obey every positive law, no matter its content (*section 2*). Then I will examine the reflexes of his position regarding the right of resistance on his concept of law (*section 3*). After that I will question whether his position can be considered positivist or not (*section 4*) and, as a conclusion (*section 5*), I will handle the problems of the conception Kant adopted.

2. Kant on the right of resistance

What is Kant's position regarding the right to revolution, or, in more general terms, about the right of resistance? I will concentrate my analysis on the position Kant defended in the *Doctrine of Right*[3], but I will start with a short description of what he says about the topic in *Theory and Practice*[4].

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[1] G. WALDRON, *Kant's Legal Positivism*, in *Harvard Law Review*, 109, 1995-1996, p. 1535-1566 at 1566.

[2] R. ALEXY, *On the concept and nature of law*, in *Ratio Juris*, 21 (3), 2008, p. 281-299 at 285-286.

[3] Kant's works will be quoted according to the Academy Edition. The first quotation will include the full title of the work, whereas the following references will contain the titles' abbreviations: *MM* for the *Metaphysics of Morals*, *TP* for *On the common saying: that may be correct in theory, but it is of no use in practice*, *PP* for *Towards Perpetual Peace*, *Refl* for Kant's *Reflexions*, *LP* for *On a supposed right to lie from philanthropy* and *MM* for *The Metaphysics of Morals*.

[4] Although Kant handled these topics in other works such as *Perpetual Peace* (I. KANT, *Zum ewigen Frieden*, in *Kants gesammelte Schriften*, Königlich Preußischen Akademie der Wissenschaften, Bd. VIII, Berlin, 1907/14, p. 341-386; English translation: I. KANT, *Towards Perpetual Peace*, in ID., *Practical Philosophy*, Mary J. Gregor [trans., ed.], Cambridge, 1996, p. 315-351) and the *Reflexions* (I. KANT, *Reflexionen zur Rechtsphilosophie*, in *Kants gesammelte Schriften*, Königlich Preußischen Akademie der Wissenschaften, Bd. XIX, Berlin, 1934), *Theory and Practice* and *The Metaphysics of Morals* (*Doctrine of Right*) are the texts in which Kant developed more precisely his ideas about them.

Kant's defense of the duty to obey authority appears for the first time in *Theory and Practice*, where he says that 'the power within a state that gives effect to the law is unopposable'[5]. This may infer that (a) the power within a state that gives effect to the law can and, moreover, *must* be coercive, and that (b) there is no right of resistance, even if the legal system is unjust. Kant justifies this position by arguing that without means of enforcement and coercion no state could survive, for if this maxim were made universal, the civil constitution would be annihilated. Kant then affirms:

> From this it follows that any resistance to the supreme legislative power, any incitement to have the subject's dissatisfaction become active, any insurrection that breaks out in rebellion, is the highest and most punishable crime within a commonwealth, because it destroys its foundation. And this prohibition is unconditional, so that even if the power or its agent, the head of the state, has gone so far to as to violate the original contract and has, thereby, according to the subject's concept, forfeited the right to be legislator inasmuch as he has empowered the government to proceed quite violently (tyrannically), a subject is still not permitted any resistance by way of counteracting force[6].

This statement seems to reveal irreproachable evidence of an absolute duty to obey authority. It is important to stress here the fact that Kant refers both to the *supreme legislative power* and to the *head of the state*, that is, to both the legislative and the executive powers. Although Kant does not go further on this issue here (he will return to this topic in the *Doctrine of Right*), he explicitly asserts that no matter the violation is performed by the legislative power or by the executive (the head of the state), there is no right to oppose it.

Although these words seem conclusive, Westphal sees Kant's position regarding obedience in *Theory and Practice* as dubious. He bases

[5] I. KANT, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, in *Kants gesammelte Schriften*, Königlich Preußischen Akademie der Wissenschaften, Bd. VIII, Berlin, 1907/14, p. 273-313 at 299; English translation: I. KANT, *On the common saying: that may be correct in theory, but it is of no use in practice*, in ID., *Practical Philosophy*, Mary J. Gregor (trans., ed.), Cambridge, 1996, p. 277-309, at 299.

[6] I. KANT, *TP*, p. 299.

his argument on Kant's writing in the previous paragraph, which refers to the law the legislator gives:

> For, provided it is not self-contradictory that an entire people should agree to such a law, however bitter they might find it, the law is in conformity with right. But if a public law is in conformity with this, and so beyond reproach (*irreprehensible*) with regard to right, then there is also joined with it authorization to coerce and, on the other's part, a prohibition against actively resisting the will of the legislator; that is, the power within a state that gives effect to the law is also unopposable (*irresistible*)'[7].

Westphal argues that Kant might have meant that not *every* law, but only *legitimate* law, should be obeyed[8]. He believes Kant was of two minds regarding this topic and suggests that, on the one hand, Kant viewed legitimacy of law as a requirement for its enforcement (meaning that only legitimate law should be enforced), while also arguing that supreme state power is necessary for the exercise of state authority as well as a necessary condition for the existence of right[9]. For Westphal, Kant does not resolve in *Theory and Practice* the tension between the *a priori* metaphysical elements of his theory and his moral-pragmatic views, although he acknowledges that Kant offers a consistent solution to this issue in the subsequent writings[10]. Although I agree that such tension exists, I will not elaborate on this aspect of Westphal's analysis. I just want to stress that, in my view, when Kant says that 'if a public law is in conformity with this, and so beyond reproach (*irreprehensible*) with regard to right, then there is also joined with it authorization to coerce and, on the other's part, a prohibition against actively resisting the will of the legislator', he *does not* mean that *only a law with that the entire people could agree* is legitimate and that *only such a law* cannot be opposed. Instead, I believe that Kant meant that *only a law*

[7] I. KANT, *TP*, p. 299.

[8] K.R. WESTPHAL, *Kant on the state, law and obedience to authority in the alleged 'anti-revolutionary' writings*, in S. BYRD, J. HURSCHKA (eds.), *Kant and Law*, Burlington, Vt., 2006, p. 201-244 at 206.

[9] K.R. WESTPHAL, *op. cit*., p. 206-207.

[10] K.R. WESTPHAL, *op. cit*., p. 207.

that the entire people could agree is legitimate and, therefore, this law cannot be opposed. Furthermore, in my view, Kant's writing on this may suggest that the enforcement of an illegitimate law is not itself an illegitimate act. Perhaps, Kant meant through his writing in *Theory and Practice* that although the legitimacy of a law is determined by it being accepted by the entire people, it also is legitimate to enforce an illegitimate law. Thus, when Kant says that the legislator cannot err because he has the idea of the original contract at hand[11], he does not mean that the legislator cannot make an illegitimate law, but, rather, that the legislator can always know what is right. Therefore, if the legislator makes an illegitimate law, he does it knowing what he is doing. Hence, obedience seems to be, already in *Theory and Practice*, an absolute duty.

Now I should handle the way Kant dealt with obedience to authority in the *Doctrine of Right*. In paragraph 45, Kant divides the powers of the state in three:

> Every state contains three *authorities* within it, that is, the general united will consists of three persons (*trias politica*): the *sovereign authority* (sovereignty) in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge (*postestas legislatoria, rectoria et iudiciaria*)[12].

In paragraph 46, following the tendency already established in *Theory and Practice*, he affirms that

> it can be said of these authorities, regarded in their dignity, that the will of the *legislator* (*legislatoris*) with regard to what is externally mine or yours is *irreproachable* (*irreprehensible*); that the executive power of the *supreme ruler* (*summi rectoris*) is irresistible; and that the verdict of

[11] I. KANT, *TP*, p. 299.

[12] I. KANT, *Die Metaphysik der Sitten*, in *Kants gesammelte Schriften*, Königlich Preußischen Akademie der Wissenschaften, Bd. VI, Berlin, 1907/14, p. 203-493 at 313; English translation: I. KANT, *The Metaphysics of Morals*, in ID., Practical Philosophy, Mary J. Gregor (trans., ed.), Cambridge, 1996, p. 363-603.

> the highest *judge* (*supremi iudicis*) is *irreversible* (cannot be appealed)[13].

At first glance, Kant seems to suggest that one has an absolute duty not to oppose the three authorities (in parallel to his writings in *Theory and Practice*). Moreover, in the General Remark that follows paragraph 49, there are other pieces of evidence in this sense. For example, Kant says that the people cannot judge otherwise than the present head of the state[14], that someone who wants to resist authority should be punished, got rid of or expelled[15], that when the ruler proceeds contrary to the law, the subjects may oppose this injustice by complaints, but not by resistance[16], that a people cannot offer any resistance to the legislative head of the state which would be consistent with right[17] and that there is no right to sedition, or rebellion, least of all against the head of the state[18], with any attempt at this warranting high treason[19]. Kant also says that a change in the constitution can be made by the sovereign, but not by the people, and if this reform is made, it affects only the executive authority, not the legislative[20].

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[13] I. KANT, *MM*, p. 316.

[14] 'The people cannot and may not judge otherwise than as the present head of the state (*summus imperans*) wills it to' (I. KANT, *MM*, p. 318).

[15] 'If a subject, having pondered over the ultimate origin of the authority now ruling, wanted to resist this authority, he would be punished, got rid of, or expelled (as an outlaw, *exlex*) in accordance with the laws of this authority, that is, with every right' (I. KANT, *MM*, p. 318-319).

[16] When the ruler 'proceeds contrary to the law (…), subjects may indeed oppose this injustice by *complaints* (*gravamina*) but not by resistance' (I. KANT, *MM*, p. 319).

[17] 'A people cannot offer any resistance to the legislative head of a state which would be consistent with right' (DR, VI: 320).

[18] 'There is (…) no right to sedition (*seditio*), still less to rebellion (*rebellio*), and least of all is there a right against the head of state as an individual person (the monarch)' (I. KANT, *MM*, p. 320).

[19] 'Any attempt whatsoever at this is high treason (*proditio eminens*)' (I. KANT, *MM*, p. VI: 320).

[20] 'A change in a (defective) constitution, which may certainly be necessary at times, can therefore be carried out only through *reform* by the sovereign itself, but not by the people, and therefore not by *revolution*; and when such a change takes place this

The reason Kant presents, in the *Doctrine of Right*, for not accepting coercion against authority is the one he had already presented in *Theory and Practice*. He argues that if there were a right to resist the supreme commander, he would not be the supreme commander, but instead, the supreme commander would be the one that can resist him, and this is self-contradictory[21]. A few lines later, he presents the argument once again: for the people to have the right to oppose the highest authority, there should be a public law authorizing it. Such a provision in public law would integrate the people with the highest authority – in effect establishing the people as sovereign (again a potentially self-contradictory position)[22]. Thus, it was the need of a highest authority and the necessity of avoiding a contradiction that made Kant defend his position regarding an absolute duty of obedience.

The ones like Westphal, who argue against this interpretation, that is to say, the ones who defend that the duty of obedience was, for Kant, not absolute, in general affirm that, for him, this duty is restricted to the cases in which positive law is legitimate, that is to say, in which it does not violate the united will of the people. That is a possible interpretation, for indeed, as we have seen, Kant had already affirmed, in *Theory and Practice*[23], that only a law, which the entire people could agree, is legitimate. But from this it does follow that only such a law which the entire people could agree should be obeyed. Besides that, in my view, this interpretation has the disadvantage of contradicting many explicit textual pieces of evidence not only from the *Doctrine of Right* but also from *Theory and Practice* and from *Towards Perpetual Peace*[24]. In favor of it, as reminds us Alexy, there is only one textual explicit evidence in the appendix to the second edition of the *Metaphysical First Principles of the Doctrine of Right*, where Kant says that the categorical

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reform can affect only the *executive authority*, not the legislative' (I. KANT, *MM*, p. 318).

[21] I. KANT, *MM*, p. 319.

[22] I. KANT, *MM*, p. 320.

[23] I. KANT, *MM*, p. 299.

[24] I. KANT, *PP*.

imperative 'obey the authority who has power over you' is restricted by the exception[25] '(in whatever does not conflict with inner morality)'[26].

How should we then understand Kant's position? I want to propose an interpretation that seems to me to be the most coherent with Kant's writings. To fully understand the meaning of Kant's conception about the duty of obedience to authority one has first to distinguish between obedience to the sovereign (legislator) and obedience to the ruler. Kant argues that 'a people's sovereign (legislator) cannot also be its *ruler*, since the ruler is subject to the law and so is put under obligation through the law by *another*, namely the sovereign'[27], and adds that 'the sovereign can also take the ruler's authority away from him, depose him, or reform his administration'[28]. Thus, from these passages follows that the ruler can lose his power if it is not in conformity with the law. Although Kant does not talk here about a right of resistance, which would be exercised by the people, he talks about a right of the sovereign to oppose the ruler. There is additional evidence in this vein. For example, Kant says a few pages after the previous quotation that although no active resistance against the government may be exercised by the people (an active resistance), a negative resistance, that is, a refusal of the people (in parliament) to accede to every demand the government puts forth as necessary for administering the state may exist[29].

How can one harmonize the quotations just mentioned in the paragraph above (that suggest a right to resist) with those presented earlier in this paper (paragraph 46 and the General Remark that follows paragraph 49, that indicate an absolute duty to obey authority)? Is there an absolute duty to obey authority or is there a right to resist it? At least at first glance, these positions seem contradictory, but, as we are going to see, they are actually not.

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[25] R. ALEXY, *The dual nature of law*, in *Ratio Juris*, 23 (2), 2010, p. 167-182 at 174. According to Alexy, these exceptions are found in I. KANT, *Refl* 8.014, XIX: p. 6-9; 8.043, XIX: p. 7-16; 8055, XIX: p. 582-596.

[26] I. KANT, *MM*, p. 371.

[27] I. KANT, *MM*, p. 317.

[28] I. KANT, *MM*, p. 317.

[29] I. KANT, *MM*, p. 322.

Kant believed that the legislative power is the highest source of political power. Recall that, in paragraph 45, after presenting the three powers of the state, Kant says that they are

> like three propositions in a syllogism: the major premise, which contains the *law* of that will; the minor premise, which contains the *command* to behave in accordance with the law, that is, the principle of subsumption under the law, and the conclusion, which contains the *verdict* (sentence), what is laid down as a right in the case at hand[30].

Hence, if the legislative is the major premise in the syllogism, it is above the executive and contains its power. Because the legislative is the highest authority, it is coherent to argue that it can oppose resistance to the ruler. This much was accepted by Kant, who himself wrote of the legislator as the rightful defender against the illegitimate ruler. However, ultimately, under this argument, the ruler is the one that holds the decision of what is actually going to be enforced because if the ruler does not accept the legislator's limitation (e.g., resistance in parliament), the capacity of the legislator to offer anything more than resistance to the ruler is limited[31].

In my view, Kant believed the *people* had an absolute duty of obedience, that is to say, a duty that should always be fulfilled. We can conclude that because of two reasons. First, as we have seen in the quotations above, Kant argued that no resistance could be opposed by the people even if *the authority is not legitimate* (i.e., even if the authority has taken power illegitimately); second, even if *the command emanated by the authority is not legitimate*, it should be fulfilled (no matter the legitimacy of the authority itself). Thus, Kant believed that the people could never oppose authority, but he admitted that the legislative power, which is, according to him, the source of the ruler's power, could oppose it, not by means of coercion, but only passively, in parliament. This is, I believe, Kant's view on this matter.

Unfortunately, there are two significant problems associated with Kant's position. First, if the legislator does not offer resistance to an

[30] I. KANT, *MM*, p. 313.

[31] K.R. WESTPHAL, *op. cit*., p. 393-397.

unjust ruler (or to an unjust command emanated from a ruler) or if the legislator itself performs an unjust act, nothing can be done. Second, since the ruler (i.e., the executive) has the power to coerce, the legislator can do little to redress the despotic use of power (even if it wants to), because the legislator, by its nature, has no power to coerce (i.e., to use force).

3. Kant's conception about the right of resistance and the relation between law and moral

3.1. The right of resistance and the principle of right

If I am correct in my analysis, Kant defended that *the people had an absolute duty not to offer resistance to authority*, but admitted *a passive duty to be exercised by the legislator against the executive*. From this, we can conclude that the executive is the supreme authority regarding the use of force, though it is (theoretically) under the legislative. In practice, there can be no coercion against an illegal command emanated by the ruler, although there can be, in one case, coercion against an illegal command emanated by the legislative. Let us see.

Kant himself admits that the executive creates no laws, but he recognizes its power to make decrees. Thus, if the executive performs the illegitimate command, the legislative can oppose it, but *not through force*. If the command emanates from the legislative, there can be coercion against it because the legislative has no coactive power. However, the executive does possess such powers and, therefore, the ruler may not enforce the laws the legislative creates. Thus, when the legislative establishes a law, the executive decides if it will be coerced or not (i.e., accept and enforce the law or not).

Let us imagine two scenarios. In one, the legislative creates a legitimate law. The executive can choose to enforce it or not (although, from a moral point of view it *should* enforce it). If the executive decides to enforce it, then this enforcement is legitimate. If the executive commands the non-enforcement of such law, then the legislative can oppose it passively but can use no force against the executive. In anoth-

er scenario, the legislative creates an illegitimate law. If the executive does not enforce it, then this non-enforcement would be in principle legitimate[32]. If the executive enforces it, the legislative will not oppose the illegitimate enforcement because it (the legislative) was the source of the illegitimacy itself. These scenarios illustrate that Kant's reasoning is at least problematic (and potentially flawed) to the extent to which his work provides a foundation for excusing the right to disobey a duty. Does the violation of one's duty provide another with the right to violate his duty, ultimately establishing equilibrium of sorts? When grounding law, Kant admits so: coercion against illegitimate use of freedom is not, in the end, against freedom in conformity with universal laws. However, when dealing with the right to lie, he does not admit this kind of reasoning: I cannot lie to a murder, even to save an innocent's life[33]. Therefore, is it not clear whether Kant would place in the hands of the ruler the power to correct the legislator's illegitimate laws (and perhaps he would not since he argued that the legislative is the highest source of power). But what is of interest here is that the ruler can decide what will be enforced. Thus, one can conclude that, in Kant's system, it is the ruler who holds supreme authority or, using Westphal words, there is, in Kant, a conflation of powers within the hands of the ruler[34].

Hence, since the executive is the supreme source of coercion, it is almost irrelevant, *in practice*, that the legislator is the supreme source of power. The sovereign (legislator), who is legally the supreme source of power, does not have at his disposal the same coercive means as does the ruler. Thus, the ruler can violate the law made by the legislator. This is problematic, since the law should be provided with the *au-*

[32] That would be coherent with the affirmative that all legislation should be founded in the general agreement of the people. Maybe it could be argued that the executive should enforce such an illegitimate law, for the legislative, which is the higher source of power, has enacted it.

[33] I. KANT, *Über ein vermeintes Recht aus Menschenliebe zu lügen*, in *Kants gesammelte Schriften*, Königlich Preußischen Akademie der Wissenschaften, Bd. VIII, Berlin, 1907/14, p. 423-430; English translation: I. KANT, *On a Supposed Right to Lie from Philanthropy*, in ID., *Practical Philosophy*, Mary J. Gregor (trans., ed.), Cambridge, 1996, p. 609-615.

[34] K.R. WESTPHAL, *op. cit*.

thorization to coerce and the *means* to coerce. Kant's attempt to avoid a contradiction generates itself a contradiction. The nature of political power endorses this conclusion: Kant had said that the legislative is the power that creates laws and the executive is the power that enforces these laws. Yet, Kant's definition of right maintains that right is always connected with the possibility of coercion[35]. Although the legislative legally decides *what* should be coerced or not, the executive possesses the *means* of coercion. Moreover, even if the executive's commands are illegitimate, they must be obeyed.

3.2. The distinction between theoretical connection and practical effects

Is Kant's position on the right of resistance sufficient to define his view on the relation between law and moral? The answer to this question is negative. One's position about the right of resistance can be considered an element, or even an essential element of one's conception about the relation between law and moral, but not the whole conception one has about it. What then is the other element of such a conception? It is one's conception about the relation between law and moral independently of what the effects of immorality in positive law are. Robert Alexy has clearly identified these two elements: when one advocates that the relation between law and moral has no effects in legal validity one is defending, according to Alexy, a 'qualifying connection', while, on the other hand, when one advocates that the relation between law and moral has effects on legal validity one is defending a 'classifying connection'[36].

I will take Alexy's distinction, but I should use another nomenclature: I will refer to a theoretical or ideal connection between law and moral and to the practical effects of this theoretical or ideal connection between law and moral. I use the terms *theoretical connection* and *practical effects* not in the sense of theoretical and practical philosophy. Both belong to the province of practical philosophy. The term theoreti-

[35] I. KANT, *MM*, p. 231.

[36] R. ALEXY, *Begriff und Geltung des Rechts*, Freiburg/München, 1992, p. 48-49.

cal connection means here a foundational and material connection (in the sense that the content of law has to be in accordance with morality), while the term practical effects means effects applied to legal validity. The reason I use this and not Alexy's vocabulary is only to stress the fact that the ones who defend a theoretical connection do not necessarily defend practical effects, but, on the other hand, the ones that defend practical effects necessarily defend a theoretical connection.

The question of whether there is a right of resistance, which I have already analyzed, regards the practical effects of the relation between law and moral in the validity of positive law. Now, the theoretical or ideal connection regards the possibility of ideally deriving law from morality. Naturally, if one defends to exist no theoretical relation between law and moral, she or he cannot defend that practical effects, in the sense I defined practical effects, exist. Yet, if one does defend the existence of this theoretical or ideal connection, one can either defend that this connection has practical effects on legal validity or not.

Thus, identifying that one denies any right of resistance is not sufficient to affirm that one denies any relation between law and moral. Hence, there are, in short, three possible theses:

a. there is a theoretical connection between law and moral and this theoretical connection has effects on the validity of positive law, that is to say, there are both a theoretical connection between law and moral and practical effects of such connection;
b. there is a theoretical connection between law and moral and this theoretical connection has no effects on the validity of positive law, that is to say, there is a theoretical connection between law and moral but such connection has no practical effects;
c. there is no theoretical connection between law and moral. In this case, naturally, there can be no practical effects, for there cannot be practical effects of a connection that does not exist.

We have already seen that the duty to obey authority was for Kant absolute. This means either that he denied any practical effects of an existing theoretical connection between law and moral or that he did not even admit a theoretical connection between law and moral. In other words, in the case of Kant, thesis 'a' is excluded and thesis 'b' and thesis 'c' are positive candidates. Therefore, to find out whether Kant

defended thesis 'b' or 'c' one has to investigate whether there is a theoretical connection between law and moral in his philosophy. I should do that now.

3.3. The theoretical connection between law and moral in Kant's philosophy

There are many different possible theses about the theoretical relation between law and moral in Kant. The position that one adopts on this matter depends much on the Kantian text upon which one grounds her or his analysis. For Merle, Kant has defended two different concepts of law: one liberal and one moral. Yet, according to Merle, Kant did not endorse the two concepts in the same text. In his view, Kant defended the law as coexistence of equal empirical freedom in *Towards Perpetual Peace*[37], and law as a derivation from the moral law in the Doctrine of Right[38]. For the sake of simplification, I will limit myself to an analysis of what Kant says about this matter in the *Doctrine of Right*.

Kant affirms that right 'is the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom'[39]. Since this choice, as Kant expressly says, has to do only with external actions[40], it can be connected with coercion. Indeed, Kant says that 'there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it'[41]. And this coercion does not violate universal laws because

> resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong),

[37] I. KANT, *PP*, p. 349-350.

[38] J.-C. MERLE, *Die zwei kantischen Begriffe des Rechts*, in *Jahrbuch für Recht und Ethik*, 12, Berlin, 2004 p. 331-346, at 331-332.

[39] I. KANT, *MM*, p. 230.

[40] I. KANT, *MM*, p. 231.

[41] I. KANT, *MM*, p. 230.

> coercion that is opposed to this (as *a hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right[42].

Hence, the principle of right does not admit every kind of coercion, but only coercion that opposes a hindrance to freedom in accordance with universal laws. An illegitimate law is the one in which coercion does not hinder a particular use of freedom that *is* a hindrance to freedom in accordance with universal laws. Rather, an illegitimate is a law under which coercion hinders a use of freedom that *is not* a hindrance to freedom in accordance with universal laws. Thus, coercion, in such cases, is inconsistent with the principle of right and, hence, it is not legitimate.

The existence of a moral criterion to check whether the law is legitimate or not should be sufficient to prove that there is a theoretical connection between law and moral in Kant. Yet, there are more pieces of evidence in favor of this thesis: according to Kant, duties of right are indirect ethical duties[43] and there is an innate right of freedom[44].

My conclusion is that Kant defended, at least in the *Metaphysic of Morals*, a theoretical connection between law and moral. And, as we have seen, one that defends a theoretical connection can either defend such connection has practical effects or not. As we have also seen, Since Kant defended a theoretical connection between law and moral but admitted no right of resistance, we have to conclude that he *denied any practical effects of an existing theoretical connection between law and moral*. Why did Kant do that? As I mentioned above, Kenneth Westphal suggests that Kant thought, on the one hand, that legitimacy of law is a requirement for its enforcement, while, on the other hand, he simultaneously argued that supreme state power is necessary for the exercise of state authority – a necessary condition for the existence of law. Westphal also suggests that this dubious position reflects a tension between the *a priori* metaphysical elements of Kant's theory and his

[42] I. KANT, *MM*, p. 230.
[43] I. KANT, *MM*, p. 219.
[44] I. KANT, *MM*, p. 237.

moral-pragmatic views[45]. Alexy also suggests that Kant's position can be derived of this tension: he talks about, on the one hand, a claim of correctness or justice and, on the other hand, legal security, both present in Kant's concept of law[46].

One could argue that Kant's rejection of any practical effects of an existing theoretical connection can be seen as a diminishment of the ideal dimension of law. That is a possible interpretation. Yet, it has to be stressed that, for Kant, legal security is a moral requirement, that is to say, it comes out of the ideal dimension of law, precisely like material correctness does. Thus, it is possible to defend the interpretation that, for Kant, the reason why the theoretical or ideal connection between law and moral has no practical effects on legal validity is the ideal dimension itself or, in other words, comes out of the very idea of a theoretical or ideal connection between law and moral.

4. Is Kant's position positivist?

The result of my analysis is that Kant defended a theoretical connection between law and moral, but admitted no practical effects of such a connection. Is Kant's position positivist or not?

The question of whether Kant was a legal positivist or not depends on one's concept of legal positivism. I will Take Robert Alexy's definition, according to which all positivists defend the separation thesis, that is to say, they defend that there is no necessary connection between law and moral[47], while all non-positivists defend the connection thesis, that is to say, they defend that there is a necessary connection between law and moral[48]. Following a tendency already established in contemporary legal theory, Alexy divides legal positivism into two conceptions: inclusive and exclusive legal positivism. According to him, also non-

[45] K.R. WESTPHAL, *op. cit*.

[46] R. ALEXY, *On the concept and nature of law*, cit.

[47] R. ALEXY, *op. ult. cit.*, p. 284.

[48] R. ALEXY, *op. ult. cit.*, p. 285.

positivism can be divided in three conceptions: exclusive, inclusive and super-inclusive non-positivism[49].

Exclusive positivism, which, according to Alexy, is defended by Raz, affirms that the moral is necessarily excluded from the concept of law[50]. Inclusive positivism, which had its main thesis formulated by Kelsen and is defended by Coleman, affirms that the moral does not necessarily have to be either excluded or included in the concept of law, that is to say, the inclusion is a matter of convention, depending on what positive law determines[51].

Exclusive non-positivism, such as Beyleveld and Brownsword's, affirms that every degree of immorality of a legal norm leads to its invalidity[52]. Inclusive non-positivism, which was defended by Radbruch and is adopted by Alexy himself, affirms that the immorality of a legal norm leads to its legal invalidity only when the threshold of extreme injustice is achieved[53]. Super-inclusive non-positivism affirms that the immorality of a norm has no effects on its legal validity, that is to say, that a norm that is substantially immoral remains legally valid[54].

What is Kant's position in Alexy's classification? Let us first examine Alexy's reasoning about this. According to Alexy, exclusive positivism affirms that the concept of law has no connection at all with moral[55]. For the reasons we have seen above, it would be very difficult to suggest that Kant's concept of law, especially the one that he presented in the *Doctrine of Right*, fulfills this criterion. On the other hand, exclusive non-positivism affirms that the immorality of a legal norm always leads to its legal invalidity, while inclusive non-positivism affirms that the immorality of a legal norm leads to its legal invalidity when the threshold of extreme injustice is achieved[56]. Since Kant did not accept any right of resistance, legal validity is not affected at all by

[49] R. ALEXY, *op. ult. cit.*, p. 284.
[50] R. ALEXY, *op. ult. cit.*, p. 285.
[51] R. ALEXY, *op. ult. cit.*, p. 285.
[52] R. ALEXY, *op. ult. cit.*, p. 287.
[53] R. ALEXY, *op. ult. cit.*, p. 287.
[54] R. ALEXY, *op. ult. cit.*, p. 288.
[55] R. ALEXY, *op. ult. cit.*, p. 286.
[56] R. ALEXY, *op. ult. cit.*, p. 287.

immorality. Thus Kant can be considered neither as an exclusive nor as an inclusive legal non-positivist. Therefore, for Alexy, the question whether Kant was positivist or not is the question of whether he was an inclusive positivist or a super-inclusive non-positivist. It is hard to answer this question, for inclusive positivism and super-inclusive non-positivism are on the frontier between positivism and non-positivism. According to Alexy, at first glance, it seems that Kant's concept of law can be interpreted either as inclusive positivism or as super-inclusive non-positivism.

On the one hand, as we have seen, Kant's concept of law is firmly connected with moral, for all duties of right are ethical duties and there is an innate right of freedom. As observes Alexy, these ideas cannot be considered non-positivist[57]. But, on the other hand, Kant defends, as we have also seen, that every legal norm, no matter how unjust its content is, is valid. This position is typically positivist. Alexy believes that Kant should be considered a super-inclusive non-positivist, because, in his view, the denial of any right of resistance is not sufficient to erase the fact that he derives law from morality.

I want to use the distinction between *theoretical connection* and *practical effects of such connection*, which I took from Alexy, to precise in which category Kant should be placed. Exclusive positivism admits no connection between law and moral. It defends not only that immorality has no effects in law, but rather that there is no connection between law and moral at all. Therefore they defend thesis 'c' mentioned above. Inclusive positivism stands for a conflation between theoretical connection and practical effects. What is important for them is that the law determines the relation between law and moral. Therefore they defend that the law can either adopt thesis 'a' or thesis 'c' mentioned above. Exclusive non-positivism defends thesis 'a' mentioned above, in a very strong form, for, according to it, every injustice deprives legal validity of legal norms. Inclusive non-positivism defends thesis 'a' in a light form, for, according to it, only extreme injustice deprives legal validity of legal norms. Last but not least, super-inclusive non-positivism defends thesis 'b'. In short:

[57] R. ALEXY, *op. ult. cit.*, p. 288.

exclusive positivism	inclusive positivism	super-inclusive non-positivism	inclusive positivism	exclusive positivism
thesis 'c'	theses 'a' or 'c', depending on positive law	thesis 'b'	light thesis 'a'	strong thesis 'a'

If this is correct, Kant is a super-inclusive non-positivist, as states Alexy, for he defended thesis 'b'. Of course one could question this classification. Questioning it would imply questioning the very possibility of a super-inclusive non-positivism. One could say, for instance, that super-inclusive non-positivism is no non-positivism, but rather positivism, for the defense of a merely theoretical connection, without any practical effects, is not, in fact, the defense of a moral connection. It is important to stress that the classification adopted here assumes that a merely theoretical connection between law and moral is sufficient to consider a theory non-positivist, for a theoretical connection means that there are both a moral criteria to evaluate the correctness of positive law and a moral duty to establish a positive law that is morally correct.

5. Conclusion: the remaining problem of Kant's super-inclusive non-positivism

My analysis confirms Alexy's affirmation that Kant was a super-inclusive non-positivist. But there is still one observation to be made. On the one hand, Kant's super-inclusive positivism recognizes the double nature of law, that is to say, that law has an ideal and a real dimension. By doing that it presents a criterion to evaluate the correctness of positive law. On the other hand, its denial of any form of resistance, that is to say, its denial of any practical effects of a strong existing connection between law and moral leads, in practice, to a moral character of the duty to obey the legal system, even when it is unjust. This means that, in Kant, an immoral legal command is not only legally valid, as some positivists believe, but also morally valid! How is it possible? How can there be a moral duty to obey an immoral legal command, especially when the legislator has the moral duty to establish a moral legal command? As we have seen, Kant believed there is no contradic-

tion here, for a contradiction would exist if someone had a right to resist the supreme power, which, in this case, would not be the supreme power anymore. The moral duty to obey an immoral juridical norm is a price one has to pay when one defends thesis ‘b’. The final question, which cannot be handled here, is whether this price is so high that it invalidates thesis ‘b’ itself.

THE CONCEPT OF "SYSTEM" IN LEGAL THEORY: A PHILOSOPHICAL INSIGHT

Federico Puppo

1. Introduction

The aim of this paper is to present a brief reflection on the concept of "system", a real cornerstone of legal knowledge and law itself. Just think how common it is to refer to such a concept in everyday conversation about law: we as jurists often, or even always, speak about codes (actually the systematic product of a certain type of legal knowledge) or, even more clearly, about systems of sources of law or sets of rules, organized in hierarchical way.

To tell the truth, it could be really difficult to eliminate the concept of "system" from the legal field without serious consequences: but in the last decades a deep reconsideration of the previous conception of law – the modern one, in which the concept of system has been developed – has been carried out due to the new shapes of law we continuously are obliged to consider. *Lex mercatoria*, *lex electronica*, soft law, conflicts between international and national sets of rules within the so called 'dialogues among Courts' (the example of EU is prominent), and so on, are a few examples of new kinds of aspects of law (and/or our ways of conceiving law) that were neither predictable nor desirable for that conception of law that can be called 'modern'.

This latter is a conception with characters defined «within the Jacobin period of the French revolution, later threatening on the nineteenth-

century evolution of doctrine and practice»[1]. That is the conception which is nowadays, in times that can be called of «pos-modernism»[2], clearly in crisis, with the connected ideas of system of sources of law and legal system too[3].

These issues will not be considered in this paper, but they are the frame within our considerations will be developed. Rather, we would like to offer an answer to a previous basic question, on the nature of the concept of "system" that is now in crisis. In order to reach this aim, our paper will be organized as follows: at first, we will consider what we, as jurists, usually refer when we talk about the system; then we will study its genesis and its development from an historical-philosophical point of view; lastly, we will try to draw up some conclusions.

But, before all, a short epistemological clarification is needed. In fact, once we speak of concepts like the one of "system" (but think also to some other typical legal concepts: "justice", "validity", "rightfulness", "fairness", but the very idea of "law" too, and so on) a question may arise: are those concepts made up by our discourses or do they exist before our reasoning? In other words: do we *discover* them or do we *create* them? It is clear that we cannot go into details here, but it is a problem very similar to the one of Platonism in mathematics; and its answer depends on which kind of conception you have.

In a nutshell: if you were a legal positivist, and so, from a certain point of view, a conventionalist, you shall probably choose for the idea

[1] P. GROSSI, *Della interpretazione come invenzione (la riscoperta pos-moderna del ruolo inventivo della interpretazione)*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 47, 2018, pp. 9-19: 2 (our translation).

[2] *Ibid*. (our translation).

[3] «The mainstream theory of law is still based on this compromise: judges may interpret only sources established by the constituent power or by the legislator. The crisis (of the doctrine) of sources, however, forces us to reconsider this compromise. Great constitutional and international supreme courts, in fact, also bestow on themselves the power to choose their sources. In particular, they promote to the rank of supreme sources normative materials that were not previously considered to be formally legal, and redefine the hierarchical relationships between them and formal sources» [M. BARBERIS, *For a truly realistic theory of law*, in *Revus* [Online], 29, 2016, § 29 (available at: http://journals.openedition.org/revus/3624; connection on 16 July 2018)].

that legal «concepts come *after* legal norms and positive law»[4]; while, being a natural lawyer, and so, from a certain point of view, against conventionalism, you shall probably opt for the idea that «concepts come *before* legal norms and positive law (or, at least, that not always they come after them)»[5]. Obviously, it is also possible to have, so to say, middle-sized-conceptions and so to think that something is created by our conventions, but something it is not: in fact the two main philosophical conceptions of legal positivism and natural law theories can be nowadays nearer than they were in the past, as discussions on rules' and principles' relations clearly show.

In this regard, it could be still possible to argue for the existence of «the legal system [as] a theoretical model of positive law»[6], at least for rules' domain, that can be considered to be the core of law. While, as for principles, which are the wider moral domain of law, the possibility to speak in term of system seems to be more problematic, being principles plural and conflicting in nature, sometimes inconsistently. By the way, it is not so easy, in real cases, to distinguish rules from principles, and so to draw a clear line between them[7]: in this way, our common idea of system is put under discussion.

2. The systematic view of law

In order to understand what a system is, it could be useful to remember that the word "system" comes from

> Late Latin *systema* "an arrangement, system", from Greek *systema* "organized whole, a whole compounded of parts", from stem of *synistanai*

[4] A. PINTORE, *La teoria analitica dei concetti giuridici*, Napoli, 1990, p. 1 (her italics; our translation).

[5] *Ibid*. (her italics; our translation).

[6] M. BARBERIS, *Manuale di filosofia del diritto*, Torino, 2011, p. 181 (our translation).

[7] *Ibid*.

> "to place together, organize, form in order", from *syn-* "together" + root of *histanai* "cause to stand"[8].

From this point of view, it is clear that the word refers to the idea of putting together different things organized in a certain way: from this point of view, not every kind of collection can be defined or identified as system, but only that one that is organized according to a certain type of order. So, at a first step, "system" may probably be defined as: the representation of the internal structure of a complex set of different entities.

In legal domain, legal norms are types of entities: which kind of relations they should have to recognize the existence of a system has been the main question discussed by one of the prominent philosopher of law of the last century, Hans Kelsen, whose legal formalism represented one of the theoretical basis for the development of the 20th-century legal theory. For reasons that we are going to see, the basic idea discussed by Kelsen is that legal system must be considered from a formal point of view as set of norms organized within the unity and coherence given by the hierarchy of norms. In fact, coherently with its Kantian philosophical background, according to Kelsen it is possible to recognize the existence of a system once a hierarchical order is given:

> A legal order is an aggregate or plurality of general and individual norms that govern human behaviour, that prescribe, in other words, how one ought to behave. […]. A plurality of norms is an order if the norms constitute a unity, and they constitute a unity if they have the same basis of validity. […]. The basis of the validity of a norm, an "ought", can only be another norm, another "ought"; it cannot be a fact, an "is" […]. The appeal to the basis of the validity of a legal norm cannot go on interminability. It leads in the end to an act whose subjective meaning, a norm, cannot be interpreted on the basis of positive law as its objective meaning. […]. The subjective meaning of this last act can only be *presupposed* as its objective meaning. […]. The norm that is the subjective meaning and, in virtue of the presupposition, also the objective meaning of this last act is the basis of the validity of all other legal norms belonging to a legal order. It is the constitution of the legal or-

[8] See the word "System" available at the website https://www.etymonline.com/word/system (connection on 02 August 2018).

> der […], is […] the *basic norm*. […] The basic norm is the *basic regulator of the creation of the legal order*. […]. The forgoing remarks show that a legal order is not a plurality of valid norms on the same plane but rather a hierarchical structure (*Stufenbau*) of superior and subordinate norms. […] The unity of a legal order is the unity of a network of generative relations. […]. A conflict between legal norms at different level in the normative system cannot take place[9].

Legal norms, reduced at the domain of "ought" in the name of the 'division' at first established by Hume, can be considered to be organized as a legal system for their consistent unity and hierarchical relations: because of *Stufenbau*. In this view, it is not possible to admit the validity of legal norms outside the given legal system:

> Only a competent authority can create valid norms; and such competence can only be based on a norm that authorizes the issuing of norms. […] A legal norm is […] valid […] because it is created in a certain way. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm[10].

Without any doubt, it could be possible to say that «the thesis that legal systems have a pyramidal structure is commonly accepted»[11]. And, in the face of its well-known problematic aspects, such theory has become the widespread conception of law according to which

> the validity of a given legal norm N1 depends on the existence of a superior, higher-ranked, norm N0, authorizing the issuance of N1. N0 is a

[9] H. KELSEN, *The Concept of the Legal Order*, trans. Stanley L. Paulson, in *The American Journal of Jurisprudence*, 27.1, 1982, pp. 64-84: 64-66; 68-70 (available at: https://academic.oup.com/ajj/article-abstract/27/1/64/203271; connection on 16 July 2018) (his italics).

[10] H. KELSEN, *Pure Theory of Law*, trans. M. Knight, Berkeley, Los Angeles-London, 1967 (1st ed. 1960), pp. 194; 198.

[11] R. GUASTINI, *Fonti del diritto*, in G. PINO, A. SCHIAVELLO, V. VILLA (a cura di), *Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo*, Torino, 2013, pp. 119-143: 125 (our translation).

power-conferring norm, which entitles a certain subject (for example, a legislative organ) to create (new) norms[12].

From that, the very «common and peaceful remark according to which in modern legal systems sources of law are hierarchically organized in different levels»[13]. One of the most interesting aspect of this conception is that the pyramid of norm can be, so to say, extended outside a single legal order for being the imagine of relations among different legal systems. In fact, since there is more than one legal order (each state or sovereign power has its own *Stufenbau*), it is also necessary to understand which kind of relations are possible among different legal systems. And, as it happens with legal norms inside a system, different legal systems can be hierarchically ordered in a pyramid, with mutual relations of horizontal coordination (once systems are at the same level) or vertical subordination (once they are at different levels)[14].

In this way, the connection among the concepts of "order", "system" and "hierarchy" is given: a connection that can be said to be structural, like a conceptual triangle. These three concepts become interdependent, almost equivalent: system is given once it is ordered in a certain way, that is hierarchical; hierarchy it is given once we have a certain type of order, that is systematic; order is truly existent once we can say to have a system, that is hierarchy.

From this point of view, it seems possible to argue in favour of the fact that the idea of system «is homologous to the idea of order: the system basically is the representation of modes and inner links according to which a complex set is ordered»[15].

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[12] R. GUASTINI, *Kelsen on Validity (Once More)*, in *Ratio Juris*, 29, 2016, pp. 402-409: 1.

[13] R. GUASTINI, *Fonti del diritto*, cit., p. 129 (our translation).

[14] This idea expressed, among others, by N. BOBBIO, *Teoria generale del diritto*. Torino, 1993, pp. 278ff., and already affirmed, for example, by H. KELSEN, *The Concept of the Legal Order*, cit., and H. KELSEN, *Pure Theory of Law*, cit., is, as well known, one of the most problematic aspect of Kelsen's theory on relations among international law and national laws.

[15] M. BARCELLONA, *Diritto, sistema e senso. Lineamenti di una teoria*, Torino, 1996, p. 29 (our translation).

As already clarified, it is obviously possible to say or to think that such a system is made up by our theoretical choices or that it pre-exists to them.

In this latter case – that, by hard simplification, it is still the case of modern scientific thought's fathers, like Descartes or Galilei and clearly it is the case of Aequinas and others natural lawyers –, an order (of the world, of the reality, of the law and values, and so on) exists before the description that can be done by using our reason[16]: and so, that order conditions our description of itself and our reason too. While, in the former case, always by simplification, the one typical of the positivistic evolution of scientific thought, the system is considered to be «the result of decisions and choices, so to say as a contingent artificial production»[17]: in this case, the validity criteria end up to be given by these same decisions and choices, since they cannot be considered metaphysically pre-existent (or, at least, they would not be considered as such).

It is within these kinds of positivistic developments that the long complex creation of a model conceived as a «complete, formal, and conceptually ordered system that satisfies the legal norms of objectivity and consistency»[18] is done. That has been «an artificial attempt of simplification and constriction»[19], in which we find

> the representation and functioning of a legal order conceived of as unified and hierarchical, unified because hierarchical (because the content of the inferior norm must comply with the prescription of the superior norm, unity of the system is guaranteed)[20].

[16] What changes between Aequinas and Descrates and Galilei is the knowledge we could have of that order, since for the latters, at least in the realm of mathematical field, we may know everything.

[17] G. MARRAMAO, *L'ordine disincantato*, Roma, 1985, p. 24 (our translation).

[18] G. MINDA, *Postmodern Legal Movements. Law and Jurisprudence at Century's End*, New York-London, 1995, p. 13.

[19] P. GROSSI, *Scienza giuridica italiana. Un profilo storico (1860-1950)*, Milano, 2000, p. 276 (our translation).

[20] M. DELMAS-MARTY, *Towards a truly common law. Europe as a laboratory for legal pluralism*, trans. N. Norberg, Cambridge, 2002 (1st ed. 1994), p. 2.

The fall of this conception probably is the most interesting issue we have to discuss and solve in our time: but we think that a good answer needs also to remember the philosophical origins of the concepts that are now in crisis. And this is what we would like to try to do in the next sections.

3. The idea of the hierarchical nature of system

To reflecting on system's notion means to put into discussion «one of the Western wisdom's pillar. Everyone who undertakes a scientific description or a theoretical construction makes reference to that notion – consciously or not, giving her consent or not»[21].

For reasons already mentioned, this kind of notion is strictly related with the one of hierarchy, at least in the development of the modern thought. We cannot give here all the reasons in support of this claim [22], but we may remember some relevant arguments in favour of that.

For example, it may be of some interest to point out that «the term "hierarchy" is unknown in classical ancient times: it is absentee in the classical Greek and it is not used in the New Testament»[23]. In fact, the term started to be used with the meaning we usually assign to it by the 6h Century A.D. only, thanks to the *Corpus dionysiacum* and its Latin translation: henceforward, the affirmation of an entire philosophical thought (the neo-Platonic one) started, being destined of becoming the theoretical basis for the development of the systematic and hierarchical order's idea, that will be so important for the legal knowledge too within its the modern development[24].

To tell the truth, as well known it is possible to find out an idea of systematization even in the Roman legal experience: but it cannot be

[21] M.G. LOSANO, *Sistema e struttura nel diritto. Volume I. Dalle origini alla Scuola storica*, Milano, 2002, p. XVI (our translation).

[22] For a deeper analysis of this issue, see F. PUPPO, *Metodo, pluralismo, diritto. La scienza giuridica tra tendenze 'conservatrici' e 'innovatrici'*, Roma, 2013.

[23] P. CAPPELLINI, *Storie di concetti giuridici*, Torino, 2010, p. 152 (our translation).

[24] We cannot go into details here: for the explanation of this issue see M. MANZIN, *Ordo Iuris. La nascita del pensiero sistematico*, Milano, 2008.

forgotten that, in that conception, the idea of system – represented, for example, in «Cicero's works by the *ius civile*'s reduction *ad artem*»[25] –, is completely different from the one we find in the modern conception.

In the classical and Roman idea of system, this concept it is still conceived as an operation of thought «to give order and soundness into the knowledge (*plurum in unum cognoscere*)»[26]: but "system" it is here conceived «as *universum* (whose premises are the Universe's order and beauty)»[27], while, in the modern conception, "system" will be conceived as «system which has lost the *universum* ([…] rather seen as unknowable, endless but nonsensical)»[28]. And that is why it will become possible to opt for a conventionalist view, to consider "system" as something created then discovered by our reason: because it makes no sense to question on something that is considered to be unknowable or nonsensical, as the metaphysical aspects of *universum* are.

This is exactly the way made by the Scientific thought during the Enlightenment and Positivism: periods in which the ideal of knowledge became mathematics and its deductive method, already legitimised, among others, by Descartes or Leibniz. That is the theoretical context in which the concept of "system" has been clarified: in fact, it is possible to make a distinction between the so called 'external system' and the so called 'internal system'.

The external system can be defined as «the scientific propositions' system which describe a certain type of reality. So it has the same structure in every kind of discipline»[29].

The internal system «is the system which is inside a specific subject, that is the object of a certain discipline. Its structure changes as the discipline does»[30].

The structure is «the connection that links the different elements of one of these systems. It is the whole of relations of things, not the whole of things»[31].

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[25] P. CAPPELLINI, *Storie di concetti giuridici*, cit., p. 240 (our translation).

[26] *Ibid.*, p. 241 (our translation).

[27] *Ibid.*, p. 242 (our translation).

[28] *Ibid.* (our translation).

[29] M.G. LOSANO, *Sistema e struttura nel diritto*, cit., p. 168 (our translation).

[30] *Ibid*. (our translation).

What is necessary to specify it is the fact that, according to this perspective, it can be said that «all the sciences or disciplines have the same structure, while all the objects of a certain science have different structure»[32]. And so, even if we could have different objects, we can justify the possibility to use just one type of method in different fields, in order to obtain, for example, certainty, the basic aim of the Cartesian method.

That is exactly what happened in the legal field: at first for the legal reasoning's imagine given by the legal syllogism's theory developed by Beccaria and Montesquieu; but, then, with the development of the idea of deductive system as the imagine of law, that is mainly given by Christian Wolff, who can be considered the arrival point for a science of law *more geometrico constructa*. Great is the role played by Wolff in the construction of a systematic account of law (that will be so important for Kelsen thanks to Kant): in fact, Wolff's theory was developed with the aim

> to apply to law the logical-mathematical method, concluding from one fundamental principle *by demonstration* (so to say in a deductive way and without inductions or some kind of intuitions) all natural laws. Wolff, better than others, gave an explicit definition of *legal system* according to which the connection among different legal rules is a type of concatenation and logical development. The logical sequence among legal rules (or among their elements) constitutes the research's *object*[33].

From this point of view, we may say that Wolff can be considered one of the great father for the legal systematic theory. But not only: it may be considered one of the best example of philosopher according to whom knowledge means certainty, with theoretical privilege assigned to science.

In a very broad way, "science" can be defined as a certain kind of knowledge in which all the propositions that are part of a system are all interrelated by *modus deductionis* from principles considered as indis-

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[31] *Ibid*. (our translation).

[32] *Ibid*. (our translation).

[33] G. LAZZARO, *Sistema giuridico*, in *Novissimo digesto italiano*, XVII, 1970, pp. 459-464: 461 (his italics; our translation).

putable and immutable. Kant himself was deeply influenced by Wolff's philosophy and, as well known, Kelsen's theory is neo-Kantian in nature:

> relations between the systematic conception by Christian Wolff and Immanuel Kant were due to the common interest for exact sciences […] and to the fact that Kant received Wolff's theory through one of his main pupils: Martin Knutzen, who was professor of philosophy in Könisberg when the young Kant attended university. […]. In Kant's philosophy the "system" underwent further and double specification, that will be adopted by next philosophers. The system becomes the model to which each science must tend towards: there is no scientificity without systematicity. Secondly, the system is no more a deductive set of propositions, but it is a set of proposition that must be deduced from one principle. To make the connection between systematicity and scientificity possible, Kant adopted mathematics as model[34].

So, it is with Wolff and Kant that we had the final step towards the systematicity of knowledge: at the point that the concept of "system" (or, to be more precise, of "external system") became an undisputed premise of scientificity and no more something the existence of which it would be necessary to explain or justify[35].

This is the premise: a certain kind of knowledge can be really considered as such if and only if it can be organized as *system*, like mathematics is. Rather, every discipline must look at mathematics as model of *rationality*: in fact, a system can be defined as such if and only if its propositions can be *deduced* from one principle, so to build up a certain kind unity, that is *hierarchy*.

Deep is the role played by this conception in the legal field, with Kelsen and his legal formalism, that assumes the external system for law, so to say a logical connection among norms, the different parts of

[34] M.G. LOSANO, *Sistema e struttura nel diritto*, cit., p. 97 (our translation). By the way, even the development of logic knew that kind of approach towards mathematics, as it happened with Boole and logicians after him (we cannot deal with this kind of topic here: let us refer to F. PUPPO, *Dalla vaghezza del linguaggio alla retorica forense. Saggio di logica giuridica*, Padova, 2012).

[35] See on that M.G. LOSANO, *Sistema e struttura nel diritto*, cit., p. 102; G. LAZZARO, *Storia e teoria della costruzione giuridica*, Torino, 1965, pp. 36-64.

legal system, which mutual relations can be no more than purely formal (in fact, to consider their content would make impossible the reduction of law to one principle and the construction of *Stufenbau*). From this point of view, it can be said that the structure of law it is no more the aim of legal scholars' analysis and discourses, but, after Kelsen, it became our starting point: but that is what we lost, and that is why, nowadays, our legal knowledge suffers a deep crisis.

4. Some conclusive remarks

In this paper we discussed content and genesis of the concept of "system": by referring to its etymology and its philosophical development we showed its relation with the ideals of order and certainty that can be considered typical of a certain kind of scientific thought.

From this point of view, the particular meaning of "external system" is the key to understand how and why such a big diffusion of that kind of concept had become one of the cornerstone for legal science too. Kelsen clearly is the most important legal theorist who promoted systematicity into the legal field, by imparting some pillar of Kant's philosophy developed on the basis of Wolff's conception.

By analysing these assumptions we showed how structural is the connection between the three concepts of "order", "system" and "hierarchy" for the development of the modern conception of law, that was legitimised by Kelsen in the name of the unitary construction of law within the reduction of law to the realm of ought, and so on the basis of a dualism between 'is' and 'ought'[36].

All that became the idea of system we find in legal theory and this is the same idea we share in our common belief: in fact, we may probably agree on calling something 'knowledge' since it could be organized as a system. That means: organized in a deductive way, as mathematics is. For having systematicity we must search for logical connections among propositions, that means, in the legal field, among legal propositions, so

[36] See among others M.G. LOSANO, *Sistema e struttura nel diritto*, cit., p. 44.

to say norms. And this is what makes possible the Kelsenian legal formalism: we do not care nothing then the formal side of legal norms.

But, as we may see and verify, it is a philosophical conception totally unable to understand and explain what is happening to law in the real world today: the limits of the traditional conception of the system of sources of law, or the picture of pyramid of norms or legal systems, are well known and so it is not necessary to remember them.

And so, for sure, to look at these matters from a Kelsenian-systematic point of view makes the solution really difficult, almost impossible: rather, it seems more promising to develop a different kind of approach, in which different ideas of "order" and "system" may find place. For example, where conventionalism cannot be the only way to look at the concept of "system", like the classical conceptions of *universum*, for example the one of Roman experience, show. And where, at the same times, the static concept of a hierarchical system, with a taxonomical conception of order, may collaborate with – or, better, it may be included within – a dynamic model of system, with a conception of order more similar to the one of *kósmos* then the one of *taxis*[37].

In which hierarchies are not given as immutable premises, but researched as problematic and moving, sometimes non-existent[38]: in which law can be really different from the idea we have of that.

[37] For in-depth analysis of these concepts see M. MANZIN, *Ordo Iuris*, cit.

[38] Different approaches have been developed in this sense: see, for example, F. OST, M. VAN DE KERCHOVE, *De la pyramide au réseau?Pour une théorie dialectique du droit*, Bruxelles, 2002; or M. DELMAS-MARTY, *Towards a truly common law*, cit.; M. DELMAS-MARTY, *Les forces imaginantes du droit (II). Le pluralisme ordonné*, Paris, 2006. We tried to give our contribution with our F. PUPPO, *Metodo, pluralismo, diritto,* cit.

JUDGE TRAINING FOR ORALITY: EXPERIENCE, HISTORY AND MEMORY OF THE UNWRITTEN LAW

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SUMMARY: *1. Pulling the strings of orality and dialogue. 2. The word said, the body viewed: the role of the senses. 3. Orality and the preparation of the actor. 4. Pedagogy, history and memory of orality.*

In the early days, when the hearings moved forward, and it was time to hear the witnesses, I used to get so anxious that I would feel a pain on my back that would leave me breathless. The effort to maintain the appearance of security would rob me of my body strength. And I was sure that fear and anxiety were stamped on my face, molding my tone of voice and escaping through my gestures. Everyone would notice: she is a new judge who is unable to hold hearings. The feeling of these first days has certainly gone by. The lawyers and attorneys took me by the hand and experience taught me how to do it. The lawyers kept on asking and asking, as they are supposed to do, and at each answer I manage to find the gaps and loops. After some time, it no longer hurt. It was just tiresome. After the 15th, 18th hearing of the day I usually went home happy. There were thousands of stories to tell, to laugh about, and to suffer. There were thousands of stories about life as it is, about law as it is. I felt as tired as someone who have run several kilometers. But it was not the body (muscles, bones, nerves) that was worn out. It was the soul that was sucked in by the conflict and needed time to recover. There was the weight of a responsibility that is not taught at any law school: the responsibility of the unwritten law that lives inside the courtrooms.

They are the places where a part of the memory of law is kept, which is embodied, made by senses, exposed through them, in the tactile perception that comes from the soul. And that touches the other and

is touched by them. And this memory escapes from courtrooms because they have doors that open inward and outward.

The door leaves the room and opens itself to the waiting room, the elevator, the street. The door leaves the room and opens into verb: the mouth of the room or *la bouche de la loi*. It explains what has happened indoors, like a story always ready to be revisited as the ontologically lived law.

The door opens to the heart of the office. It hides and reveals the rhythm of the case, its beep in circulation between various phases, the vital flow made out of paper or made on the computer screen. It meets people who will enquire about the progress of the cases. What is happening or what is going to happen next.

And whilst moving between doors and rooms, some say good morning, others don't. Some understand and gather. Others do not understand and disintegrate.

All unwritten stories can be told and shared because they happened one day. Someone saw it. Someone was present at that moment, even though there is not one single line written about what has happened. The law was experienced in that meeting: through health and sickness, through happiness and sadness; for good and for evil.

The purpose of this chapter is to talk about judge training under the perspective of these contingencies and to highlight the role of judge training as an opportunity to teach, learn, recover and keep the memory of orality.

1. Pulling the strings of orality and dialogue

It is tradition in academic writing to refer to the Greeks. Despite a consistent criticism of the disconnection between the bonds of historicity with remote and diverse situations, with time and space cultivated differently, we end up, deliberately, in a common place. Turn to the Greeks. The Western thought is founded on them and was, therefore, imbued by the dialogue. This is done, however, like a string that is pulled for the manufacture of a fabric known to be awkward, more due

to the poetic taste than to the literally philosophic or historical. And this reference takes the side with Jorge Luis Borges:

> Some five hundred years before Christianity the best thing ever registered in the universal history took place in the Magna Graecia: the discovery of the dialogue. Faith, certainties, dogma, curses, prayers, prohibitions, orders, taboos, tyranny, wars and glories besieged the orb; some Greeks contracted, we will never know how, the unique habit of talking. They doubted, persuaded, disagreed, and changed opinions, postponed. Perhaps they were helped by their mythology that was, like Shinto, a collection of imprecise fables and variable cosmogonies. These disperse conjectures were the first roots of what we now call, not without pomp, metaphysics. Without these few Greek talkers, Western culture is inconceivable[1].

The *Greek talkers* formulated the arrays for the thought around justice and conflict solving ways through laws that changed from oral emissions, lived in tradition, to the written text. Billier and Maryiolli described a "move towards abstraction"[2]. Along the way traced by the ancient Greeks, the history of law flows, with comings and goings that today arrive as means to learn the invisibility of the factors of concreteness and, in an essentially relevant way, the ones pertinent to orality of all circuits of law enforcement.

The classic philosophy with Socrates, Plato and Aristotle leaves a gap through which the instantaneous of orality escapes and, contradictorily, also the continuity of the troubles of the experience of treatment (solution) of conflicts[3]. The *unique habit of talking* passes by form and substance of humanity manifestation that build law.

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[1] J.L. BORGES, *Sobre a amizade e outros diálogos*, São Paulo, 2009, p. 21.

[2] J.-C. BILLIER, A. MARYIOLI, *História da Filosofia do Direito*, Barueri-São Paulo, 2005, p. 9.

[3] See, among others, for a general view, W. JAEGER, *Alabanza de la ley: las origenes de la filosofia del derecho y los griegos*, Madrid, 1953; ID., *Aristoteles: bases para la historia de su desarrollo intelectual*, Mexico, 1995, ID., *Paidea: a formação do homem grego*, São Paulo, 1979, L.C. DE MONCADA, *Filosofia do Direito e do Estado*, 2. ed. rev. e acres., Coimbra, 1955, v. 1, Parte histórica; G. REALE, *História da filosofia antiga*, São Paulo-Loyola, 1995, 5v.; G. REALE, D. ANTISERI, *História da filosofia*, 4. ed. São Paulo, 1990, 3v.; J.-C. BILLIER, A. MARYIOLI, *História da Filosofia do Direito*, Barueri-São Paulo, 2005.

Thus lies Socrates and his own judgment, in a dialogue to death. It is transformed into matrix of the syllogism that takes the inevitability of the end as an identification of the human being (*Every human being is mortal. Socrates is human. Therefore, Socrates is mortal*). The remembered path is recomposed in the version of the days in the dialogic lecturing about the justice in The Republic and in The Laws that Plato wanted to be kept. Socrates goes with his pupils, mingles with them, and requires the expression of their own doubts:

> The Socratic dialogue theme is the desire to reach with other men an intelligence to which everyone must follow, about a subject that ceases an infinite value to all: that of the supreme values of life. To reach this target, Socrates always goes from what the speaker or men in general agree with. This situation serves as a "foundation" or hypothesis, after which the consequences that result from it are developed, confronting with other data from our consciousness considered as established facts[4].

In a courtroom, there are established facts. They are in the law, in a tradition of interpretation of the theme, in the evidence already brought to the process. It is common, however, for people to notice the data under dissonant interpretative approaches. The talk usually concentrates on risk levels that will reach fields ranging from law to the prospects differed during an execution. As in the Socratic dialogues, the goal is to reach an understanding of the situation in which everyone has a vision, even if distinguished. The way the conversation goes is vital to any achievement, even to the establishment of the premises for negotiation that will be fulfilled only in a remote future.

In Plato, the structure of the dialogue that gives voice to Socrates, between a character and a historically situated person, records the most significant features of the practice of public speaking, which are the *never knowing enough*, the availability to know with and in the other, justice as something that is exercised by knowledge. This is the raw material for preparation of the process in the oral scene[5].

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[4] W. JAEGER, *Paidea: a formação do homem grego*, cit., p. 523.

[5] M. GAGARIN, P. WOODRUFF, *Early Greek legal thoughts*, in E. PATTARO, F.D. MILLER, JR., C.-A. BIONDI (eds.), *A treatise of legal philosophy and general juris-*

In regard to law, the path taken from this dialectic around the ignorance may recede in essential questions of the binomial *knowledge-ignorance* of incisive expression for its effectiveness. In a courtroom, in which the most varied public gathers, the effects of ignoring are constantly experimented. The dialogues that intersect the days are not mere reproduction of the text of the law. The judge must deal with *non-knowledge*: his *non-knowledge* in relation to the parties and theirs in relation to him or her and to the law. The discovery of the *not known* highlighted in the facts that he did not witness and the revelation of the meanings of the law to the conflict require attentive ears, action contained to control the scene, awareness of the fragility of his knowledge as a legal agent. It is a caution that allows time for the conclusion to be formed for the decision or the improvement of the solution by consensus. The courtroom is a place for the teaching linked to legal knowledge. It is a means of communication in the small sphere of the concrete dynamic of legal relations.

It is worth saying one more time (as it is in the alphabet in which legal effectiveness is composed) that the purpose of the law is the spontaneous adhesion as balance point between differences.

Aggressiveness, recklessness and rudeness of dialogue disrupt the sharing of words. Patience, understanding, and attention provide the rebalance, making the image of the judge and the State.

And once again there is the human body to represent the city as in Plato's Republic. The comparison is irresistible because, when the judge sits on his or her chair and listens and speaks, he or she is a body available for the distribution of the justice by the word; for the trial of the equality in a scale bordered by the difference of interests, of antagonism, of conflict. The State is transformed in a live and tangible human spark, with pains and smells.

The classic Greek also resonates in the voice of Aristotle, to whom the structure of the dialogue is modeled on the otherness of the experience of the virtues, especially justice and, in its counterpoint, the friendship. The citizenship of the *polis* only takes place in the city, dia-

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prudence, Dordrecht, The Netherlands, 2007, v. 6; *A history of philosophy of law from the ancients Greeks to the scholastics*, p. 36.

logically, because it is natural. This happens in the rhythm of daily life, permeated by the need to exercise the *better justice*, the equity, which is the one that adapts general to private, in the shaping of the measuring ruler to the irregularity of surfaces. And this is done whilst exercising the virtue that exists to the city, from the premise that there is no training in relation to the moral virtue. It follows from the "nature that gives us the capability to receive them and this capability is improved and matured by habit"[6]. There is, however, a possible training for prudence, which is a virtue to the practice of the solution of daily conflicts. This practice is in the essence of the processes of judge training.

The experience of justice by the spoken word is sprayed in the consciousness of error and accuracy, in the capability to see what is consolidated as tradition or custom and to measure the actions and reactions from risks and limits. Attention is needed to understand the example and the importance of the look, the gesture, the posture.

The sinuosity of the comparison with those so remote *Greek talkers* is justified only as a path to the differentiation between the written and the spoken from a very marked perspective that may hide the permanence of means of expression or communication even under the view of a law that is predominantly expressed in the text that is visually shown on paper.

The illusion that the cycle between orality and writing is something arranged just in relation to law cannot be created. Shaped in the human culture and influenced by it, law is a means of communication (of justice) that responds to the gradations of time. McLuhan uses the primary verbal movement for Greek writing with the purpose of exploring the history of humanity in which the transit from one to the other carried the already solid signs of the means of communication used until them. Beginning with the Greeks, it reaches the electric age and could port in the electronic age where he would see his theories confirmed:

> The alphabet is a technology of visual fragmentation and specialism, and it led the Greeks quickly to the discovery of the classifiable data. (…) As long as the oral culture was not overpowered by the technologi-

[6] ARISTÓTELES, *Poética*, in ID., *A poética clássica: Aristóteles, Horácio, Longino*, 12. ed., São Paulo, 2005, p. 63.

> cal extension of the visual power in the alphabet, there was a very rich interplay of the oral and written forms. The revival of the oral culture in our own electric age now exists in a similar fecund relation with the still powerful written and visual culture. We are in our century "winding the tape backwards". The Greek went from oral to written even as we are moving from written to oral. They "ended" in a desert of classified data as we could "end" in a new tribal encyclopaedia of auditory incantation[7].

The speech was, in both ancient and middle ages[8], the predominant medium of spreading the message and it was being mixed to others or being changed, or even *going backwards* with the invention of other means of communication. The effects can be felt in relation to all expressions of the Western culture whether to make a meaningful time, or to project the expression of the last way of electronically capturing the image and diffusing it in channels unimagined a few year ago, such as YouTube. The vision and the hearing in the movement of speech comes back to the scene, but the means are different from the old age and that certainly interferes in the way that the message is transmitted and even in its contents.

Briggs and Burke emphasize that the verbal communication does not receive due attention when it comes to changes in the visual culture in early modern Europe[9]. It was the essence of the religion (the practices, the pulpit, the processions, the preaching), of the teachings in academies and the emissions of the daily culture was noted on the corner, on the rumors. The changing processes do not happen in isolation but are committed to the obstacles that are interposed and to the nature of the means that are happening or accumulating.

It is no different with law. It does not fit into writing. It is intended for the integration in people's lives. It resides in the speech, which molds it. The conflict is essentially oral in most cases and it is renewed

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[7] M. MCLUHAN, *Media and cultural change*, in E. MCLUHAN, F. ZINGRONE, *Essencial McLuhan*, New York, 1995, p. 92. It is also very provocative the description made in B. RUSSEL, *História da filosofia ocidental*, São Paulo, 1957, v. 1, p. 10-13.

[8] A. BRIGGS, P. BURKE, *Uma história social da mídia*, Rio de Janeiro, 2006, p. 20.

[9] See A. BRIGGS, P. BURKE, *op. cit.*, p. 36.

orally at the judge's meeting when evidence is produced or when it is performed in the *Day in the Court*.

The law, as one of the main contemporary legal phenomena, is product of verbal processes that range from the meandering, sometimes inaccessible. Their dynamic is kept trapped in the invisibility and intangibility, which makes the contours of the legal theory sometimes poor and meaningless.

In a historical perspective, one of the materializing signs of the change in the ways of message exposition about the rules is the official writing of the customs, in middle age, which were aimed to ease their proof through their translation by the registration in paper. It changes the *ius commune*. Gilissen highlights, however, that this writing process implied interpolation, or else, "due to the process of drafting and approval, each custom is more or less modified, above all towards unification and, often, the Romanization"[10]. The history of law in continental Europe experiences this transition with more emphasis from the fifteenth and sixteenth centuries. It coincided with the media changes introduced by the press[11]. It denotes the steps in the construction of a *ius commune* where the feeling was, according to Antonio Manuel Hespanha, in large, "caused by the homogeneity of the intellectual education of agents in charge of building the medieval legal knowledge – the scholar jurists"[12]. The tendency changes with the influence of the spirit of subsequent times and the complexity of this movement is not the subject of this chapter[13]. However, the literate legal culture is, therefore, predominantly written and it tends to disregard the maintenance of oral factors as considerable influence on statutory law interpretation.

One can retain the history of the removal of oral tradition mainly by the introduction of new means that enable the expansion in the written production and the facilitation of transporting the texts (including the laws). Rouland emphasizes to the effects of the writing in relation to the

[10] J. GILISSEN, *Introdução histórica ao direito*, 2. ed, Lisboa, 1995, p. 274.

[11] See J. GILISSEN, *op. cit.*, p. 274 and C.A. CANNATA, *Historia de la ciência jurídica européia*, Madrid, 1996, p. 169-170.

[12] A.M. HESPANHA, *Cultura jurídica européia: síntese de um milênio*, Mem Martins, Portugal, 2003, p. 90.

[13] See A.M. HESPANHA, *op. ult. cit.*

understanding of the different legal systems, mainly when the point of departure is focused on less complex systems and heteronomy that are predominantly more oral:

> Despite the appearances (the verbal message is limited in its fixation and more difficult to maintain), the orality does not constitute a "primitive" form of communication, and no more than the verbal law is "pre-law". It corresponds to a type of society that can be classified as a community and that thinks like the union of complementary groups, in a hierarchy of different degrees. The writing insists above all in the message that it conveys. Moreover, it applies in certain anonymity of the social relations[14].

The question is still how law communicates. And it has relevance when considered that the judge is also the agent of this knowledge which is the subject of communication and also experiences the effects of the efficiency and inefficiency of the processes.

António Manuel Hespanha mentions a research made to understand the means of access to the knowledge of law. The conclusion is that the sources or means, according to the respondents, were, in descending order, "talks, experience, television and, a little less, newspapers"[15]. So, it is important to point out the role of the written legal text as a source of knowledge:

> With little informative effectiveness (also in descending order of quality, as it is noticed by the respondents): brochures and formal education, conferences and law books. This apparently strange hierarchy, in which the sources that a jurist would recognize as having the best quality of information are found among those to which the respondents assign less informative impact, ultimately reveals, once again, – to beyond the hermetic of the most technical legal speeches – the distance that takes apart the beliefs of the legal world from the beliefs of the real world[16].

Orality continues to be a channel of knowledge that supersedes the text of the typical legal phenomena (law, decision, theory). The strength

[14] N. ROULAND, *Introduction historique au droit*, Paris, 1998, p. 422.

[15] A.M. HESPANHA, *O caleidoscópio do direito e a justiça nos dias e no mundo de hoje*, Coimbra, 2007, p. 293.

[16] A.M. HESPANHA, *op. ult. cit.*, p. 293.

of the speech in relation to legal texts sharpens when its role in everyday life is considered: The voice is found in places where laws are enforced and decisions are made. This goes even far beyond the role cited by Hespanha[17]. The voice is present in the places where laws are made and where laws are enforced.

The courtrooms are territories that carry in their horizons the strength and the stigma of a world that demands a constant translation into writing or the transformation of the speech into text. The *civilization of the alphabet* meets the speech one, but always seeks to attract it in its web of distance and anonymity.

In orality, the reaction is immediate, visible, and corporal. It is given in the response of the speech, in the body motion. Actions and reactions become invisible in the aridity of the letters recorded on paper. The experience of speaking becomes memory and turns into a text that can keep some of it, but will not register all the nuances. It remains in the individual experience of the parties, of their lawyers and of the judge that become witnesses of the other side of the coin: how is law before it is translated into writing?

To deal with this issue with regards to the training of judges is not, therefore, only to emphasize what Jurisprudence says about the principle of orality and its problems, because this is a technical concept and aimed at the maintenance of the abstract focus.

The education for orality cannot be understood apart from the contingencies subjacent to writing. The understanding of the characters that participate in this performance should be encouraged, and attention should be brought to something essential: the oral expression builds an image of what the judge is, which, therefore, is integrated in the image of what the Judiciary is beyond the static of the writing which has many details that can be heard, seen or felt. It represents the senses – all of them – in the exhibition. The judge who does not greet the staff, who mistreats the employees, who is rude to lawyers, who is harsh with the parties, who addresses to them as if they were an object instead of a person, is building in the speech an image of themselves and of the Ju-

[17] A.M. HESPANHA, *O caleidoscópio do direito e a justiça nos dias e no mundo de hoje*, cit., p. 295.

diciary that will never dissipate. In the daily scene, they are responsible for a small scale by which the knowledge of the law is widespread.

The written translation is always restrictive. And it always becomes more synthetic and less linked to the performance of the interpreter. This is a complication in the processes of educating judges, because there is a tendency to getting far from the circumstances of reality.

However, this experience of law may become a vestige, in *a vessel of the pre-history of the law*, if the digital process reaches where imagination allows it to be taken. The forecasts are the recovery of the reaffirmation of the past through evidence in a new way of recording and communication that merges speech and reproduction of the full image. The means of communication, once again, will certainly interfere not only in the process of knowledge, but also in the interpretation with nuances that cannot be entirely defined at this instance, but for which one should be aware. The electronic world will include and exclude. It is always that way and it is not advisable to only celebrate technology's achievement. One should pay attention to the rhythm of reality and, therefore, the education for orality gains importance in relation to the media by which it will be expressed. It is no exaggeration to think that the image, in its audio and visual aspects, will never replace the text, even because the way of reaction to the text on paper and on the screen is different. This always implies the possibility of hypertext and of connections not previously envisaged. The narrative of a movement will never be the same as playing it live.

The question to be asked, therefore, is the following: how to prepare judges to deal with these various forms of speech that persist as means of legal communication?

2. The word said, the body viewed: the role of the senses

The experience of playing a musical instrument with someone else or singing in group, in a choir, gives the exact tone of the practice of orality in a work like the doings of the law. To know the keynotes is not enough. It is not enough to know the musical tempo, the precise dosage of what is interpreted. One needs to be substantially connected with the

other. It is not only about the music. It is about the relation between two bodies in space. An interpreter cannot suffocate the colleague with his instrument[18] or with his voice, jeopardizing the sense of music. He must listen to himself and listen to the other even if mechanically dealing with the counting of the beats, the technique, and the alternation of notes and rhythms in the score.

The conductor's position is equivalent. His role is not to be in the front of the orchestra shaking his arms in a definite rhythm. He needs to communicate with the musicians. His and their memories revive their prior work during rehearsals, in the definitions of the meaning to give each piece played. A signal of the body, the look given to musicians of a certain suit recalls something that is expected of them. And attracts the others to the need to allow that emphasis that must come from a certain group: softer, more aggressive, *piano*, *forte*. The communication is established by the viewing of the movement that restores the sense. This communication may not happen. And, just like in the courtrooms, there are people carrying their horizons, their concepts and prejudice. The performance, in any of the cases, marks the lives of those who are present. And sets in space and time the relational data to which are exposed the ones who interpret the acts of musicians and judges.

A very shy judge tells us that he did not effectively know what to do during his hearings in the very beginning. Everyone reacts in their own way. There are those who become aggressive. There are those who become instable in their decisions. The reaction of this judge was silence, followed by an attention, also silent, and an expression that, instead of doubt, led the viewers to imagine that he was in a deep reflection about the facts, and that the solution would come full of serenity and wisdom. In those days as a beginner, no decision more serious was taken immediately. They came in time. As painful as this learning was for him, his experience does not highlight systematic conflicts created in courtrooms or more compelling relationship problems. The image of serenity

[18] To exemplify with sound and image, the guitar played by two people – the same guitar and the same song (http://www.youtube.com/watch?v=CcsSPzr7ays); two guitars and the song that I find beautiful and was never able to play (https://www.youtube.com/watch?v=M8RuMlSOeBY) – Bachianinha n. 1, by Paulinho Nogueira, in his interpretation with Toquinho.

ended up contaminating lawyers' reactions as the issues were being resolved at their own pace.

Silence, through which he spoke, communicated a willingness to learn what was consistent with the Socratic doubt. He boosted on others the dialogue and the engagement and allowed himself time to learn by the expression of shared knowledge.

His movement in time of silence is a clear image. The openness to understanding is, in this case, more plastic, more adaptable, because the log of the typical orality was not set. There was no verbal speech and the respect to which he is a creditor, nowadays, follows from an image that has been set.

This silence and these feelings are a fact of life, for which there is no turning back. It is not only about orality, but the dialogical and complex communication in a space that also communicates (with its rituals) and takes part of the culture of law that assumes total knowledge and dissemination. Even when the messages are understood, in most cases, by lawyers, who get used even to the disruptions, setbacks and excesses, they are not assimilated by the parties that do not belong in that environment. There is a blatant silent language that governs this interlacing of cultures from which the judge has control.

The need to be understood is essential in the formal structure of law. It is in the roots of the due process of law. Even if the oral decisions renounce the detailed motivation and their written record are not essential in all cases, there is an implicit demand for the understanding of the adopted options.

And this relates to something that is atavistic in each one of us, because we learn from listening and speaking since childhood. That was how the ability of understanding appeared. It is this voice that returns, subliminally, as if we were reviving the deepness of the game, of the play, of the contest in the earliest circles where we learned how to communicate.

The courtroom reproduces this impact of separation between spoken and written. A place where the implementation takes place, in it the voice keeps on talking.

And each one of us is exposed in embodiment adding voice to movements, to the gestures, to how a chair is lifted, to the reaction to

the staff who enters the room. I used to be concerned because I could seem more nervous or anxious than I would like to and I was certain of the damage that I could cause if this feeling permeates my talk, my gestures, my expression, because these are some of the endless ways of linguistic strengthening as referred by Umberto Eco in the book in which he anatomizes how the interpreter is integrated to the work:

> In face to face communication endless ways of linguistic strengthening (signing, ostentation, and so on) and endless procedures of redundancy and feedback are involved, one in support of the other. This is a sign that there is never a single linguistic communication, but a semiotic activity in a broad sense, where more systems of signs complement each other. What happens, however, with the written text that the author produces and trusts to multiple acts of interpretation, like a message in a bottle?[19]

The law and all its written forms, which are its predominant sources nowadays, are messages put in a bottle that are projected to meet the future. They formally reject these demonstrations of linguistic strengthening of orality as if they were not present. However, the time and the place in which the bottle will be opened matters, and it also matters especially what will happen when the parties, lawyers, judges and staff gather around the *fire* to know what is in it and to decide what to do with it. Their talk, their expression, their gestures are some of the various interpretation acts that will become part of the way the meaning of the message will be translated. We are all readers who create the history of law and frequently and continuously revert it to spoken and written data. And we are all subject to the effects of the media.

3. Orality and the preparation of the actor

Some of the possibilities for the practice of orality in judge training are the analysis of artistic expression (caricatures, films, music, literature as examples of interdisciplinary or analogy support), the understanding of the historical perspective of the procedural phenomenon,

[19] U. ECO, *Lector in fabula*, São Paulo, 2004, p. 35.

the analysis of difficult cases, the simulation exercises, the sharing of experiences, the interviewing of people (talking to people) who attend the Courtrooms. Judges on training must be encouraged to express themselves. They must be able to wide open the possibilities of the process of exposure of the context in which orality is experienced: listening and being listened. More than the face-to-face, as traditional pedagogical method, it is very significant for them to realize the effects of their own oral expression.

Although there are many ways to discuss the matter, theatrical techniques could be very efficient. And the training of actors in Stanislaviski's version would be very useful because it emphasizes the learning process[20].

It is not meant to say that the judge should pretend to be a character, acting and *fantasizing*. They must be aware of the role they play when they are seen, when their voice is hear, when their body moves.

McLuhan also brings the grand Russian director, who has built one of the most important techniques for drama acting, to explain the conflict between spoken and written word:

> The conflict between spoken word and its written form is enlightening. Even though phonetic writing separates and extends the visual strength of words, it does it in a relatively slow and rude way. There are not many ways to write the word 'night', but Stanislavski used to ask the young actors to pronounce it in fifty different ways and variations, whilst the audience recorded the different nuances of feelings and meanings expressed by them. More than one page on exam and more than one story have been dedicated to express what is nothing but a sob, a moan, a laugh or a piercing scream. The written word challenges, in sequence, what is immediate and implicit in the written word[21].

The speech allows a greater assertion or an imposition of disgust or rejection because it is not isolated. With it comes the gesture, body language, voice modulation, in addition to the meaning that it denotes or connotes.

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[20] C. STANISLAVISKI, *A preparação do ator*, Rio de Janeiro, 1982.

[21] M. MCLUHAN, *Os meios de comunicação como extensão do homem: understanding media*, São Paulo, 2005, p. 97.

To compare, therefore, the exhibition in the hearing to an actor is to force the judge to face more than their place in the density of the written text. He must be aware of the senses. They must keep in mind that the actor, even when acting in monologue, should relate to the scenario, with the whole context built from a message that must be carried by the text, and with the audience. The audience is the recipient of their manifestation, although they do not speak directly to it. They speak to the public. They are seen by the public. There is an adjustment to the peculiarity of the text, the context and the message. Each part of the communication must be prepared to give meaning and resonate on the interpreter-actor and on the interpreter-audience. These are the received and sent rays, as said by Stanislaviski:

> Every feeling expressed by us, while being expressed, requires an intangible form of adjustment, which is very peculiar. All types of group communication, with an imaginary object, present or absent, require adjustments peculiar to each of them. We serve from all our five senses and of all elements of our inner and outer conformation to communicate. We emit and receive rays, we use our eyes, our physiognomic expression, our voice and intonation, our hands, our fingers, our entire body and in each case we make the corresponding adjustments that may become necessary, whatever they are[22].

When the text is told, it must use the resources designed to reach the public in the most adequate way.

The actor prepares to improvise. The *ad libitum* only works well when founded in a previously calculated support and when not lost in excesses. Risks and results to reach must be balanced. To achieve it there are rehearsals, study, and practice. The judge training for orality does not discard the same efforts and care to prepare for action and reaction in improvising.

Hyperbole can take place. There is a risk to reach a sensitive point of someone or something that they can turn into artifice to promote the conflict and hide the essence of the dispute as the hearing takes place.

[22] C. STANISLAVISKI, *op. cit.*, p. 242.

Barthes refers to the professor's speech, as an ideal speaker, which observes what he calls Law to reach a result within an expected standard:

> Either the speaker selects, with all clear conscience, the role of authority; in this case it is enough to "speak well", i.e. speak in compliance with the law present in all speeches: without resumption, in a convenient speed, or even clearly (…); the clear statement is really a verdict, sentential, a criminal speech[23].

He reiterates the need to break these laws of consistency to achieve results, which also is peculiar to the actor's technique.

The clarity of expression must safeguard the standards, but must, simultaneously, seek to go beyond them to assimilate the message. It is not a matter of encouraging a disrespectful informality or a verbal excess, but of seeking approximation through the argument that could include all the participants of the conversation in the mildest possible way.

McLuhan's observation, reporting to Stanislaviski, that all words can be said in a thousand manners and each one with a different goal, is a lesson to be learned and used. Because sometimes the message is lost by the way it is (badly) said. Bitterness, hate, aggression overlap the meaning and prevent the interchange and the dialogue experience. The awareness that there are ways to say things is essential and in the hearing it can lead to a trial, as said by Stanislaviski always with reference to acting:

> When an actor is given a part, step by step, it can be expected that they, at a certain important moment, say their words in a clear, sharp, serious voice. Let's suppose that, instead, they adopt, most unexpectedly, a light, happy, very calm tone, in an original way to act their part. The surprising element is so curious and efficient that we are persuaded that this new way is the only possible interpretation for that part. And we ask ourselves: "How could I have never thought about this, not even imagine that those sentences were so meaningful?"[24].

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[23] R. BARTHES, *O rumor da língua*, São Paulo, 2004, p. 386-387.

[24] C. STANISLAVISKI, *op. cit.*, p. 249.

The *surprising element* is not only a resource to the intense embodiment of the motion in football fields. It is a point to molding the argument of orality and can bring meaning to something that can fossilize in the routine.

It is necessary to master the scene and not only throw sentences looking for a result or to get rid of it quickly. It is necessary to do more than just *selling an image* as if it was merchandise. Even though it may be right, the artificiality of the issue will be kept, as it happens to the actor, once again as support to analogy. Stanislaviski shows his pupils what the effect of the protocol speech is, but not tuned in with the feeling that should chair the exhibition:

> For those who have significant outdoor equipment, what I did just now would not be difficult. Let the voice resound, the tongue clearly pronounces words and sentences, the plastic poses, and the general effect will be enjoyable. I have acted as a diva in a *café-chantant* constantly observing them, to see if it was a hit. I felt as if I was merchandise and you were the buyers[25].

The Russian director talks to his students after interpreting a passage just using the formal mechanical techniques available to actors. He wants them to recognize a fake interpretation. This is relevant within his way of conceiving the theatre, because he developed the technique of emotional or affective memory. It is inside it, in their past line, that the actor seeks the support to *feel what and how the characters feel* and passes this on through the text that is being acted and in the relationship with other characters, their actors and their respective *emotional memories*. A pleasant experience, or the pain of the loss of a loved one, or the feeling of fear of something and so on, all this fits in the drain from where reciprocal relations are taken out. Judges expose or present themselves with their reminiscences and feelings and are submitted to reactions of all present, with their conflicts and ways to confront them.

The practice of *emotional memory* can also promote relations of empathy. The judge, as an intermediary between the parties[26], must im-

[25] C. STANISLAVISKI, *op. cit.*, p. 224.

[26] ARISTÓTELES, *Ética a Nicômaco*, Bauru-São Paulo, 2002, p. 144.

bue themselves of the reasons of the parties, even if they need to adopt one of them as being a guide for their direction to decide.

The time that judges, parties and lawyers spend together is short for an entire perception of all circumstances, for the entanglement of *emotional memories*, for the full empathic practice. The total completion of these processes would require deep and dilated interaction. However, the short period in which they interact is what is reserved for the restoration in the process of the life line of those involved in the most complex way for solving the case. In this interchange of resetting the parties' past and present there are, as characters of the process, something in common with what happens between the actor, the character represented and the public:

> The dramatist just gives us a few minutes of the whole lives of their characters. A lot of what happens behind the scenes is omitted. Often nothing is said about what happened to the characters in the backstage, nor for what reason they do what they do while back on stage. We have to fill in what is left unsaid. Otherwise, we would have to offer only scraps and pieces of the life of people we interpret. It's not possible to live like this, so we need to make, for our roles, relatively uninterrupted lines[27].

Outside the courtroom, the rest of the world is like a backstage to the judge. The processes are scraps of people's or businesses' lives and the notion of legal relevance contribute to this segmentation, but coherence must be preserved. The *whens*, the *wheres*, the *whys*, the *hows* interest only to the extent of litigation and dispute limits. Aggression between the parties or between the lawyers may come from something in their coexistence that does not even relate to work or to that process and to this part of the characters' lives, the judge has no access, despite the continuation of the stories: the audience integrates it even about that undisclosed contingency.

Moreover, the lack of facts is a constant at the hearings. Judges fill in the lives of the parties that continue unknown to them and that are relevant to the outcome of the case. This happens with the hearing when deciding what and how to ask parties and witnesses. They be-

[27] C. STANISLAVISKI, *op. cit.*, p. 271-272.

come dramaturges when telling their conception of the facts as they rushed in through evidence. And it is not unusual that, at the time of ruling the decision, they notice a question that should have been made. The lack of it or the lack of evidence of the relevant fact has a solution that is not important to orality and which its artificiality reiterates the closing of the writing: the technique of distribution of the burdens of proof. It is a touch of magic kept by the system to establish a truth that enables the judge to decide even if only based on probabilities. They will never know if what they understood was right or wrong and, whatever the effectiveness of the consequences on the recipients of the sentence, there will be change in the circuit of their lives. So is the lesson that Stanislaviski gives his pupils:

> The life of a person or a role (…) consists of an endless change of objects, circles of attention, whether in reality, whether in imagination: in the kingdom of memories of the past or the dreams with the future. The uninterrupted nature of this line is of vital importance to the artist, and you must learn to establish them in yourselves[28].

Judges in training should also stay *on the side of the courtroom*, passing by it *as if they were not judges* to become aware that they will be seen and of how they will be seen.

At the end of each hearing or each day, a line of connection between our lives that is forever is established. It makes memory and integrates in the text of the decision to come. It will follow the description about that text like an invisible addendum. The story is improvised and acted every time the door is opened, and someone goes through it.

4. Pedagogy, history and memory of orality

The places where judge training is developed are within the scene and, therefore, have the possibility to considerer what is disregarded as a factor of law. They should not repeat the formulas of knowledge al-

[28] C. STANISLAVISKI, *op. cit.*, p. 273.

ready frayed by redundancy. It is their task to face the difficulties imposed by problems judges have in their routine.

The models for this pedagogical exercise are endless and should enable the interchange of the judges, replicating the vicissitudes of the scenes of permanent dialogue to which they are exposed. Silence them, therefore, with a face-to-face pedagogy that prevents them from listening their own voice and to contrast it with that of their colleagues, is to restrict their passage through zones full of danger to which the daily life will submit them.

Thus, even though writing is a means of substantial expression of the judges' activity, emphasis should be given to the distinction that is established between it and the orality, from the belief that the means of expression permeates the message and interfere in the substance of the communication, composing an image of the Judiciary itself that has implications to legal epistemology.

Simultaneously, there is an overcast of connections between writing and speaking leading to the need of a report about the circumstances that comprise the process of ruling a decision on a case. It is important to establish an organized core of sources for the recovery of the reminiscence about how the legal manufacture is done under unwritten and written exposures and about its influence on how law is understood.

The narrative about reality must seek the most varied ways of expression to enable the widest possible access. It can take advantage of correlations with artistic expression. It can use the most varied forms of literary expression, including the journalistic essays which enable a more immediate scrap with a moment-limit of reality. The experience of judge training is a place for the deposit of this source of fonts for the dissection of the influence of orality on law as a reality.

To register and share the feelings that encircled the experience of speech and, for this, "refer to the experiences of illusions, memories, feelings arising from the person that I am when I speak, the person who I was when I spoke"[29] can contribute to express the anxiety of the non-return and of the consequences that it involves for those who work as judges. Even if orality is maintained within the memory of those who

[29] R. BARTHES, *op. cit.*, p. 401.

are involved with a specific process, it is important to establish ways to recognize the relevance of the oral experience in the understanding of law's dynamics.

Magistrate schools, by the aggregating sense that should rule their actions, are the place by excellence in which the dialogical game can be reassembled in its various forms and in which one can return to it, as raw material essential to the education on how to be a judge.

For, in fact, to be a judge, a lawyer or a party in a process means only that we are only human beings entered into the course of life and facing the certainty of finitude. We are just like everyone else.

To educate for orality is to face the infinite not only in relation to the unlimited filed of the improvisations proposed by the dynamic of the days, as for the means that can be used to *prepare actors*. None of them will close the perspectives, nor define perfect formulas. The goal is, above all, to highlight the potentiality of the missteps, of the storms, of the wholesome, of the promising, of what is recorded in the memory of those who interact in places where justice is made. To educate to the speech is to navigate in the potentialities of the concretion in law, as told by Barthes to which it is turned to finalize: "Nothing to do: language is always power; to speak is to exercise a willingness to power: in the space of speech, no innocence, no safety"[30].

And no one lives in writing. Even without innocence and without safety it is vital to face the risks of the speech in action, this (sometimes) hidden side of the law.

[30] R. BARTHES, *O rumor da língua*, São Paulo, 2004, p. 388.

E-COMMERCE AND ANONYMOUS CONSUMERS AND TRADERS

Marcelo de Oliveira Milagres

SUMMARY: *1. Introduction. 2. Capacity and contractual identity. 3. Brief considerations about the Brazilian legal reality and the European community on ecommerce. 4. Conclusion.*

1. Introduction

A 14-years-old Brazilian teenager on vacation in Italy, using his smartphone and visiting a well-known business-buying site based in the United States of America, acquires an European supplier product, manufactured by Chinese producer no identified, with scheduling of delivery in Brazil and having a clause of election of foreign jurisdiction. Is this a valid contract?

In addition to discussions about the place of the transaction and definition of jurisdiction to resolve any conflict in these businesses, there are discussions about the validity of this economic operation and the non-identification of the producer.

In the present times, the participation of infants in social life is increasing, giving opinions, choosing, protesting and even realized contracts. Unavoidable, then, are the questions: Are the manifestation of the will of these people protected and recognized by the legal system? Would the general rules of disability reach the universe of the most current and complex life situations? How to work with producer / supplier anonymity?

The codification movement recognizes that every person is capable of rights and duties – a capacity that is not confused with the personal exercise of rights and which is not restricted to the personality (in this sense, for example, how many depersonalized entities have capacity

negotiation). In turn, are possible contracts without a juridical transaction?

How to explain the efficacy of a compulsory relationship according to which a subject, absolute or relatively incapable, using a computer, a tablet, a smartphone, buys and acquires several products or services, satisfying the most diverse desires.

In times of an economy of speed, a plural and hypercomplex society, markets without frontiers, cyberspace, an incorporeal reality, consumption on demand, of Netflix experiences, Spotify, Zipcar, Cloud Computing, Facebook, Instagram, Snapchat, Second life, it seems inevitable to rediscover the contract and its agentes.

The artificial intelligence is a reality, the interactions go beyond known B2B (business to business), B2C (business to consumer), G2C (government to citizen), C2C (consumer to consumer), reaching H2T (human to thing) and T2T (thing to thing).

We contract the most diverse goods, things, services, utilities, needs and non necessities. We live the world of contracts.

But would the contracts really be juridical transactions?

How to explain the reality of contracts by depersonalized subjects, people and not people, capable and not capable, identified and anonymous.

Today, capacity to contract no longer seems to adjust to the negotiating capacity, to the will qualified by the right. Capacity for law and capacity in fact differ, as well as negotiating capacity and equity capacity.

See:

The Brazilian Civil Code, in its art. 104, determines that the validity of the legal business requires capable agent. Full capacity, in the Brazilian model, is reached at 18 years of age.

But how explain the contracts made by various minors? Existing, would they be valid or invalid, effective or ineffective?

How, by electronic means, ensure this requirement of validity?

According to art. 1425 of the Italian Civil Code, *il contratto è annullabile se una delle parti era legalmente incapace di contrattare.*

In times of intense negotiability, how to guarantee the security of commercial transactions, how to guarantee the viability of the most di-

verse contracts, when does not have the possibility to identify the subjects and their own capacity.

Enzo Roppo has already said that the contract is the legal-formal instrument of economic operations. Before form, there is the economic substrate[1].

It seems increasingly distant the contracts between presents, the possibility of the contract face-to-face. How to preserve private autonomy in the face of these dynamic and virtual ways of acting? No more handshaking, but clicks have different effects.

It also highlights the discussion about situations of anonymity or the uncorrected and complete identification of the supply chain.

Here I am for several contracts in their electronic form, including related contracts. I made a few clicks. I acquired air and land transportation on the Internet, also, I negotiated my lodging and other activities through this means. The support was not presential or material, in reverse, immaterial. The terms of use of the shopping sites themselves configure standardized contracts.

Without a compulsory digital ID, I registered with my personal data, filled in some forms, but did not have the proof or the certainty of my negotiating capacity. The IP address is relevant, but can say nothing about the actual user. We all contract and are connected, but not everyone can invariably contract.

Without entering into the possibilities of virtual crimes, what is the certainty that I contracted with subjects with capacity and suitability and who guarantees to my contractors that I would not be a subject, although endowed with the attributes of technology, devoid of intellectual or patrimonial capacity and, of legitimacy. Appearances are worth, but appearances deceive. The virtual identity can be represented by an avatar, virtuality that distance itself from reality or legal possibilities.

The Internet is global, the interests are varied, laws are local and / or regional and not all markets are integrated. As you can see, the complication factors are diverse.

[1] See V. ROPPO, *Il contratto*, 2nd ed., Milano, 2011.

In a report presented at the United Nations Conference on Trade and Development held on 3 and 4 July 2017 in Geneva, the following ecommerce challenges were identified:

- Weak Internet infrastructure, including speed and reliability
- Unstable communications network
- Relatively low online connectivity and insufficient electricity supply
- Language barriers
- Deceptive information and marketing practices with respect to both goods and services and prices
- Misleading advertising
- Lack of clear and sufficient information on both the identity and location of traders, as well as goods and services, prices and guarantees
- E-commerce offers made by anonymous traders
- Drip pricing practices, where the final amount due is not known until the whole process is complete
- Uncertainty on merchantability of goods
- Monetary refunds for non-satisfactory products
- Non-fulfilment of return or refund policies announced on trader websites
- Long and tedious refund process
- Expenses for returning goods to be covered by consumers
- Data security and online scams, identity theft and frauds
- Irreversibility of electronic payments
- Security of online and mobile payments and chargeback options
- Unclear information on chargebacks and withdrawals
- Denial by e-commerce websites of responsibility for online payments that are blocked by banks or payment gateways
- Fraudulent and fly-by-night operators who take money from consumers without providing products or services
- Protection of personal data and privacy
- Electronic identification and authentication tools
- Late or non-delivery of products or delivery of defective, wrong or spurious products
- Non-provision of promised services or offered gifts
- Non-compliance with legally established cooling off periods
- Insufficient or non-existent customer care

- Denial of after-sales service
- Lack of consumer awareness of their rights and duties, as well as those of businesses
- Lack of basic information technology skills and financial literacy
- Concerns about dispute resolution procedures
- Resistance to or delay in providing redress by financial institutions upon receiving consumer complaints, requiring intervention by consumer protection authorities
- Competent jurisdiction and applicable law with regard to cross-border e-commerce disputes.

In the scope of this conference, we can highlight the challenges involving the mechanisms of identification of suppliers and consumers (Electronic identification and authentication tools and E-commerce offers made by anonymous traders).

2. Capacity and contractual identity

In the economic sphere or in the case of patrimonies situations, it is possible to recognize the validity and effectiveness of contracts concluded by the incapacitated – unrepresented or unassisted –, separating the agreements from the negotiating basis and defining them as a common activity. The contractual relations of fact – denomination of the German doctrine – often originate of will reflected and socially recognized.

Frédéric Zenati-Castaing and Thierry Revet[2], commenting the French model of full exercise capacity at age 18, also recognize the validity of contracts made by minors that do not cause them any harm and are socially accepted. In that same sense, Philippe Malaurie[3].

The Brazilian legislation itself also allows the child to be held liable for an unlawful act. The art. 928 of the Civil Code provides that the incapacitated person is liable for the damages he causes if the persons

[2] F. ZENATI-CASTAING, T. REVET, *Manuel de droit des personnes*, Paris, 2006. p.128.

[3] P. MALAURIE, *Les personnes: la protection des mineurs et des majeurs*, 4. éd., Paris, 2009, p. 258.

responsible for him do not have an obligation to do so or do not have sufficient means.

The young age, as is seen, it does not disqualify the will of the subject of law and does not remove its responsibility.

The Brazilian Civil Code itself, in art. 181, disciplines that no one can claim what, by an annulled obligation, paid an incapable one, if it does not prove that it reversed to the benefit of the amount paid. In turn, art. 180 provides that a minor, between 16 (sixteen) and 18 (eighteen) years of age, may not, in order to avoid an obligation, invoke his age if he intentionally concealed it when he was asked by the other party, or if, he declares himself to be greater.

Thus, it could be concluded that if the contract was entered by an absolutely incapacitated, under 16 (sixteen) years, even if he concealed his age, the business could be declared null and void. Caution is required.

The problem is compounded by the electronic contracting. How can the offeror, the tenderer or the supplier be able to ascertain the ability of the purchaser, the recipient, the user or the consumer if the information exchange take place digitally and depersonalized?

The conclusive behavior of the recipient of the proposal can be extracted from electronic operations that denote the knowledge of the contracting.

Contracts, by electronic means, seem to address any person and not person. Imagine, for example, depersonalized entities or autonomous imputation centers (bankrupt estate, estate, condominium, de facto societies and others). Is the identification of the supplier and of the consumer legally required?

How to make sure that the contractor has – or not – capacity for fact or exercise, if in the electronic environment, depersonalization is the rule. If the interested party, after satisfying all the electronic requirements of the standard ecommerce program, has created the legitimate expectation in the offeror of the validity of the acceptance, it can not be subtracted from the economic effects of this economic operation, under penalty of violation of confidence in the economic transactions.

The identification of the acquirer or acceptor of the proposal is significant, not only for the discussions involving capacity or incapacity,

but for the definition of the legal regime applicable to the business relationship. Is the purchaser – or not – the consumer? These are, for example, business between businessman and consumer (B2C) or businessman and entrepreneur (B2B).

In the facto society, even if the acquirer or acceptor is incapacitated, if he did not express this situation or could not be perceived, with emphasis on contracting by electronic means, the presumption of validity of the contract based on the principle of trust prevails.

For example, how to disregard the economic operation, consubstantiated in the acquisition of a product (soft drink, juice, snacks) by a minor of sixteen (16) years, by placing money in a machine, especially when the acquired thing was consumed by the own smaller? Is this not a socially acceptable situation?

The Brazilian Civil Code itself, in its art. 113, stipulates that legal transactions must be interpreted in accordance with good faith and the uses of the place where they are celebrated. Discipline is even included the detailed silence. According to art. 111, silence implies consent, when circumstances or uses authorize it, and it is not necessary the declaration of expressed will. Based on the theory of trust, it also provides art. 138 that juridical transactions are voidable when the declarations of will emanate from a substantial mistake that could have been perceived by a normally diligent person, given the circumstances of the transaction.

According to Karl Larenz[4]:

> The obligatory effect of the behavior of the user is not based, once again, on the fact that it is imputed to the subject as an expression of the will to be forced, but in the fact that, without taking into account the will of the agent, the behavior will be understood, according to the uses of the traffic, as justification of an obligation. It is the typical social "response" or "reaction" to supply and therefore has the socially typical meaning of a source of obligation. No one can dispense with the legal consequences of his own act. The consequence of the typical social behavior of the agent, unaffordable, independent of his will and therefore

[4] K. LARENZ, *O estabelecimento de relações obrigacionais por meio de comportamento social típico*, Trad. Alessandro Hirata, in *Revista Direito GV*, São Paulo, v. 2, n. 1, jan./jun. 2006, p. 60.

> impossible to eliminate by him, is to be the obligated agent, through the receipt of fact from the benefit, to the custom consideration or according to tariffs.

The OECD policy guidance for addressing emerging consumer protection and empowerment issues in mobile commerce provides examples of situations in which problems could arise when children access mobile devices and purchase products without the knowledge or consent of their guardians (see http://www.oecd-ilibrary.org/science-and technology/oecd-policy-guidance-for-addressing-emerging-consumer-protection-andempowerment-issues-in-mobile-commerce_230363687074). Children can make such purchases without having to provide appropriate authentication before making payment commitments. To address this issue, the OECD policy guidance provides for certain measures that stakeholders may take, such as providing parents with the ability to set a ceiling that would limit the amount of charges that children could accrue using mobile telephones. The OECD consumer policy guidance on mobile and online payments recommends that Governments, businesses and other stakeholders take measures to enable parents or guardians to monitor and limit children's mobile and online payments for goods and services.

3. Brief considerations about the Brazilian legal reality and the European community on ecommerce

In Brazil, the Consumer Defense Code does not discipline ecommerce. Fit the Decree No. 7.962 of 15 March 2013 regulates e-commerce contracts, with respect to off-premises contracts and establishing minimum detailed information requirements, underlining that information should be clear and accessible, to avoid misleading advertising.

It seeks greater protection of consumer expectations by including the necessary identification of the supplier, highlighting the necessary information for its location and contact.

In the scope of European Union, the Directive 2000/31 / EC on electronic commerce stands out, with emphasis on the consumer's right to full information.

By Legislative Decree n. 70 of 9 April 2003, Italy has transposed Directive 2000/31 into the internal market, with particular reference to electronic commerce

The Codice Del Consumo itself (Decree No. 206/2005), in its art. 31, has specific concern with minors. Also, in the distance contracts, it is also necessary to identify the supplier, including his geographical address (article 49).

The art. 2250 of the Italian Civil Code also requires that the corporate companies, in their corporate website, indicate as much information as possible, highlighting the headquarters and registration of the constitutive acts.

A basic and differential issue between Brazil and the European Community is the extent of the concept of consumer.

According to art. 2 of the European Directive 2000/31, "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession.

In Brazil, the legal entity can also be considered a consumer (Article 2 of Law 8078/1990).

The challenge remains, it seeks to fully identify the supplier, forgetting the equal identification of the consumer, highlighting the need for technical instruments to assess their real contractual capacity.

4. Conclusion

How to route the solution to this contemporary complexity?

The way seems to be the cooperation and harmonization of legislation.

If we experience network contracts, we need to share and optimize solutions.

If the Internet is global, we need common solutions.

The General Assembly, in its resolution 70/186, decided to establish the Intergovernmental Group of Experts on Consumer Protection Law

and Policy, within the framework of an existing commission of the Trade and Development Board of UNCTAD, to provide the international institutional machinery for the guidelines for consumer protection. The functions of the Intergovernmental Group of Experts are detailed in guideline 97. UNCTAD, through the Intergovernmental Group of Experts, provides an international forum for dialogue, networking and exchanging experiences and best practices in the area of consumer protection. The first session of the Intergovernmental Group of Experts was held in 2016, with more than 300 participants from consumer protection authorities, civil society, academia, legal practices and business associations.

As highlighted in the European Directive 2000/31, n. 58, in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

If we advance in the contractual annexed duties, with the search of the full identification of all suppliers that are part of the contractual network, we still need to improve mechanisms for identifying the consumer, assessing their real contractual capacity, and protecting the most vulnerable.

Even if the undeniable advances in technology are recognized, in practice, there are real difficulties in identifying the subjects of electronic contracts. How to harmonize the contract law? The challenge remains.

NETWORK NEUTRALITY: WHAT IS INTERNET MADE OF, HOW IS IT CHANGING AND HOW DOES IT AFFECT YOUR LIFE?

Leonardo Parentoni

1. Introduction and delimitation of the subject

This chapter does not only bring legal considerations. Nor it brings only considerations related to the Information Technology, as the author has no specific training in this last area. Rather, it seeks to merge both, understanding that their joint analysis is essential to understand the actual functioning of the Internet and, with that, propose legal solutions that are plausible and feasible, not only from a theoretical point of view, but especially in the factual aspect. After all, the best theory is the one that works in practice.

Based on this premise, it is intended to address the origins of the Internet and its unique features, responsible for turning it into the success it is today. Afterwards, it is shown how the Internet has been changing in recent years, and the consequences of this change in people and entrepreneurs' lives and in the proper functioning of markets.

Then it is discussed the aspect that, in the author's view, is the main regulatory response to the new problems: the network neutrality. Network neutrality is conceptualized with foreign legal literature and the treatment of the subject brought by the Brazilian Civil Rights Frame-

work for the Internet is also analysed. Finally, the author presents his understanding of how should the network neutrality be applied.

2. Brief history of the Internet

The remote origin of the Internet pushes back to the 50s of the last century, long before its worldwide expansion. Like any other technology, it was the result of a socioeconomic context, which directly influenced the form and the goals for which it was developed. Understanding this point is essential to critically analyse the Internet of today[1].

Indeed, the world was living the so called "cold war", a clear conflict between the United States and the Soviet Union. During this period, the fastest means of communication was by telephone. The telephone network, however, was very vulnerable to military strikes. Aware of this weakness, the US Department of Defense wanted to develop a safer alternative. That's when a systems programmer at Rand Corporation, named Paul Baran, suggested, *still in the 50s*, a computer network model similar to the Internet. The Department of Defense, then, consulted with AT&T, the company that monopolized the telephone communication of the country, to figure out if she would be interested in developing this model. AT&T immediately rejected the idea, affirming that it was not feasible[2].

[1] M. CASTELLS, *La Galaxia Internet*, Translation: Raúl Quintana, Barcelona, 2001, p. 23. "(…) la producción de una determinada tecnología en un momento histórico condiciona su contenido y los usos que se hacen de ella en su desarrollo futuro. Internet no escapa a esta regla. La historia de Internet sirve para comprender su evolución posterior".

[2] A.S. TANENBAUM, D.J. WETHERALL, *Computer Networks*, 5th Ed., Boston, 2011, p. 55. "Around 1960, the DoD [Department of Defense] awarded a contract to the RAND Corporation to find a solution. One of its employees, Paul Baran, came up with the highly distributed and fault-tolerant design (…) Baran proposed using digital packet-switching technology. Baran wrote several reports for the DoD describing his ideas in detail. Officials at the Pentagon liked the concept and asked AT&T, then the U.S. national telephone monopoly, to build a prototype. AT&T dismissed Baran's ideas out of hand. The biggest and richest corporation in the world was not about to allow

Then, in October 1957, the Soviet Union took a worldwide reported step towards technological progress, launching the Sputnik satellite. In reaction to this, the then US President, Dwight Eisenhower, developed, in September 1959, within the Department of Defense, an agency for advanced research projects (Advanced Research Projects Agency - ARPANET), dedicated specifically to improve the communication nets. The objective was to overcome the Soviet Union.

Among other purposes, the ARPANET would develop a safer communication network that could remain available even when one of its components got damaged (eg. in case of destruction of a military base, the information stored in it would remain accessible)[3].

However, at that time, the ARPANET had a modest infrastructure[4]. Therefore, *it appealed to the academic world* to develop their objectives[5]. Professors and students then rescued the ideas of Paul Baran, demonstrating the feasibility of establishing a computer network based on the standard that had been suggested by him years before[6].

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some young whippersnapper tell it how to build a telephone system. They said Baran's network could not be built and the idea was killed".

[3] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 45-46. "Given the DoD's [Department of Defense] worry that some of its precious hosts, routers, and internet-work gateways might get blown to pieces at a moment's notice by an attack from the Soviet Union, another major goal was that the network be able to survive loss of subnet hardware, without existing conversations being broken off. In other words, the DoD wanted connections to remain intact as long as the source and destination machines were functioning, even if some of the machines or transmission lines in between were suddenly put out of operation. Furthermore, since applications with divergent requirements were envisioned, ranging from transferring files to real-time speech transmission, a flexible architecture was needed".

[4] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 56. "ARPA had no scientists or laboratories; in fact, it had nothing more than an office and a small (by Pentagon standards) budget. It did its work by issuing grants and contracts to universities and companies whose ideas looked promising to it".

[5] The first academic institutions to take part at the Net were the University of California, Los Angeles, and the Stanford Research Institute, in October 1969. Right after, the Utah University and the California University, in Santa Barbara, also took part at it.

[6] Highlighting the importance of academics for the development of Internet: K. HAFNER, M. LYON, *Where Wizards Stay Up Late: The origins of the internet*, New York, 1996.

In the 70s there were already several Local Area Networks (LANs) at the United States of America, but they were not interconnected. For example, at universities. Or even the private networks BBS type (Bulletin Board Systems)[7]. The challenge was to develop a *universal communication standard,* capable of interconnecting all networks and giving birth to a "network of networks". For this purpose, the ARPANET began to promote research in the field, which resulted, in 1978, in the creation of the TCP/IP protocols, which are still the standard of the Internet[8]. Based on them, the various local networks got integrated and started to allow an exchange of information and academic experiences never seen before. A few years later, in the late 80s, the number of institutions, devices and people connected was already so great that the ARPANET was replaced by a more robust network called NSFNET (National Science Foundation Network), reaching across the country. The Internet was taking off from its military origins[9].

At this point, it would not be feasible to keep the Internet under the sole responsibility of the US Government. Then, it was created a private company controlled by the State (ANS - Advanced Networks and Services), to manage the progressive transfer of the network to commercial exploitation ("privatization" of the Internet). This *was consolidated in the 90s*, when many private companies were already acting as access providers[10]. It was also at this time that the network expanded worldwide. That is, effective internationalization of the Internet and its commercial exploitation have started about 40 years after the first researches on the subject.

This brief historic intended to demonstrate that the Internet *was not created as a market-led initiative*. On the contrary, AT&T, a company

[7] A famous BBS in the 80s was BITNET, which stands for "because it's there newtwork", evidencing that this kind of net was already a reality.

[8] M. CASTELLS, *op. cit.*, p. 25. "Para conseguir que las redes de ordenadores pudieran comunicar entre ellas, eran necesarios unos protocolos de comunicación estandarizados. (…) En 1978, Cerf, junto con Pastel y Cohen, que trabajaban en la University of Southem California, dividieron el TCP en dos partes, añadiendo el protocolo interredes (IP) y creando así el protocolo TCP/IP estándar sobre el que aún opera Internet".

[9] ARPANET was definitively shut-down in February 1990.

[10] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 60.

that monopolized the US telephone communications, showed complete disinterest in the technology in the 50s. In fact, the worldwide web was the result of a partnership between the US Government and educational institutions of the country. Its birth is both military and academic[11]. As summed up by Manuel Castells[12]: "the Internet was born in the unusual crossroad between big science, military research and the libertarian culture".

As it will be analysed below, this historical feature was of major importance for the success of the worldwide web.

3. What is Internet made of? Network design and its layers

In order to build something, one needs to not only define how the building will be, but also materialize this idea through a project. The architecture/design is the preliminary step to the implementation of the work. With regard to computer networks, this step is called the network architecture or network design[13]. It is the network architecture that de-

[11] L. PARENTONI, *Documento Eletrônico: Aplicação e Interpretação pelo Poder Judiciário*, Curitiba, 2007, p. 27-29.

[12] M. CASTELLS, *op. cit.*, p. 31. "Internet nació en la insólita encrucijada entre la gran ciencia, la investigación militar y la cultura libertaria".

[13] B. VAN SCHEWICK, *Internet Architecture and Innovation*, Massachusetts, 2010, p. 20-21. "[architecture] denotes the fundamental structures of a complex system as defined during the early stages of product development. Similar to the way the architecture of a house is different from the house itself, the architecture of a system is not the final, working system; rather, it is a description of the system's basic building blocks. (…) In short, the architecture describes the components of the system, what they do, and how they interact".

See also: L. LESSIG, *Code: Version 2.0*, New York, 2006, p. 24; e A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 31. "A set of layers and protocols is called a network architecture. The specification of an architecture must contain enough information to allow an implementer to write the program or build the hardware for each layer so that it will correctly obey the appropriate protocol".

Also: R.S. WHITT, *A deference to protocol: Fashioning a three-dimensional public policy framework for the internet age*, in *Cardozo Arts & Entertainment Law Journal*, v. 31, n. 03, p. 689-768, Jul. 2013, p. 704. "'Architecture' is a high-level descriptor of a complex system's organization of basic building blocks, its fundamental structures.

fines how the entire infrastructure[14] of a computer network will be, affecting its functioning and even the cost and the possibilities for future modification.

There are several possibilities for network architecture. It will depend on the direction followed by its creators. This direction, in turn, is given by the design principles[15]. In the development of the Internet, there were applied four fundamental principles: 1) Packet switching; 2) Modularity; 3) Network layers; and 4) End-to-end.

Understanding the original design of the Internet is essential to perceive how it has been changing and what are the consequences of these changes.

Indeed, the basic feature of the Internet is to divide the data into smaller fractions, called packets, transmitting them separately. Each packet receives information about who is the sender and what is the address (*addressing*). Hitherto, something similar to traditional mail, on paper. The big difference is that the various packets can travel simultaneously by several routes, even changing the route along the way, to privilege the one that is faster and more effective (*switching*). Getting to the destination, the packets are reassembled to form the original data and then delivered. This principle enables the data transmission even if one or a few network components are disconnected, congested or by any reason unavailable[16]. This was the solution suggested by Paul

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How the Internet runs is completely dependent on the implementing software code, its fundamental nature created and shaped by engineers".

[14] About the concept of infrastructure see: R.D. OLIVEIRA, L. PARENTONI, *Uma Advertência sobre Interoperabilidade e o Artigo 154, Parágrafo Único, do CPC*, in *Revista Magister de Direito Civil e Processual Civil*, Ano IV, n.º 19, p. 51-73, jul./ago. 2007.

[15] B. VAN SCHEWICK, *op. cit.*, p. 23. "A design principle describes known connections between architectural choices and the characteristics of the resulting architecture. (…) a design principle describes how to design an architecture for a system with specific quality characteristics, and, like different versions of a dish, the resulting architectures will differ depending on the design principles that were used to create them".

[16] L.G. ROBERTS, *The evolution of packet switching. Proceedings of the IEEE*, New York, v. 11, p. 1307-1313, Nov. 1978, p. 1307. "[A packet switched network] divides the input flow of information into small segments, or packets, of data which move

Baran in the 50s, and subsequently endorsed by the US Government, through ARPANET. The following figure compares traditional data communication, via direct cable connection, with packet switching:

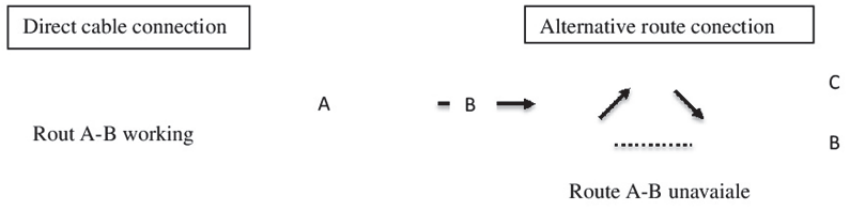

Figure 1. Alternative routes of communication through internet

It is noticed that the difference is the possibility that the data from "A" to "B" is delivered, even if the direct connection between them is compromised, as there is the option of using the route through "C". On the Internet, for each route there are hundreds or even thousands of alternatives. The following figure illustrates how the data is broken during transmission and then reassembled at the destination:

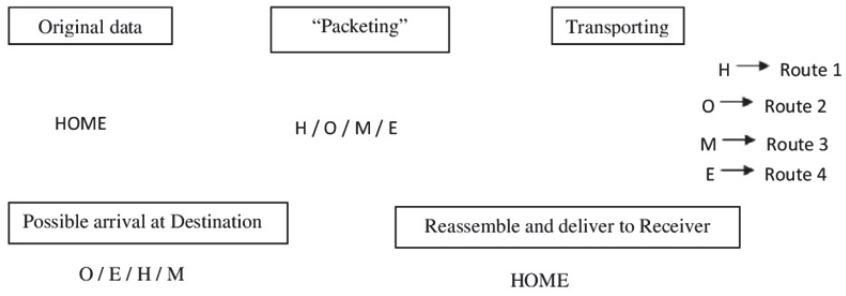

Figure 2. Data communication through packet switching

The second principle applied at the original Internet design was *modularity*. Based on it, the network consists of many parts, independent of each other, called modules[17]. The intention is to reduce to a min-

through the network in a manner similar to the handling of mail but at immensely higher speeds".

[17] B. VAN SCHEWICK, *op. cit.*, p. 38. "Modularity is a design principle that intentionally makes components highly independent ('loosely coupled'). Components of

imum the dependence of the network as a whole upon each component. For this reason, every module has two types of information, the visible and the "invisible"[18]. *Visible information* is one that any component of the network needs to know in order to connect with a particular module. It should remain unchanged and available to any interested party during whole life of the network, in order to not disrupt communication between modules. For example, the VGA port format, used for monitors connection to PCs, is a visible data. Knowing this information, any manufacturer is able to produce a monitor that supports this port.

On the other hand, the necessary information for the internal operation of each module is called *"invisible" information*. It is usually known only by the module manufacturer, consolidating its competitive advantage over competitors. For example, the resolution and mode of operation of the monitor. As long as the visible information remains the same, modules with different internal configurations are compatible. That is, the same PC could connect to many monitors. Another example is the USB port. Holding the visible information (format of the port and what is needed to connect to it), any manufacturer can develop a compatible product, such as mice, printers, cameras, mobile phones, tablets, etc. The fact that each product has a different internal setting does not affect the connection. *The great advantage of modularity is to allow internal improvements in each component of the network with no need to change its entire infrastructure*[19].

In turn, communication between the various modules is established through its internal specifications (*protocols*)[20] and through connection

modular designs are called modules. When designing a modular architecture, system architects decompose the system in a way that minimizes dependencies among components".

[18] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 29. "The fundamental idea is that a particular piece of software (or hardware) provides a service to its users but keeps the details of its internal state and algorithms hidden from them".

[19] It steps aside from the "all or nothing" logic, allowing ponctual modifications, as well as reducing the adaption cost of each modification.

[20] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 29. "Basically, a protocol is an agreement between the communicating parties on how communication is to proceed".

to the layers that are immediately higher and lower (*services*)[21]. Thus, network layers are arranged vertically (*stack of layers*)[22] with relative independence from one another.

Yochai Benkler believes that any communication system should present at least 3 layers[23]. Specifically in what regards the Internet, there is no consensus about how many layers there are and which would they be, and there is more than one classification[24]. *In this paper, the description comprising 6 layers was chosen*: 1) Physical; 2) Of Connection (data link); 3) Of Network; 4) Of Data Transport; 5) Of Applications; and 6) Of Content.

The initial layer from the bottom up, is the physical. She encompasses the devices that transmit data in its raw form (raw data), such as network cables, satellites and mobile phone towers[25]. Next, comes the

[21] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 40. "Services and protocols are distinct concepts. (…) A service is a set of primitives (operations) that a layer provides to the layer above it. The service defines what operations the layer is prepared to perform on behalf of its users, but it says nothing at all about how these operations are implemented. A service relates to an interface between two layers, with the lower layer being the service provider and the upper layer being the service user.

A protocol, in contrast, is a set of rules governing the format and meaning of the packets, or messages that are exchanged by the peer entities within a layer".

[22] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 29. "To reduce their design complexity, most networks are organized as a stack of layers or levels, each one built upon the one below it. The number of layers, the name of each layer, the contents of each layer, and the function of each layer differ from network to network. The purpose of each layer is to offer certain services to the higher layers while shielding those layers from the details of how the offered services are actually implemented".

[23] Y. BENKLER, *From consumers to users: Shifting the deeper structures of regulation toward sustainable commons and user access. Federal Communications Law Journal*, in *George Washington University Law School*, v. 52, n. 03, p. 561-579, 2000.

[24] Depending on the classification, certain layers are assembled or disassembled. There are, for example, those who consider that the physical layer would not be a part of the network itself, as it does not correspond to one of its modules, merely transmitting the data in raw form (raw data).

[25] C.S. YOO, *Protocol Layering and Internet Policy*, in *The University of Pennsylvania Law Review*, v. 161, n. 06, p. 1707-1771, 2013, p. 1747. "Any path that can convey a message sequence can constitute a link in this layer, whether physical or not. The means of encoding information varies widely depending on whether the carrier wave is composed of visible light passing through a fiber optics network, an electromagnetic

connection layer, responsible for establishing the connection between the devices that transmit the raw data and the network itself[26]. The third layer is the one that assigns identification to the data, through the *Internet Protocol* (IP)[27]. In effect, any device connected to the Internet must have an identification number. It is through this number that the IP protocol individualizes the device, ensuring that it properly sends and receives data. In a simplified way, the IP address works for the Internet such as the home address of the person works for the post office. Each device has a unique IP, but the same person may have multiple devices connected to the network simultaneously, each one with a different IP. For example, mobile phone, PC, tablet etc. What matters is to individualize the devices, not their holder[28].

After identifying the data with the source and the destination IPs (end hosts), the fourth layer is responsible for effectively transmitting them[29]. This is done through another protocol called TCP (*Transfer Control Protocol*). It is this protocol that fraction the original data into smaller packets and, in the sequence, transmits them.

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wave passing through a copper wire, or an electromagnetic wave passing through the ether".

[26] C.S. YOO, *op. cit.*, p. 1746. "Data-link layer protocols share with network-layer protocols the responsibility for guiding traffic through the network; as a result, data-link layer protocols necessarily run in switches as well as hosts".

[27] C.S. YOO, *op. cit.*, p. 1745. "(…) this layer provides the uniform basis that each network connected to the Internet uses to transmit data communications across an ever-changing landscape of technologically heterogeneous systems".

[28] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 43. "The network layer controls the operation of the subnet. A key design issue is determining how packets are routed from source to destination".

The possibility of a dynamic IP does not interfere in this reasoning because in every connection the device will have a specific IP. There will only be no guarantee that the following connection uses the same number.

[29] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 44. "The basic function of the transport layer is to accept data from above it, split it up into smaller units if need be, pass these to the network layer, and ensure that the pieces all arrive correctly at the other end".

The IP and the TCP work together, consolidating the heart of the Internet[30]: one individualizes the data by inserting the source and the destination addresses; the other splits the data, transmits and reassembles them at the destination. For that reason, it is common to hear "TCP/IP protocol" (in the singular), when in reality they are two different[31] and complementary things (a protocol suite).

The fifth layer network is the applications one[32]. On this layer all software and typical features of the Internet are run (in programming language), such as the browsers used to access sites, the social networks and the download of files. The end result of these applications is then transmitted to the user, by the sixth and final layer. Most users generally think that the Internet is composed only by this last layer, as it represents all they effectively see on the screen of their devices. The lower layers are commonly known and exploited only by the system's programmers and the services providers.

This modular architecture, organized in layers, defines the way the data communication via the Internet is processed. Indeed, there is no direct transfer from a layer, in the source device, to the equivalent layer in the target device. In fact, the communication first flows "top-down", from the device used to generate the data, through TCP/IP, which will individualize, route and fraction them into packets, until they reach the physical layer. From there, they will be transmitted in its raw form until they reach the place in which the receiver is located. After that, they start to flow "from the bottom up", ranging from the physical layer to the connection one, through TCP/IP, which will be responsible to check if the destination is correct and, if so, reassemble the packets, reconstituting the original data, to then send them to the application that will process them (in programming language), until the final result is dis-

[30] L.B. SOLUM, M. CHUNG, *The Layers Principle: Internet Architecture and the Law*, in *Notre Dame Law Review*, v. 79, n. 03, p. 815-948, Jan. 2004, p. 839. "Without TCP/IP there can be no Internet".

[31] In the origins of the Internet it has been proposed to merge both protocols into a single one, the Internetwork Transmission Control Protocol - ITCP. However, this idea was soon discarded: B. VAN SCHEWICK, *op. cit.*, p. 96 a 98.

[32] C.S. YOO, *op. cit.*, p. 1742. "This layer encompasses a wide variety of protocols, each designed to support particular classes of applications".

played on the receiver device[33]. The following figure facilitates the visualization of this route:

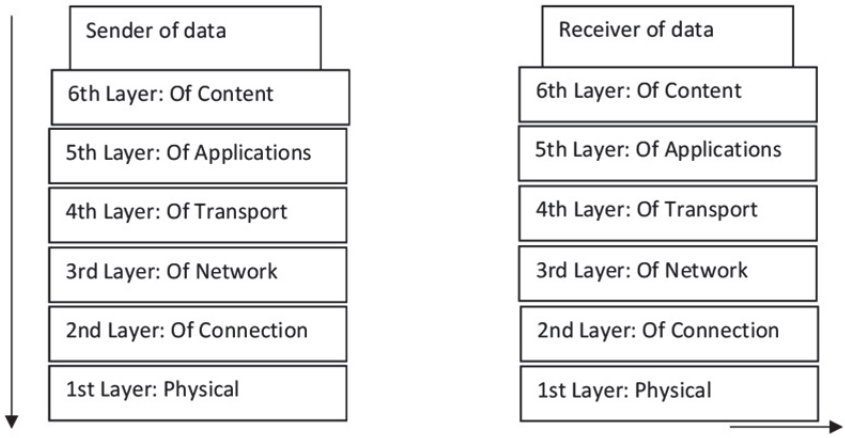

Figure 3. Network layers.

The characteristic feature of this network architecture is that the core layers, such as TCP/IP, are not able to identify the content of the transmitted data. For them, it is not a concern whether the data represent a legal text, a journalistic article or any other manifestation of thought. The type of application to which they relate is also indifferent. For example, if they relate to a web page, to the transmission of a movie or to a post on a social network. The same and universal standard is followed for the transporting of *any* data, directed to *any* kind of application[34]. The applications, located at the penultimate upper layer, are the sole responsible for identifying the content of the data and for what purpose they should be applied to. This is the fourth and final design principle used in the construction of the Internet: Running Applications in the Upper Layer (*end-to-end*). Opposite option is that one in which the functioning of the applications is controlled by the central layers of

[33] L.B. SOLUM, M. CHUNG, *op. cit.*, p. 816-817.

[34] B. VAN SCHEWICK, *op. cit.*, p. 72. "[This] results in a network that is not able to distinguish between the different applications running over it, or to control or to positively or negatively affect their execution".

the network (core centered). This option was *not* used on Internet's original design.

The simplicity in the operation of the central layers of the Internet, coupled with the absence of filters, allows any new application to be immediately and worldwide disseminated, without requiring any further adjustment in the basic network infrastructure[35]. For this reason, the Internet has become a major conductor, open to the transmission, sharing and collective construction of various types of content, stimulating innovation and dialogue[36]. *The success of the Internet, therefore, is closely related to the original design of the network.*

On the other hand, as the internal specification of each module remains visible only to its manufacturer (hence hidden from all other services that connect to this module), the integration between them is not the best possible. There are, thus, *loss of performance* in the modular architecture model, if compared with the full integration of the network components.

These advantages and disadvantages of the original Internet architecture will be discussed with further detail later. For now, it is enough to highlight that there is no perfect alternative, capable of providing only qualities. The network design necessarily involves a trade-off between losses and gains.

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[35] B. VAN SCHEWICK, *op. cit.*, p. 140. "In an end-to-end network (such as the original Internet) in which network operators and application designers follow the broad version of the end-to-end arguments, designing, implementing, testing, and deploying a new application do not require changing the network's core (…)".

Obviously, this rule is not absolute. Certain applications, to present an acceptable performance, may eventually require structural changes in the network. This is the case of streaming of audio and video, as well as the peer-to-peer applications.

[36] S. RANCHORDÁS, *Does Sharing Mean Caring? Innovation in the Sharing Economy*, in *Minnesota Journal of Law, Science & Technology*, v. 16, n. 01, p. 01-63, winter 2015, p. 14-15. "Innovation is a broad concept that can be defined differently depending on the context and field in question. (…) innovation is defined as 'the ability to take new ideas and translate them into commercial [or effective social] outcomes by using new processes, products, or services (…)'. Innovation is more than an idea or a novelty; it must be the first successful concretization of an idea in the marketplace or in society".

4. How is Internet changing

In the previous topics, it has been demonstrated that the Internet is a *human construction*, guided by certain *principles and objectives*[37]. Like any other human construction, it can be altered. After all, there are other possible settings, each one guided by different social, political and economic purposes[38]. It happens that, depending on the type of change, and on the intensity with which it is implemented, this can give rise to a new Internet, entirely different from the one the world has used to know. This topic intends to, briefly, point out some of these changes. In the next topic it will be done a critical analysis about them, in the legal perspective.

It is known that the phone lines were built focusing, primarily, at the transmission of sounds. Just as TV cables were designed only to the service of paid TV. None of these technologies were designed to the Internet typical data flow, especially because the Internet was developed later. Consequently, the transmission speed for the Internet applications was originally very low. Subsequent changes in these instruments, however, have made possible the transmission of data at speeds until then unforeseeable, which rendered these new technologies the name "broadband"[39]. Thus, copper cables were gradually replaced by optical fibre, whilst traditional phone lines evolved to ADSL (asymmetric digital subscriber line)[40]. The same has occurred in relation to the

[37] L. LESSIG, *Code: Version 2.0*, cit., p. 06. "We can build, or architect, or code cyberspace to protect values that we believe are fundamental. Or we can build, or architect, or code cyberspace to allow those values to disappear. There is no middle ground. There is no choice that does not include some kind of building. Code is never found; it is only ever made, and only ever made by us".

[38] R. LEMOS, *Uma Breve História da Criação do Marco Civil*, in N. DE LUCCA, A. SIMÃO FILHO, C.R.P. DE LIMA (Coord.), *Direito & Internet III: Marco Civil da Internet - Lei nº 12.965/2014*, São Paulo, 2015, t. I, p. 79.

[39] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 95-111.

[40] In Brazil, for instance, the companies "Oi" and "GVT" provide access via ADSL, whilst "NET" and "SKY" use the optical fibre cable system. In less urbanized regions of the country, where telephone networks and cabling are still precarious, alternative access technologies, through radio or satellite, are often used.

Internet access through the electricity transmission networks, satellites, radio waves, microwaves or WiFi (wireless fidelity).

Each of these technologies, in their own way, and for different backgrounds, allowed the improvement of the Internet-trough communications. The common element that have to be highlighted is that *all of them could be implemented only in the physical and in the connection layers, without the need of entirely altering the network operation*. Hence, Internet-connected devices remained fully interoperable. This was only possible thanks to the original layered design and to the modularity.

Throughout the evolution of the Internet, several other modifications were made solely in the *application layer*, also *preserving the core of the network*. There were created, for instance, protocols for the direct file transfer between devices (*file transfer protocol* - FTP) and the communication via e-mail (*simple mail transfer protocol* - SMTP).

One of the most impactful change in how the Internet is used was the development of the DNS (*domain name system*)[41]. It has been already said that every device connected to the network has an IP address. To access the device, it would then be necessary to type this address, consisting in numerical sequences, such as "200.251.4.1". However, such sequences are difficult to memorize and they may change over time. This made surfing at the Internet extremely complex. It was difficult for people to memorize a sequence like this for each site they commonly accessed, and check if the numbers had not changed.

In order to solve this problem, there was an application capable of associating each IP address to a specific name, so that typing the name replaced typing the numeric address. This application is called DNS. She is responsible for the fluid and intuitive way navigating on the network currently is, by simply typing "www.google.com" or "www.facebook.com" to access sites, whatever their IP numbers are. The DNS was not part of the original architecture of the network and was introduced later on, shortly before its commercial exploitation.

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[41] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 611-612.

Also: R.F. MACIEL, *A Requisição Judicial de Registro de Conexão e Aplicações no Marco Civil*, in N. DE LUCCA, A. SIMÃO FILHO, C.R.P. DE LIMA (Coord.), *Direito & Internet III: Marco Civil da Internet - Lei nº 12.965/2014*, São Paulo, 2015, t. II, p. 478.

Another important recent change, which also has been unnoticed by most Internet users, is the transition from IPv4 to IPv6. Indeed, IPv refers to the IP protocol *version* that, as described, serves to individualize devices on the network by assigning them an IP address. When the Internet was created, the version number 4 of this protocol (IPv4) was adopted[42] and, in accordance to it, addresses were formed by four numerical sequences, each one ranging from 0 to 255. For example, "200.251.0.1". This version allowed approximately 4.29 billion devices to be simultaneously connected. It may seem a lot, but it is not. Knowing that the tendency is that more and more individuals and companies have access to the Internet, and that each one can consume alone, tens or even hundreds of IP addresses, then it follows that the total number of addresses was doomed to someday end[43].

When this comes to happen, the Internet would be "crowded", preventing the addition of new users and/or devices[44]. To overcome this problem, another version of the IP protocol was developed, called IPv6[45]. Through IPv6 it is possible to offer, simultaneously, a few trillion times the maximum number of addresses supported by IPv4. An impressive amount, which will be hardly overwhelmed, even if the number of network-connected devices increases[46].

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[42] Technical description at UNITED STATES OF AMERICA, *The Internet Engineering Task Force - IETF*, available at <https://tools.ietf.org/html/rfc791>, access 21 March 2016.

The three previous versions were used in the network early days, when it was still restricted to the US.

[43] This could take decades longer to happen if certain IP addresses had not been assigned, collectively, to some US institutions, far above their needs.

[44] Phenomenon dubbed IPcalypse in a jocular allusion to the Apocalypse of the Internet, available at <http://www.ipcalypse.net/>, access 21 March 2016.

[45] Technical description at UNITED STATES OF AMERICA, *The Internet Engineering Task Force - IETF*, available at <https://tools.ietf.org/html/rfc2460>, access 21 March 2016.

[46] It is estimated that IPv6 addresses allows to form more addresses than the total number of atoms in the universe: A. MELANCIA, *O crescimento da Internet*, in *Revista Programar*, available at <http://www.revista-programar.info/artigos/ipv6-para-programadores/>, access 09 April 2016.

IPv6 is based on the hexadecimal system, combining letters and numbers. This new protocol is being implemented gradually, coexisting with IPv4. For example, the email address "www.facebook.com" corresponded, in March 2016, to the IPv4 "200.175.89.139" and to the IPv6 "2A03: 2880: 2130: CF24: face: b00c: 0: 25de66.220.158.68"[47].

Hitherto it has been pointed out some changes that are happening at peripheral layers of the Internet (physical, connection and applications layers). None of them, however, reached the heart of the network, to the point of changing the principles of the original design, such as the operation of TCP/IP protocols. It happens that this kind of change – much more serious and controversial – is also already happening. It consists on the introduction of technologies for monitoring the package *content* itself (*deep packet inspection* - DPI)[48].

The DPI is a software capable of examining both the packet routing's information (headers), which indicate its source and destination, and the actual content of each data packet. This occurs when the data are passing through a given point in the network, where the software is programmed to act[49]. From this point on, it is possible to *discriminate packets*, defining whether they should proceed or be discarded, as well as imposing different speeds for each transmission. The access to headers is necessary and legal, because it is essential to the flow of data on Internet. What the law forbids is the discrimination between packets, based on this information.

This was *inconceivable* in the origins of the Internet. As seen, the worldwide web was designed under the principle of modularity, to ensure interoperability with any new program or hardware, without requiring changes to the network infrastructure (the original modules) or

[47] The use of dynamic IPs was not taken into account, to simplify the example.

[48] M. GEIST, *The Emergence of Net Neutrality Regulation in Canada: How Canada Developed a Consensus Policy on One of the Internet's Most Contentious Issues*, in N. DE LUCCA, A. SIMÃO FILHO, C.R.P. DE LIMA (Coord.), *Direito & Internet III: Marco Civil da Internet - Lei nº 12.965/2014*, São Paulo, 2015, t. II, p. 646. "The DPI [deep packet inspection] capabilities allow ISPs to identify the type of content that runs on their networks and render it possible for them to manage the traffic based on the content".

[49] Such programs are normally operated by the Internet service providers.

to its layers. As long as the external information of each module remained the same, an infinite range of new modules could be connected.

Not only that, but *the TCP/IP protocols worked neutrally,* transmitting any data packets, regardless of their origin, destination or of which given species they were. Only at the top layer of the network that data would be identified, by each particular application, in order to generate the final result (a movie, music, text etc.). During the transmission, it shall be reinforced, it was absolutely irrelevant to which sort of data it was.

It turns out that this has changed. Currently, much of the physical infrastructure of the Internet belongs to the private sector[50]. Thus, it is no surprise that private interests are behind the major recent changes in the network operation. One of the most controversial is precisely the introduction of the DPI. From this technology on, the Internet service providers have gained a previously inconceivable power. They are able to manipulate the way users sense the network, providing greater speed to some data packets over others. Or even interrupting the transmission of certain packets. Taking up the example of the Post Office, it is as if providers could read all the posted correspondence, choosing whether and when to deliver each one. The recipient would tend to think that some services were more efficient than others, as some of the correspondence relating to them (for example, payment slips), always arrive first, whilst others tend to delay. Now picture the range of business, political and ideological interests that could abide such discrimination.

Practices of this sort, by the Post Office, would sound absurd and unacceptable. However, on the Internet, they are already taking place, and with great frequency. Worst of all, many users do not even know

[50] L.F.T. VERGUEIRO, *Marco Civil da Internet e Guerra Cibernética: Análise Comparativa à Luz do Manual de Talin Sobre os Princípios do Direito Internacional Aplicáveis à Guerra Cibernética*, in N. DE LUCCA, A. SIMÃO FILHO, C.R.P. DE LIMA (Coord.), *Direito & Internet III: Marco Civil da Internet - Lei nº 12.965/2014*, São Paulo, 2015, t. II, p. 634-635. "(…) The core of the Internet is formed by a series of infrastructure elements: the interconnection points (IXP), the backbones or national stems, regional networks and local networks, in general, are in owned by private entities, in a way that its openness and its technology contains elements with potential for internal control".

it[51]. This structural change in Internet *has misrepresented its main feature*, which was precisely the neutrality of the TCP/IP protocols in what regards the transmission of content. In the original design of the network, the packet identification was restricted to the upper layer applications, where each data packet was assigned for a specific purpose (end-to-end principle). The core of the network, composed by the TCP/IP protocols, worked neutrally, without worrying about the content of the packets or who would be their sender and recipient.

The next topic will seek to demonstrate how this structural change in the core network layers leads to very serious and worldwide consequences, both micro and macroeconomic.

5. How does it affect your life

But after all, how this issue affects *your* life?

The subject of this text not only interest large corporations, even though it also interests them. Neither it affects solely the systems programmers or the engaged Internet users (known as "activists"). It affects the lives of *all* people who use, have used, or someday might make usage of the Internet[52]. In essence, billions of people around the world. This subject affects, indirectly, even those who do not have access to the World Wide Web[53]. The problem has micro and macroeconomic outcomes, both in country's internal and international levels,

[51] M. GEIST, *op. cit.*, p. 650. "Yet, the public generally remained somewhat apathetic towards the issue, with the net neutrality debate crowded by 'telecom lobbies'".

[52] Only in Brazil, about 86 million people frequently use the Internet: V. CAPUTO, *Mais da metade dos brasileiros são usuários da internet. Caderno Tecnologia*, in *Revista Exame*, available at <http://exame.abril.com.br/tecnologia/noticias/mais-da-metade-dos-brasileiros-sao-usuarios-da-internet>, access 07 April 2016.

[53] Imagine a resident of an underdeveloped country, who has never accessed the Internet, but that could be hired as an employee of a startup, whose business model is based on the Internet. The income from this job would have been a means of improving the living conditions of this citizen and his family. However, he may never have this chance, once the structural changes of the Internet can make the aforementioned startup not exist.

being able to meddle with the organization and functioning of markets[54].

In fact, the network architecture has direct influence in the costs of possible alterations of it in the future[55]. In the case of Internet, its original design used to provide *low costs for innovations*, because new products or services, as a rule, would require only changes in the top layer, on the applications, remaining intact all others[56]. Of course this rule is not absolute, since certain types of innovation in the application layer also require changes in the lower layers of the network, to ensure good quality of the services. For example, the transmission of video in real time (*streaming*), has required certain improvements in the physical and connection layers, so that the increase in the data stream would not overload the network. Even in the TCP/IP layers it would require, eventually, changes in the protocols, in order to adapt them to new applications. IPv6, mentioned above, is a good example. What should be clear is that, in all these cases, the original network design – and the principles that guided its creation – has been *preserved*.

By contrast, in networks that have integrated design, the cost of any alteration tends to be higher, since it is not enough to change just one or

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[54] F.K. COMPARATO, *Capitalismo e Poder Econômico*, in *Revista da Faculdade de Direito da UFMG*, special number: em memória do Professor Washington Peluso Albino de Souza, p. 167-195, 2013, p. 169. "What is properly called market, and that have always been the center of the attention of classical political economy, is the open space of distribution of goods and the provision of services, where imperates the law of division and specialization of tasks".

[55] B. VAN SCHEWICK, *op. cit.*, p. 116. "(…) the number and the kinds of components that need to be changed to realize a particular innovation may differ among architectures. As a result, realizing that innovation may be more expensive in one architecture than in another".

[56] B. VAN SCHEWICK, *op. cit.*, p. 151. "The Internet was designed to interconnect subnets regardless of their physical network technology. (…) To connect a new type of subnet to the Internet, all one needs is a router that can connect this type of subnet to a physical network that uses an existing network technology. (…) These design choices make it possible to innovate on application-layer protocols (as long as no other application-layer protocols depend on them) and on link-layer protocols (as long as the IP service interface stays the same) without any system-adaptation costs, both when new protocols are added and when existing protocols are innovated upon".

a few modules, being necessary to adapt the entire infrastructure[57]. And the higher the cost, the more difficult it becomes to small entrepreneurs to launch new products or services. Consequently, integrated networks present two disadvantages: 1) they make innovation more expensive; and 2) they tend to concentrated the innovation in a small group of people, precisely the ones that have sufficient resources to bear the costs of major changes in the network infrastructure.

Thus, the architecture of a computer network certainly influences *who* is able to innovate. But it doesn't stop there. It also affects some other aspects. Considering that the costs of innovation are prohibitive for small entrepreneurs, it tends to concentrate the innovation only on large companies such as Google, Facebook, Apple and Microsoft. So these companies' interests are the ones that will guide *what* should be created and *when*[58].

Considering only fully integrated network architecture, creations that today bring immense comfort and satisfaction to users, such as WhatsApp and Skype, would probably not exist. What these applications have in common is the fact that they have emerged as an alternative to traditional communication, just as telephone, which is why they have faced strong resistance from mobile telephony operators. As it can be assumed, those operators would not have developed something that, at the time, would conflict with their own business model.

Thus, the creation of these applications was only possible thanks to the original design of the Internet. In this model, *the creative power is shifted* from the center (large companies) to the end (the final users). As long as any user can make use of the pre-built network infrastructure,

[57] B. VAN SCHEWICK, *op. cit.*, p. 121. "Owing to the different levels of coupling between components, the costs of realizing a specific innovation probably will be greater in an integrated architecture than in a modular architecture".

[58] P.H.S. RAMOS, *O Marco Civil e a Importância da Neutralidade de Rede: Evidências Empíricas no Brasil*, in N. DE LUCCA, A. SIMÃO FILHO, C.R.P. DE LIMA (Coord.), *Direito & Internet III: Marco Civil da Internet - Lei nº 12.965/2014*, São Paulo, 2015, t. II, p. 149. "In an extreme model, the strengthening of the core of the architecture can lead to a similar communication model, of what happened in traditional television – even if users have the choice to change the channel, the communication flow has primarily one direction, and the decisions on content availability and the use of applications will be restricted to the interests of those who manage the core network".

without the need for adjustments, it becomes considerably easier and cheaper to develop new products or services and, immediately, to make them available to the market, possibly even worldwide. Mark Zuckerberg, founder of Facebook, for example, payed the first servers that hosted the famous social media for only $85.00 per month[59].

Even when external financing is needed, the modular architecture seems to be more advantageous. It allows the capture of funds to be done in an alternative form, other than the financial market, and also the reduction of costs, such as in crowdfunding[60]. This *gives greater freedom and flexibility to developers*, since they don't need to submit to external interferences in their ideas and business plans, what would inevitably occur if they were to depend on investments coming from investment funds or large companies.

The original design of the Internet, that provides the capability of innovation described above, even against the will of the large companies in the sector, is suffering several changes. And the current changes are much deeper than those experienced in the past. Depending on the type and the way they are consolidated, they may compromise: 1) innovation; 2) freedom of expression; 3) privacy; and 4) the proper functioning of markets.

In this context, if the Internet had not been designed based on packet switching, modularity, layering and running applications in the upper layer, it certainly would not have become what it is today. Features and applications that the world is now used to, simply would not exist. And worst of all, people would not notice or miss them, because they wouldn't have even tried these features…

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[59] B. VAN SCHEWICK, *op. cit.*, p. 206.

[60] N.M. MARTINS, P.M.B.P. DA SILVA, *Funcionalidade dos sistemas financeiros e o financiamento a pequenas e médias empresas: o caso do crowdfunding*, in *Revista Economia Ensaios*, v. 29, especial edition (Associação Keynesiana Brasileira), p. 25-56, Dez. 2014, p. 26. "(…) It can be said that crowdfunding is an alternative form of financing, that connects, directly through the Internet and social networks, those that can offer, lend or invest resources with those in need of funding for projects or specific business. Moreover, the collective funding is characterized by the fact that the projects and businesses mentioned are financed by small contributions of a large number of individuals, anonymously".

An example illustrates this perfectly. Today, the peer-to-peer (P2P)[61] technology is consolidated and provides easy file sharing, for many different purposes[62]. However, when it was developed, it suffered harsh attacks and it only survived thanks to the original design of the Internet.

The first online platform that allowed users to share free music, worldwide, was Napster[63]. This application was strongly based on P2P technology. With its success and rapid growth, Napster was sued by the US recording industry, since the songs were being transferred without paying copyrights[64]. This lawsuit resulted in the extinction of the company. Despite of that, the P2P technology was not affected. The case preserved the original configuration of the Internet, since its effects were restricted to the upper layer of the network, specifically affecting only the Napster application.

Because of that fact, the P2P technology remained available and, through it, were developed several other products and services with huge success and without the Napster illegality vices. Skype is one of them. Other services highly based on technology still bring legal challenges such as Uber[65] and Airbnb[66]. But it is a fact that it would not

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[61] R. KRISHNAN, M.D. SMITH, R. TELANG, *The Economics of Peer-To-Peer Networks*, in *Journal of Information Technology Theory and Application*, v. 05, n. 03, p. 01-24, 2003, p. 01. "P2P networks allow a distributed community of users to share resources in the form of information, digital content, storage space, or processing capacity. The novel aspect of these networks is that, in contrast to client-server networks where all network content is located in a central location, P2P resources are located in and provided by computers at the edge of the network (…)".

[62] Some of these purposes, of course, are illegal. However, this does not mean that P2P technology is harmful. After all, every technology tends to be neutral. The usage that we make of them is what makes it good or bad.

[63] Further details can be found at T. WU, *When code isn't Law*, in *Virginia Law Review*, v. 89, n. 04, p. 679-751, Jun. 2003.

[64] A&M Records, Inc. v. Napster, Inc. Case n° 00-16401. 239 F.3d 1004. United States Court of Appeals for the Ninth Circuit. Decided in October, 2, 2000.

To learn more about this case: L. PARENTONI, *Documento Eletrônico: Aplicação e Interpretação pelo Poder Judiciário*, cit., p. 178-184.

[65] Open content. Wikipedia: the free encyclopedia. "Uber", available at <https://pt.wikipedia.org/wiki/Uber_%28empresa%29>, access 03 April 2016. "Uber is an American multinational corporation of urban private transport, based on disruptive technology

have been possible the emergence of any of them if, because of the Napster case, the infrastructure of the Internet, in its lower layers, had been affected in order to stop the P2P.

However, changes like that are currently taking place with enough intensity and speed. The belief that the unique features of Internet will always remain the same has already been surpassed[67]. It is undeniable that, in recent years, it has undergone changes with the clear purpose of enabling *greater control and monitoring*[68]. One of the most aggressive changes is the interference in the TCP/IP protocols, replacing the original feature of neutrality for monitoring data packets, not only in its origin and destination, but also in relation to the actual content of each package. *A side effect of this is the possibility of differentiating the data stream, according to certain interests*.

In the case of China, for example, those interests are political in nature and seek to institutionalize censorship. This way, the Chinese government interferes in the network layers in order to block access to any sites that, supposedly, contain "inappropriate content", which means

networked through an e- hailing app that offers a similar service to the traditional taxi, popularly known as 'paid ride' services.

(…) E-hailing is the act of ordering a taxi through an electronic device, usually a mobile phone or smartphone. It replaces traditional methods to call taxis, such as phone or simply wait or go looking for a taxi on the street".

[66] Open content. Wikipedia: the free encyclopedia. "Airbnb", available at <https://pt.wikipedia.org/wiki/Airbnb>, access 03 April 2016. "Airbnb allows individuals to rent the entire place or part of his own home, as a form of extra accommodation. The site provides a search platform and reserves to occur between the person who provides the accommodation and the tourist who search for rental. It covers more than 500,000 adds, in over 35,000 cities and 192 countries".

[67] About this topic: J.P. BARLOW, *A Declaration of the Independence of Cyberspace*, available at <https://projects.eff.org/~barlow/Declaration-Final.html>, access 28 December 2015.

[68] As an example: L. LESSIG, *The Law of the Horse: What cyberlaw might teach*, in *Harvard Law Review*, n. 113, p. 501-549, Dec. 1999; ID., *Code: Version 2.0*, cit.; J. ZITTRAIN, *The Future of the Internet: And how to stop it*, London, 2008; S. RODOTÀ, *A Vida Na Sociedade da Vigilância*, Tradução: Maria Celina Bodin de Moraes, Rio de Janeiro, 2008.

any political content contrary to the government's own interests[69]. This is possible since all the big connection providers of international networks (backbones)[70] in China, are all subject to strict governmental supervision and control. These providers ensure that IP addresses from China remain blocked from accessing certain foreign sites, especially newspapers and news websites[71]. In a jocular analogy with the famous Walls of China, this practice became known worldwide as The Great Firewall of China[72].

Not only the states have interfered in the functioning of the Internet. The market also does that. Major international players such as Google, Microsoft, Facebook, Apple and other of the same gender continuously monitor the network usage. The intention is to identify consumption habits and, with that information, to draw a profile of Internet users that is able to facilitate the sale of products and services completely focused on them[73]. In this context, the data acquired considerable economic value[74], being primarily responsible for paying services that are apparently

[69] R. LEMOS, *op. cit.*, p. 79. "The way the network is legally treated in different countries has very different orientations. And not always democratic values guide that relationship. In this context, the Internet is not a network disconnected from the existing political systems. Instead, more and more politics and law have influence in the evolution of the Internet and how it is governed and administered".

[70] A.S. TANENBAUM, D.J. WETHERALL, *op. cit.*, p. 64. "At the top of the food chain are a small handful of companies, like AT&T and Sprint, that operate large international backbone networks with thousands of routers connected by high-bandwidth fiber optic links. These ISPs do not pay for transit. They are usually called tier 1 ISPs and are said to form the backbone of the Internet, since everyone else must connect to them to be able to reach the entire Internet".

[71] To know if a site is blocked in China, it is possible to test it, typing: Great Firewall of China, available at <http://www.greatfirewallofchina.org/>, access 04 April 2016.

[72] L.B. SOLUM, M. CHUNG, *op. cit.*, p. 896-910.

[73] About this topic: S. BAKER, *Numerati*, Tradução: Ivo Korytowski, São Paulo, 2009.

[74] A. DE FRANCESCHI, M. LEHMANN, *Data as Tradeable Commodity and New Measures for their Protection*, in *The Italian Law Journal*, v. 01, n. 01, p. 51-72, Mar. 2015, p. 51. "Information, particularly important, significant and relevant information, (…) is today's 'digital gold'".

free, such as e-mail accounts or social networks. In all these cases, the payment is made indirectly. Instead of paying cash, the traditional way, it allows service provider to have access to user privacy and to make profit from it[75]. It is the economic interest guiding the discrimination of the data stream.

Another form of discrimination based on economic interest is traffic shaping. It consists in increasing the speed and quality of the service and, at the same time, reducing the competitors, to damage the latter. This causes the end user the false impression that a service is better than other. Imagine, for example, an Internet connection provider (responsible for the speed and connection quality) which is also – directly or through a company of the same economic group – the provider of streaming video service. Thanks to the changes that the Internet has had, in recent years, this provider can reduce the access speed of its members for competing services, affecting their quality in order to induce them to use the service of the access provider itself. In Brazil, NET (connection provider) could increase the speed of the Now service (its video streaming) and, at the same time, to reduce the speed and quality of Netflix (main competitor). In this context, subscribers of

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The "Letter of Fundamental Rights of the European Union" has been amended to emphasize the importance of personal data in this new context: EUROPEAN UNION, *European Parliament and Council of the European Union. Letter of Fundamental Rights of the European Union*, Strasbourg 12 December 2007, available at <http://eur-lex.europa.eu/legal-content/PT/TXT/?uri=celex:12012P>, access 04 April 2016.

[75] M. LEONARDI, *Marco Civil da Internet e Proteção de Dados Pessoais*, in N. DE LUCCA, A. SIMÃO FILHO, C.R.P. DE LIMA (Coord.), *Direito & Internet III: Marco Civil da Internet - Lei nº 12.965/2014*, São Paulo, 2015, t. I, p. 528. "(…) As is known, the advertisement is directed, which was made possible by the treatment of user data – personal or otherwise – that sustains the system of services and the free information online. Other business models subscriptions, micropayments, closed sites – did not have the same success with the majority of users, that were used to 'all free' online. Between paying a small fee for access, per day or per month, or giving personal data, almost all users prefer to pay with their data.

Paying with data is a valid choice and must be respected, is a model that allows all users to participate in the online system, not just those who have the resources to pay for content and services".

Having in mind that reality, today it is said that we lived in the Big Data era: V. MAYER-SCHÖNBERGER, K. CUKIER, *Big Data*, New York, 2013.

NET would have the false impression that the Now is much better than Netflix. In other countries, such practices have resulted in bitter judicial disputes[76].

Another kind of traffic shaping occurs when the Internet access provider deliberately reduces the speed of certain applications, not to benefit with service that it also provides, but simply because they want to difficult the use of these applications. This is very common in relation to P2P. The difference from the Napster case is that now it is not only about simply combating some applications based on this technology, using the argument that it stimulates fraud. The proper functioning of the Internet has been changed to harm the whole P2P, whatever are the applications that are using it or their purposes.

To justify this, the argument of the access providers is that P2P is typically used to transmit large data packets, which could overload the network, decreasing the speed available for other applications. As metaphor, the Internet could be seen as a great avenue. The more cars traveling at the same time, the slower the general flow of traffic would tend to be. The cars in this metaphor would be the data packets and P2P would represent the slow trucks that catch the flow of other vehicles. The following topics will show that this argument is false[77].

For now, it is important to note that the traffic shaping clearly subverts the original features of the Internet. It tends to accentuate the formation of monopolies and the concentration of economic power, reducing the innovations and the sharing of content, especially those coming

[76] In the US, for example, the country's largest connection provider (Comcast) artificially reduced the speed of the main competing service (Netflix), in order to induce customers to opt for the service provider itself (NBC).

The case took to a lawsuit that ended with an agreement in which Netflix had to pay extra values to Comcast, so the company would not reduce the speed of access of its members to the service provided by Netflix. Following, the other competitors were forced to seek similar agreements with Comcast.

USA. Comcast Corp. versus F.C.C. United States Court of Appeals for the District of Columbia. 600 F.3d 642, j. 06.04.2010.

[77] To avoid the overload of the network, there are alternatives that do not lead necessarily to the P2P restriction. The usage of symmetrical bandwidth, replacing the current asymmetric band model, would be one of them: B. VAN SCHEWICK, *op. cit.*, 2010, p. 69-70.

from small developers. It also means indirect censorship, once the user finds himself prevented from using certain applications, with quality and speed that could be expected of them, because of unilateral choice of the connection providers. This has a direct impact on *who* will be able to innovate, *what* will be created, *when* there will be innovation and based on what values/goals. It affects, therefore, the lives of billions of people and the functioning of the Internet, worldwide. How is the law reacting to all of this? This is the subject of the next topic.

6. The main regulatory response: network neutrality

The change in the Internet infrastructure is attracting attention from various fields of science, including the legal area, considering the amount of consequences it can cause. The main legal response to this problem is known as the principle of *net neutrality*[78]. According to this principle, the Internet service providers – especially access providers (ISPs)[79] – can not, within certain limits, discriminate the data packets that travel through its infrastructure, because of the origin, destination or content of the data. Thereof, this measure seeks to preserve the full

[78] T. WU, *Network Neutrality, Broadband Discrimination*, in *Journal of Telecommunications and High Technology Law*, v. 02, n. 01, p. 141-176, Fall. 2003, p. 165. "[network neutrality exists to] to forbid broadband operators, absent a showing of harm, from restricting what users do with their Internet connection, while giving the operator general freedom to manage bandwidth consumption and other matters of local concern. The principle achieves this by adopting the basic principle that broadband operators should have full freedom to 'police what they own' (the local network) while restrictions based on inter-network indicia should be viewed with suspicion".

M. GEIST, *op. cit.*, p. 641. "While the definition of net neutrality is open to some debate, at its core is the commitment to ensuring that Internet service providers (ISPs) treat all content and applications equally with no privileges, degrading of service or prioritization based on the content's source, ownership or destination. (…) Adopting a neutral approach, in other words, requires strict adherence to one cardinal rule: that ISPs transport data without discrimination, preference, or regard for content".

[79] M. LEONARDI, *Responsabilidade Civil dos Provedores de Serviços de Internet*, São Paulo, 2005, p. 23. "The ISP is the company that provides, as a service, the access to the Internet for their customers. Typically, these companies have a connection to a backbone or operate their own infrastructure for direct connection".

access to information and the decision-making autonomy of Internet users, in a way that they are not illegally manipulated to opt for a particular product or service.

The net neutrality is a worldwide controversial subject[80]. In Brazil, the embryo of this principle was already included in the General Telecommunications Law[81]. After long and heated debates, the issue was also included in the Brazilian Civil Rights Framework for the Internet, in April 2014. This law included the net neutrality as a principle on the use of the Internet in Brazil, dedicating a specific section to this topic:

> Article 3. The discipline of Internet use in Brazil has the following principles:
> (…)
> IV - preserving and safeguarding network neutrality;
> Article 7. Access to Internet is essential to the exercise of citizenship and users are assured the following rights:
> (…)
> V - to the maintenance of the hired quality of Internet connection;
> VI - to clear and complete information contained in the services contracts, with details on the arrangements for protecting the connection logs and access records to Internet applications, as well as network management practices that can affect its quality;
> CHAPTER III: THE PROVISION OF CONNECTION AND INTERNET APPLICATIONS SECTION I THE NETWORK NEUTRALITY
> Article 9. The agent in charge of transmission, switching or routing is obliged to treat any data package with isonomy, regardless of content, origin and destination, service, terminal or application.
> § 1st - The discrimination or degradation of traffic will be regulated in accordance to the private assignments of the president of the republic provided in item IV of the article 84 of the constitution, to the faithful implementation of this law, being heard the Internet steering

[80] In the Us, the public debate about this topic, between Tim Wu (advocate of the neutrality) and Christopher Yoo (against it), was extremely relevant for the matter: T. WU, C.S. YOO, *Keeping the Internet Neutral? Tim Wu and Christopher Yoo Debate*, in *Federal Communications Law Journal*, v. 59, n. 03, p. 575-592, June 2007.

[81] BRAZIL, *National Congress. Law n. 9.472. Brasília: 16 July 1997*. "Article 3. The user of the the communication services have the right to:

(…)

III - not to be discriminated about the conditions of access and usage of the services".

committee (CGI) and the national agency of telecommunications (ANATEL), and may only arise from:
I - technical requirements essential for the adequate provision of services and applications; and
II - emergency services prioritization.
§ 2nd - In the event of discrimination or degradation of traffic referred to in paragraph 1, the aforementioned agent must:
I - to refrain from causing damage to users, as regarded in article 927 of the civil code;
II - to act with proportionality, transparency and equal protection;
III - to inform previously the users in a transparent, clear and sufficiently descriptive manner about its management and traffic mitigation adopted practices, including those related to network security; and
IV - to provide services on non-discriminatory commercial conditions and refrain from practicing anticompetitive behaviors.
§ 3rd - In the provision of Internet connection, onerous or for free, as well as in the transmission, switching or routing, it is forbidden to block, monitor, filter or analyze the contents of data packets, respected the provisions of this article[82].

Network neutrality was one of the most controversial points of the Brazilian Civil Rights Framework for the Internet, and it was discussed throughout the whole legislative process[83]. If the interception of electronic communications scandal in several States by the Government of the United States (known as case Edward Snowden)[84] haven't happened, perhaps today the Brazilian Civil Rights Framework for the Internet would not have been approved in Congress. Mainly because the priority, in the following years, was the serious economic and political crisis that took place in the country.

In general, the Brazilian legal literature has proven favourable to the Brazilian Civil Rights Framework for the Internet, although there are, of course, some critics[85] to the way the network neutrality was treated.

[82] BRAZIL, *National Congress. Law n. 12.965. Brasília: 23 April 2014*.

[83] For a detail history of this topic: R. LEMOS, *op. cit*.

[84] Open content. Wikipédia: the free encyclopedia. "Edward Snowden", available at <https://pt.wikipedia.org/wiki/Edward_Snowden>, access 04 April 2016.

[85] Some examples of harsh critics: E.T. FILHO, *O Marco Civil da Internet e as Liberdades de Mercado*, in N. DE LUCCA, A. SIMÃO FILHO, C.R.P. DE LIMA (Coord.), *Direito & Internet III: Marco Civil da Internet - Lei nº 12.965/2014*, São Paulo, 2015, t. II, p. 59-60.

It is understood that this law – despite it being timely and relevant – is not an end in itself. It represents just another step towards the legal regulation of the subject. In order to reach its objectives, the net neutrality, according to the view of this author, must: 1) be contextualized according to the original design of the Internet and its infrastructure; and 2) have clear limits.

It is worth noticing, besides, that almost in the end of her government, less than 24 hours before being removed because of the impeachment proceedings, the President Dilma Rousseff edited a Decree[86] regulating the Brazilian Civil Rights Framework for the Internet, referring to two controversial issues: 1) net neutrality; and 2) the processing of personal data.

Despite the possible censorship referring to this moment – political and legal – based on which this Decree was published, the rules that it contains, generally, are in accordance with the ideas defended in this essay and can be considered a breakthrough in the topic.

In the next topic, these issues will be best addressed.

"In theory, this neutrality claim may be beneficial to Internet users in Brazil, but it also may have little practical effect because, because if the network is global, with data traffic from one point to another of the world, the neutrality would not have much use if other countries have not required the neutrality of their networks in their territories. It does not seem possible for the data to flow in Brazil with neutrality if the same data is transferred in different conditions in the networks of other countries.

(…)

It should be noticed that the Brazilian Civil Rights Framework for the Internet, did not consider the regulations that already existed in the General Telecommunications Law (Law 9472 of July 16, 1997). The art. 3 of that law already guaranteed users of telecommunications, among other rights, 'III - not to be discriminated against on the conditions of access and enjoyment of the service' (…).

Thus, any anti-competitive or discriminatory practices coming from the Internet connection providers, which could adversely affect the market freedom, did not result of the absence of applicable legislation, but rather of the inefficiency in combating such practices. Besides, the regulation of the General Telecommunications Law is more precise than the the one of the Brazilian Civil Rights Framework for the Internet, in which they used intentionally vague terms and terms with little semantic content, precisely to facilitate its adoption as an ordinary law by the National Congress".

[86] BRAZIL, *President of the Republic. Decree n. 8.771. Brasília: 11 May 2016*.

7. Internet design and the limits of network neutrality

Both in Brazil[87] and in the world[88], the debate over network neutrality is highly polarized. On one side, there are those that *oppose* to it. They argue, essentially, that the absolute neutrality runs counter to the basic notion of market because it eliminates the competitive advantages, discouraging investment in research and innovation. After all, what motivates innovation is exactly the temporary monopoly granted by the intellectual property system, so the creator can refund the costs that he had and still make profit. If he does not receive differential treatment to their products, services or processes, rather than the competitors, there will be no incentive to innovate. Those who share this opinion also argue that the differential treatment to certain data packets is inner to the management of computer networks, in a way that a fully neutral network would have low quality of services and which could lead to the dissatisfaction of the users. Certain controls are necessary, for example, as in the packet filtering in order to avoid spam[89], or when it seeks to prevent that only a few users (heavy users) consume all the connection[90]. These and other arguments are typical of Internet access providers and large companies in the telecommunications industry. Ultimately, these agents intend to ensure full freedom to administer the connection of the users, as they see it is the best.

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[87] P.H.S. RAMOS, *op. cit.*, p. 152. "The issue of net neutrality often brings ideological views and discourse that has little to do with scientific research. Business, political activists, lobbyists and lawmakers, although playing valid roles within the political debate, often carry his speeches with shallow arguments and little empirical evidence that, in no way, contribute to go deeper in the debate on the effects of regulation of net neutrality for the society".

[88] For both arguments in favor of and against net neutrality, see: T.M. LENARD, R.J. MAY (Coord.), *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated?*, New York, 2006.

[89] L. PARENTONI, *SPAM: presente, passado e futuro*, in *Revista de Direito das Comunicações*, ano 3, n. 5, p. 13-48, jan./jun. 2012. "(…) Spam is the electronic message that has direct or indirect commercial nature, and that is massively sent to multiple receptors, consciously, with uniform content and without any potential interest to the receptor".

[90] The excessive use of peer-to-peer applications, for example.

At the other extreme are the *advocates* of the network neutrality. Generally, some governments, non-governmental organizations, some engaged Internet users and some academics. They argue that net neutrality is consistent with the original design of the Internet, being largely responsible for the World Wide Web to become the success it is today. Furthermore, they argue that this design is vital to maintain the collaborative nature and innovative potential of the Internet. Thus, any filtering of the data packets would be, at first, harmful. Even those filtering that are based on security reasons or in the network management should be justified and adopted only in exceptional cases. In addition, the packet filtering could lead to censorship or illegally restriction of the user's choices, as in the case of traffic shaping. Therefore, the ones in favour believe that the scope of the net neutrality should be expanded as much as possible.

This essay is not linked to any of these extremes. In fact, it considers that both bring relevant arguments, which must be taken into consideration in order to understand the limits of network neutrality. It seeks, in this context, an *intermediate route*, which recognizes the need to preserve the competitive advantages of the entrepreneurs (whatever their economic size might be) and, at the same time, to allow independent developers and ordinary people to use the Internet as a tool for innovation and for sharing content. In this sense, *what is proposed is a legal regulation that first understands the functioning of the Internet and, only then, will set limits to the network neutrality, in accordance with the structural changes experienced in recent years*.

But if the original Internet design was based on certain principles, as discussed in this text, it should also occur with the legal regulation. Two legal principles are worth mentioning: 1) The end-to-end communication; and 2) The preservation of the network layers (layers principle).

From the computer network architecture's point of view, the end-to-end principle is already old and, according to that, the lower layers of the network must be designed in a way that it can work in the simplest way possible, getting the complexity reserved for upper layer applica-

tions[91]. This way, many different applications, with different degrees of complexity, are able to coexist in a way that all of them are benefited from the same standard infrastructure of data, which requires fewer changes in the network, making it more stable. In the case of the Internet, this means that the TCP/IP protocols should have as fewer interventions as possible. Innovation should preferably occur in the upper layer, with the development of new applications.

Bringing this topic to the legal analysis, decades later, this principle states that *the legal regulation of the Internet should focus on the application layer, preserving, as much as possible, the original design of the other network layers*[92]. The Napster case, already mentioned, is a good example. Focusing exclusively on the Napster application, it was possible to combat the unlawful conduct, without changing the structure of the Internet or compromising the P2P technology. Thereof, the applications that emerged later made use of P2P to provide new services. On the other hand, the Chinese model makes usage of the TCP/IP protocols for political censorship, which would be prohibited under this principle.

Some authors divide this principle in two different aspects. According to the broad version[93], the end-to-end principle determines that *the lower network layers must provide increasingly standardized and simplified services*. For example, the physical layer (connecting cables)

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[91] J.H. SALTZER, D.P. REED, D.D. CLARK, *End-to-End Arguments in System Design. ACM Transactions in Computer Systems*, New York, v. 02, n. 04, p. 277-288, Nov. 1984.

[92] L. LESSIG, *Code: Version 2.0*, cit., p. 44. "Rather than build into this network a complex set of functionality thought to be needed by every single application, this network philosophy pushes complexity to the edge of the network – to the applications that run on the network, rather than the network's core. The core is kept as simple as possible".

[93] B. VAN SCHEWICK, *op. cit.*, p. 96. "The broad version of the end-to-end arguments argues that application-specific functionality usually cannot – and preferably should not – be implemented in the lower layers of the network, the network's core. Instead, a function should be implemented in a network layer only if it can be completely and correctly implemented at that layer and is used by all clients of that layer. Thus, lower layers, or the core of the network, should provide only general services of broad utility across applications, whereas application-specific functionality should be implemented in higher layers at the end hosts".

takes care exclusively of the transport of the data in its raw form. The way to connect to it is a standard. Differently, the upper layer, the application one, performs various activities. In this layer, are performed simple and complex tasks, involving the processing of data in order to generate results as text, images, videos, etc. Consequently, *any changes in the network layer should only be made if they can be fully implemented in this layer, without it meaning that the other layers have to be changed too*. And only when these changes are *essential for all services that use this layer*. For example, there is no justification to change the TCP/IP protocols to improve the quality of a specific application, because it is not essential for the operation of the others. This attitude would lead to the disruption of the pattern in the lower layers, adding them unnecessary complexity. Moreover, this kind of change can compromise the simplicity and stability of the network. In the other hand, the replacement of copper cables for the fiber optic ones is a change that can be implemented entirely in the physical layer, benefitting all the users, without increasing the complexity in this layer. This substitution would, therefore, be in accordance with the principle in analysis.

The narrow version[94] of this principle provides that *all changes that cannot be implemented solely in one network layer*, or that would not beneficiate all the services that make usage of this layer, without any distinction, *must be implemented in the application layer, functioning end-to-end*, exclusively between the sender and receiver. Thereof, if any application is developed and it requires a functionality that still doesn't exist (such as a new type of biometric identification), it is necessary that all the technology required for its operation is inside the application itself. This way, it is enough that the users only have this application installed on their devices so they can communicate, without the need for any change in the Internet infrastructure.

[94] B. VAN SCHEWICK, *op. cit.*, p. 90. "The narrow version of the end-to-end arguments postulates that, since certain functions cannot be completely and correctly implemented in lower layers of the network, they must be implemented end-to-end between the end hosts that are the original source and the ultimate destination of data".

Another important legal principle is the preservation of network layers (layers principle)[95]. According to this principle, *only in exceptional cases the regulation of one layer can interfere with the operation of the others*. Returning to the case of China, the solution adopted by the government is contrary to this principle because, to combat a problem in the application layer (access to political content), they reached central layers of the network (TCP/IP). An extreme example would be a country that, intending to exercise the maximum control over the Internet, would keep a single access provider, which would be tightly supervised by the State. In this case, instead of focusing only on the application layer, the control is focusing on the connection layer.

The regulation that goes further of the network layer brings two problems that are apparently antagonistic: over inclusiveness and under inclusiveness. Once more referring to the case of China, it is forbidden access to any sites that contain unofficial political content. Nevertheless, many of these sites also provide other information on various subjects, which there is no need to be blocked (excessive coverage). On the other hand, sites that do not directly are dedicated to political discussion, doing it in an indirect way, would be immune to the block (insufficient coverage). Considering all that, *the best legal regulation is the one that is directed exclusively to the layer where the problem is – usually the applications layer – without any effect on the others.*

Both end-to-end and layers principles are *the basis* of the network neutrality. It is true that the TCP/IP protocols have undergone profound changes in recent years. Its original neutrality has been replaced by a

[95] L.B. SOLUM, M. CHUNG, *op. cit.*, p. 817-818. "Our thesis is that the design of legal rules should respect a fundamental principle of Internet architecture, which we shall call the layers principle. At this stage, we can roughly formulate the layers principle as a rule of thumb for Internet regulators: respect the integrity of the layers. This fundamental principle has two corollaries. The first corollary is the principle of layer separation: Internet regulation should not violate or compromise the separation between layers designed into the basic architecture of the Internet. The second corollary is the principle of minimizing layer crossing: minimize the distance between the layer at which the law aims to produce an effect and the layer directly affected by legal regulation. (…) The best regulations attack a problem at a given layer with a regulation at that layer. The worst regulations attack a problem at the content layer by imposing a regulation at the physical layer – or vice versa".

detailed investigation of the packages. Thereof, it becomes necessary to set *legal limits* to avoid the negative consequences of such monitoring. These limits are given precisely by the network neutrality. Thus, it is necessary to systematize it.

The network neutrality – as any other principle – is *not* an absolute value[96]. It should be relativized considering certain *legal reasons* or *factual characteristics* of each network.

Thereof, some factual characteristics of the Internet require special treatment for certain data packets, in a way that the final result of the process is satisfactory[97]. For example, the differential treatment is justified, having in mind the nature of the e-mail, in comparison with the streaming of video in real time. The delay of a few seconds to deliver an e-mail does not compromise the functionality of this application. In fact, it is not even noticed by the receiver. In the other hand, constant delays in displaying a video, even for only a few seconds, harms the functionality of this application. From the factual and technical-operational points of view, therefore, the different treatment of these data packets is justified, reserving higher transmission speed to streaming video, compared to email. The Brazilian Civil Rights Framework for the Internet expressly admits this type of discrimination[98], only for technical reasons, for the sake of a higher quality of services (network management)[99]. The Decree nº 8.771/2016, that regulates the Brazilian

[96] Remember that, in Brazil, even life is not an absolute value, because even the death penalty is possible in case of war formally declared (CF/88 art. 5º, XLVII, "a").

[97] T. WU, C.S. YOO, *op. cit.*, p. 577. "Yet I don't think that the fact that an absolute ban on discrimination would be ridiculous undermines the case for discrimination laws. It's like what nutritionists say about fat: there are good and bad types. And what I think is going on in the network neutrality debate – the useful part of it – is getting a better grip on what amounts to good and bad forms of discrimination on information networks".

[98] BRAZIL, *Nacional Congress. Law n. 12.965. Brasília: 23 April 2014. Article 9º, § 1º, I.*

[99] BRAZIL, *President of Republic. Decree n. 8.771. Brasília: 11 May 2016*. "Article 6. For proper delivery of services and applications on the Internet, the network management is allowed in order to preserve its stability, security and functionality, using only technical measures compatible with international standards, developed for the

Civil Rights Framework for the Internet, explains how these limitations can and should occur[100]. It starts by pointing that these limitations only affect the "connection providers and Internet applications". They do not reach, for example, "telecommunications services that are not intended for providing Internet connection" or those "intended for specific groups of users with strict control of admission", such as private networks (intranets)[101].

Another cause for lawful factual discrimination in the data flow is the *emergency services*[102]. It is even recommended to prioritize data packets that concern them, such as police or public health information, giving them greater speed of transmission. Which ones specifically are these services is a matter that should be included in regulations to be issued by the National Telecommunications Agency - ANATEL[103].

In more exceptional situations, such as a formally declared war, it would be lawful even to interfere with the physical layer and the connection in order to difficult or suppress the access to the Internet from the belligerent State. If, as mentioned, even the death penalty is permis-

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proper functioning of the Internet, and in compliance with regulatory standards issued by Anatel and considered the guidelines established by CGIbr".

[100] BRAZIL, *President of Republic. Decree n. 8.771. Brasília: 11 May 2016*. "Article 1 - This Decree points the admitted discrimination of data packets on the Internet and the traffic degradation; it indicates procedures for data storage and protection by providers of connection and applications; it points transparency measures on the request of information for registration by the public administration; and it establishes parameters for surveillance and investigation of violations of the Law 12.965 of 23 April 2014".

"Article 4. The discrimination or the degradation of traffic are exceptional measures, to the extent that it can only come from necessary technical requirements for the proper provision of services and applications or prioritization of emergency services, requiring the obedience to all the requirements set out in article 9, § 2, of Law n. 12.965/2014".

[101] BRAZIL, *President of Republic. Decree n. 8.771. Brasília: 11 May 2016. Article 2*.

[102] BRAZIL, *Nacional Congress. Law n.12.965. Brasília: 23 April 2014. Article 9º, § 1º, II*.

[103] BRAZIL, *President of Republic. Decree n. 8.771. Brasília: 11 May 2016. Article 8*.

sible in this context, even more restrictions on the Internet are allowed[104].

Anyway, even where technical and operational reasons justify the differential treatment of data, *it is the network administrator's duty to inform the users which are the criteria used and how the various kinds of data will be handled*[105]. Thus, the users would be able to question any positions that might lack in technical basis or that might be disproportionate.

These and other exceptions lead to the conclusion that despite internationally acclaimed, the term "network neutrality" may not be the most appropriate. After all, the Internet nowadays is not neutral. Some distinctions are absolutely necessary and legally permitted. What this principle seeks, in fact, is to prevent and stop *unfair* discrimination. Thereof, the network neutrality prohibits the discriminatory treatment of the same type of data packets, based on their content, origin or destination[106]. For example, the distinction between two films, simply be-

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[104] L.F.T. VERGUEIRO, *op. cit.*, p. 633-634. "Sovereignty means that the State can control the entire infrastructure from cyber activities that develop the onshore portion of its territory, in its internal waters, territorial sea (including seabed and subsoil), archipelagos and the underlying airspace. As a consequence of state sovereignty, the cyber infrastructure should be submitted to the legislative and regulatory control of the state, but also the State should protect this infrastructure, if it is private or public property. (…) In the cyber context, the principle of sovereignty allows a state to restrict or protect, in whole or in part, the access to the Internet, considering the other rules of International Law and Human Rights. (…) Similarly, the sovereignty exercised by a State on its territorial sea grants the full control over the laying of submarine cables, which is a crucial factor of control, to the extent that the portion with more massive Internet data currently is supported by submarine cables".

[105] BRAZIL, *Nacional Congress. Law n. 12.965. Brasília: 23 April 2014. Article 9º, § 2º, III.*

BRAZIL, *President of Republic. Decree n. 8.771. Brasília: 11 May 2016. Article 5 and article 7.*

[106] P.A. FORGIONI, Y.R. MIURA, *O Princípio da Neutralidade de Rede e o Marco Civil da Internet no Brasil*, in N. DE LUCCA, A. SIMÃO FILHO, C.R.P. DE LIMA (Coord.), *Direito & Internet III: Marco Civil da Internet - Lei nº 12.965/2014*, São Paulo, 2015, t. II, p. 113-114. "The discussions on the neutrality and the equal treatment of data must take into account that, in the current web architecture, there is already a differentiation of the information that goes trough its structure: equality is applied to identical or simi-

cause one is from Netflix and other from Net Now. The distinctions can be made in many ways, not only by changing the speed of access to any of these applications, but also, e.g. securing that access to one of them is "free" (in the sense that it will not be deducted from the user's data allowance), while access to others will be normally charged.

Thus, it is fully acceptable that the service providers offer various service packages with different characteristics in each of them. For example, services with lower speed and lower franchise data, cheaper, and services with higher speed and higher deductibles data (or even no deductible), with a higher cost. This is inherent in the market economy. Stratification of a particular service in different levels, with their own characteristics and different costs, is common in many areas, even in the health business, where many different plans could be offered. Moreover, this differentiation is benefic, since each person or group have specific needs and capabilities in terms of payment, and it is not reasonable nor efficient to impose just one model for all.

What is not admitted is that the network administrator, outside the legally permissible exceptions, would handle the connection of its users, having influence, even indirectly, in the way that the service package is used. The choice of how to use the Internet access is personal, being done by the users. The ISPs cannot provide the connection in order to direct users to specific applications. This rule, which could already be perfectly understood, in a systematic interpretation of the Brazilian Civil Rights Framework for the Internet, now is properly regulated[107]. Once the connection speed and other technical aspects remain the

lar data, and not to the different applications which, because of its characteristic, require different treatment".

[107] BRAZIL, *President of Republic. Decree n. 8.771. Brasília: 11 May 2016*. "Article 3. The requirement of an equal treatment brought by article 9 of the Law n. 12.965/2014, must ensure the preservation of the public and unrestricted nature of the Internet and the foundations, principles and objectives of Internet use in the country as provided by the Law n. 12.965/2014".

"Article 9. Unilateral conducts or agreements between the responsible for transmitting, switching or routing and application provider are forbidden if:

I - commit the public and unrestricted nature of the Internet and the foundations, principles and objectives of Internet use in the country;

II - prioritize data packets due to commercial arrangements; or

same, it is the user himself who will decide whether to use Netflix or Net Now, WhatsApp or any other similar application.

In addition, the *network neutrality focuses on the lower layers*, especially the TCP/IP protocols, preserving its full compatibility with any applications that already exist or will exist. *In the application layer, the rule is the free competition*. Each developer can and should create innovative technologies, increasingly complex and specific, exploring them economic and exclusively within the limits of law. In other words, innovation flourishes in the application layer, from end to end, while the network neutrality focuses on the lower layers, ensuring that they are not manipulated to seek unlawful goals.

This way, it is understood that free competition, the business strategies and the competitive advantages can be ensured, on one side, and privacy, freedom of speech, innovation and the decision-making autonomy of users, on the other.

At this point, it is necessary to question the article 2, *caput*, of Decree nº 8.771/2016[108], since it also extends the neutrality to the providers of "Internet applications", i.e., the upper layer. This article suffers from two vices. The first is its *illegality*, since it goes further from the Brazilian Civil Rights Framework for the Internet, increasing restriction that was not expressly provided by the law. After all, the article 9 of the Brazilian Civil Rights Framework for the Internet is clear in providing that net neutrality applies to the "responsible for transmitting, switching or routing" data. In other words, it applies to the administrators of the connection, that operate the lower layers of the network, such as TCP/IP. There is no nothing in the law that provides that the neutrality

III - prioritize applications offered by themselves, that is also responsible for transmitting, switching or routing or by companies that are member of the same economic group".

"Art. 10. The commercial offers and Internet access charging models should preserve a single Internet, with open nature, plural and diverse, seen as a way to promote human, economic, social and cultural development, contributing to form an inclusive and non-discriminatory society".

[108] BRAZIL, *President of Republic. Decree n. 8.771. Brasília: 11 May 2016*. "Article 2. The provisions of this Decree are intended to the companies responsible to transmit, switch or route and to the connection and Internet application providers, as defined in the item I of the caput of article 5 of the Law n. 12.965/2014".

would also reach the application layer. There are several reasons for this, as analyzed in this essay. The fact that the article 9 is included in a Chapter entitled "The provision of connection and Internet Applications" does not change this aspect. Thus, *it is understood that the network neutrality is directed specifically to the connection providers*, while the other provisions of this chapter as the "Protection of Records, the Personal Data and Private Communications", *also* go to application providers. From this point of view, the article 2, *caput*, of Decree nº 8.771/2016 goes further from the limits set by the law that it intended to regulate.

This article also suffers from a second vice. Thereof, *extending the network neutrality also to application providers, that operate exclusively in the top layer of the Internet, conflicts with the constitutional principles of free enterprise and free competition*. As stated in the text, in this layer the rule is that every entrepreneur can benefit from competitive advantages, as a result of the innovations he has caused within the limits of legality. It is precisely the *temporary* privilege of exploitation of intellectual creations, exclusively (as in patents and software), which justifies and stimulates the innovation by encouraging investment in research and development areas. Stop this can cause serious side effects.

For these reasons, and in accordance with all the ideas developed throughout this text, it is reiterated that *the network neutrality focuses on the lower layers*, especially the TCP/IP protocols, preserving its full compatibility with any applications that already exist or that will exist. *In the application layer, differently, the rule is free competition*. Each developer can explore exclusively within the limits of law, the intellectual creations there were developed. Thus, *net neutrality is the prohibition to network administrators to manipulate the connection of users in order to discriminate the same type of data packets, based on their content, origin or destination, outside the legally permitted exceptions*.

8. Conclusion

The Internet is not the work of nature but the result of a human construction. It arose as a result of a unique historical moment, which brought together the military interest of the US Government, concerned with national security, and the participation of the academic elite of the country, centered on the ideal of freedom and sharing ideas. With these features it has consolidated and evolved, becoming one of the most important inventions of the recent history of mankind.

However, the Internet has changed considerably in recent years. Some of its main features were replaced, to allow greater monitoring and control. The TCI/IP protocols, which were formerly neutrally used, now inspects the data packets, differentiating them by the source, destination or transmitted content. These changes opened the door for many forms of censorship and manipulation of users, which was not even imagined in the beginning of the Internet.

Such changes have attracted attention from various fields of science, including the law. This paper has tried to contextualize, define and systematize the one that, in the author's view, is the main legal response to new challenges: network neutrality. Maybe with its correct application, it might be able to recover the balance of forces that exited in the origins of the Internet.

SOME MECHANISM DESIGN CONCEPTS FOR LEGAL INSTITUTIONS

Fabiano Teodoro Lara

1. Introduction

This chapter seeks to identify normative strategies for building institutions which foster economic and social development. In particular, for the design of normative systems for the promotion of economic and social development, it tries to establish common bases to all branches of law and compatible with the desired institutional interaction.

There were donkeys that carried to the city loads of equal amounts of sugar and sponge. The one who wore the sponge boasted that he was able to carry the load with ease, indicating that his life had been marked with happiness for his imitation behaviour of those who succeed. The donkey carrying the sugar listened patiently. Miles gone, already tired, the donkeys came across a river they should cross. They did not know the depth and feared not being able to swim with the entire load. The donkey who carried the sugar, tired and glimpsing death, because he had no more strength to return all the way, proposed to try the crossing. If he, tired and with a heavy load, could cross the river, also would his colleague. Once the crossing started, the river proved to be very deep. The donkey had to swim. And swimming, he realized that his load of sugar was getting lighter. He reached the other bank calmly. And, arriving there, he signalled to his companion that the crossing was easy. The donkey carrying sponges, illustrated by the experience of the other,

threw himself into the river with his cargo and drowned when the sponges absorbed the water, carrying him to the bottom[1].

As in the fable of the two donkeys, the approach to development must reject standardized responses (one size fits all), seeking strategic reflection. Obviously, it is not very useful to start from the blank slate of legal knowledge for the construction of complex normative structures. The internal experiences observed in the same legal system, on other legal systems and the experiences of interactions of distinct normative systems should be observed as a source of information to make strategic normative decisions. As stated by Bellantuono:

> Depending on the goals and training of bureaucrats, comparative legal knowledge can be presented in a format which increases its chances of being used. Moreover, it can be addressed to those actors who play a pivotal role in each policymaking process[2].

Scientific progress occurs, in large part, thanks to the capacity of collecting and organizing information necessary for the construction of knowledge. Thus we perceive the advance of physics from the development of measuring instruments, or medicine from the possibility of collecting data from the human corpse. We can also invoke as example the impact of magnetic resonance image (MRI) or diffusion tensor imaging (DTI) in the development of neurology, psychiatry and psychology, as reported in Filler[3].

In recent years, there has been a great evolution in the collection, organization and access to data on human behaviour and human interaction. Obviously, this data is expected to impact on the formulation of hypotheses in several areas of applied social sciences, including those that study the regulation of human behaviour and interaction.

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[1] M. LOBATO, *Fabulas*, Brasilia, 1973.

[2] G. BELLANTUONO, *Comparative Legal Diagnostics*, working paper, 2012, p. 16 (www.ssrn.com).

[3] G. FILLER, *The history, development and impact of computed imaging in neurological diagnosis and neurosurgery: CT, MRI, and DTI*, in *Internet Journal of Neurosurgery*, v. 7, n. 1, p. 5-35, 2010.

In this scenario, legal scholars should be equipped with adequate and sufficiently strong theoretical tools for structuring legal norms that are capable of inducing socially desirable behaviours and interactions.

Legal structuring should follow a design of legal institutions that must support the needs of the reality that it intends to regulate.

2. Institutions and economic development

There is vast evidence that economic development stems from the historical accumulation of various political and economic decisions that in some way affect economic and social performance. As indicated by North[4], the choices reveal the models adopted by the active subjects in a given society. Thus, the degree of consistency of the results with intentions will reflect the degree of adequacy of the models adopted. Given that models reflect ideas, ideologies, and beliefs that are at best refined only by feedback in the application of the model, the consequences of a given policy in the short run are not only uncertain but unpredictable. North sustains that "even the most casual inspection of political and economic choices, both throughout history and today, makes clear the wide gap between intentions and outcomes"[5]. However, North continues, the characteristic of increasing returns of the institutional matrix and the complementary models adopted by the active subjects suggest that, "although the specific short-run paths are unforeseeable, the overall direction in the long run is both more predictable and more difficult to reverse"[6].

According to North, the consequences of institutions for contemporary economic analysis can be summarized as follows: 1) Economic and political models are specific to particular constellations of institutional constraints that radically vary by time and space in different economies. These models are specific and in many cases are highly sensitive to changes in institutional constraints. 2) Conscious incorpora-

[4] D. NORTH, *Institutions, institutional change and economic performance*, Cambridge, 1990.

[5] D. NORTH, *op. cit.*, p. 104.

[6] D. NORTH, *op. cit.*, p. 104.

tion of institutions will force the social sciences to question the behaviour underlying their disciplines and hence to exploit much more systematically than has been done, the implications of the expensive and imperfect processing of information for the consequent behaviour of the actors. 3) Ideas and ideologies are important, and institutions play an important role in determining how much they matter. Ideas and ideologies shape the subjective mental constructs that individuals use to interpret the world and make choices. Moreover, because they structure social interaction, formal institutions affect the price we pay for our actions, and to some degree, formal institutions are structured to lower the price of acting according to their own ideas, providing individuals with the freedom to incorporate their ideas and ideologies in the choices they make. 4) Politics and economics are inextricably interconnected, so that in any understanding of an economy's performance an understanding of political economy develops. Institutions define the relationship between politics and economics and determine how a political-economic system works. The constraints imposed by institutions on politics and economics are the most important keys to economic and political performance[7].

The findings of North, not only in *Institutions, institutional change and economic performance*, but also in *Understanding the process of economic change*[8] and with Davis and Smorodin[9], among others, authorize the hypothesis that institutions are long-term safe guides for economic and social development policies. Thus, even if the results of short-term decisions can be unforeseeable, the existence and quality of the institutions of a particular state are capable of shaping the long-term results to be achieved. In these same directions is the work of Trebilcock and Prado[10].

[7] D. NORTH, *op. cit.*, p. 109-112.

[8] D. NORTH, *Understanding the process of economic change*, New Delhi, 2006.

[9] L. DAVIS et al., *Institutional change and American economic growth*, in *CUP Archive*, 1971.

[10] M. TREBILCOCK, M. PRADO, *What Makes Poor Countries Poor? Institutional Determinants of Development*, Northampton, 2011.

Acemoglu, Johnson and Robinson state that it is safe to say that

> countries with better 'institutions', more secure property rights, and less distortionary policies will invest more in physical and human capital, and will use these factors more efficiently to achieve a greater level of income[11].

They conclude that "at some level it is obvious that institutions matter"[12] and thus suggest that differences in colonial experience may be a source of exogenous differences in institutions. And they add, suggesting research on legal institutions:

> Institutional features, such as expropriation risk, property rights enforcement, or rule of law, should probably be interpreted as an equilibrium outcome, related to some more fundamental "institutions", e.g., presidential versus parliamentary system, which can be changed directly[13].

It is important to remember that Acemoglu, Johnson and Robinson add a *caveat* in their conclusions, emphasizing that:

> It is useful to point out that our findings do not imply that institutions are predetermined by colonial policies and cannot be changed. We emphasize colonial experience as one of the many factors affecting institutions. Since mortality rates faced by settlers are arguably exogenous, they are useful as an instrument to isolate the effect of institutions on performance. In fact, our reading is that these results suggest substantial economic gains from improving institution (…)[14].

In the same sense Acemoglu et al.[15], are emphatic in concluding in another study that the main causes of large differences between countries in terms of (economic) volatility are institutional. Moreover, they

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[11] D. ACEMOGLU et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, in *The American Economic Review*, 2001, p. 1369.

[12] D. ACEMOGLU et al., *op. cit.*, p. 1369.

[13] D. ACEMOGLU et al., *op. cit.*, p. 1395.

[14] D. ACEMOGLU et al., *op. cit.*, p. 1395.

[15] D. ACEMOGLU et al., *Institutional causes, macroeconomic symptoms: volatility, crises and growth*, in *Journal of monetary economics*, v. 50, n. 1, p. 49-123, 2003.

point out that none of the standard macroeconomic variables seems to be the main means by which institutional causes lead to economic instability. With the exception that there is no evidence that macroeconomic policies do not matter, they point to the conclusion that "These macroeconomic problems, just like the volatility and the disappointing macroeconomic performance suffered by these countries, are symptoms of deeper institutional causes"[16].

That is, there are deeper institutional causes that lead to economic instability, and these institutional causes lead to poor macroeconomic outcomes through a variety of mediation channels. Macroeconomic problems should not be cause or object, but symptoms of deep institutional problems.

Kaufmann, Kraay and Zoido-Lobatón provided empirical evidence of a strong causal relationship of better governance for better development outcomes, defining governance as "the traditions and institutions by which authority in a country is exercised"[17]. They concluded that, according to these indicators, governance matters greatly for development results, providing "new evidence of strong and positive governance relationships for better development outcomes"[18].

In summary, there is a large literature that supports the statement by Cooter and Schäfer that institutions matter, and legal institutions, which are those that establish constraints, are what most matter for development[19].

[16] D. ACEMOGLU et al., *op. cit.*, p. 108.

[17] D. KAUFMANN et al., *Governance Matters, World Bank Policy Research Working Paper No. 2196*, Washington, 1999, p. 1.

[18] D. KAUFMANN et al., *op. cit.*, p. 18.

[19] R. COOTER, H. SCHÄFER, *Solomon's knot: how law can end the poverty of nations*, Princeton, 2012.

3. Institutional design

The purpose of an institution may be defined as to conduct the behaviour of individuals and social interaction in a certain direction, as pointed by Furubotn and Richter[20]. According to North,

> institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic[21].

When receiving the Nobel Prize, North clarified that "Institutions form the incentive structure of a society, and the political and economic institutions, in consequence, are the underlying determinants of economic performance"[22].

In a broader perspective, Elinor Ostrom observed:

> "Institutions" can be defined as the sets of working rules that are used to determine who is eligible to make decisions in some arena, what actions are allowed or constrained, what aggregation rules will be used, what procedures must be followed, what information must or should not be provided, and what payoffs will be assigned to individuals depending on their actions. (…) All rules contain prescriptions that forbid, permit, or require some action or outcome. Working rules are those actually used, monitored, and enforced when individuals make choices about the actions they will take[23].

Obviously, being a set of rules, institutions are the object of study and interference of law. On the other hand, as a result of the human action of regulating the behaviour of individuals and the interaction of individuals, one can not admit the mere observation of social and eco-

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[20] E. FURUBOTN, R. RICHTER, *Institutions and economic theory: The contribution of the new institutional economics*, Michigan, 2005, p. 7.

[21] D. NORTH, *Institutions, institutional change and economic performance*, cit., p. 3.

[22] D. NORTH, *Economic performance through time*, in *The American economic review*, v. 84, n. 3, p. 359-368, 1994, p. 359.

[23] E. OSTROM, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge, 1990, p. 51.

nomic harms caused by institutions as if they were facts of nature. An institution, understood as a set of rules, is human creation. It is the result of a deliberation, conscious or not, in a certain sense. Being indisputable the fact that institutions have consequences in economic and social development, institutions should be considered as elements that must be specially designed to produce desired results (society goals).

As Rodrik points out, it is not convenient nor does appropriate only to accept the consequences of bad institutions in economic and social development, summarizing the intervention to one size fit *all* policies. In his words,

> We can do better than this kind of nihilistic attitude toward advice on policy. If the original Washington Consensus is too detailed and specific, and assuming that the same set of policies works the same everywhere, nihilism goes too far in undervaluing the benefit of economic reasoning[24].

Rodrik proposes a scientific approach to the problem. This approach consisted of three stages: (a) diagnostic analysis; (b) public policy design, and (c) institutionalization. In other words, the main constraints to economic and social development should first be identified. Next, public policy must be designed to adequately address the problem diagnosed. And, finally, the process of diagnosis and political response must be institutionalized in order to guarantee economic and social development[25].

Regarding the need for learning also through comparative study, Bellantuono, referring to Young[26] [27], states that:

> Two lessons for comparative legal research can be underlined. The first is that the familiar debate about convergence and divergence of legal

[24] D. RODRIK, *One economics, many recipes: globalization, institutions, and economic growth*, Princeton, 2008, p. 88.

[25] D. RODRIK, *op. cit.*, p. 88.

[26] O. YOUNG, *Building regimes for socioecological systems: institutional diagnostics*, in O.R. YOUNG, L.A. KING, H. SCHROEDER (ed. by), *Institutions and environmental change: Main findings, applications, and research frontiers*, Cambridge, 2008.

[27] O. YOUNG, *The institutional dimensions of environmental change: fit, interplay, and scale*, Cambridge, 2002.

> systems can be managed with transparent choices about the level of generality chosen for the analysis of each legal topic. Claims of uniqueness of legal systems or legal concepts are pointless, but unsound generalizations are no less dangerous. The second lesson is that the diagnostic approach immunizes the researchers from common mistakes in legal and non-legal comparative research: missing data, unmodified interactions, judgments relying on hidden beliefs and values[28].

For the institutional design, it is necessary to understand the reality that one intends to regulate as deeply as possible. As Goodenough points out, "Law can be too cool; it can also be too hot. Like Goldilocks, the designers of legal institutions are left to search for a mix that will be just right"[29].

The appropriate institutional design presupposes adequate diagnosis, with identification of existing problems, obviously taking into account the intended purposes. In fact, it is not possible to affirm aprioristically the necessity of some result, or the inconvenience of some institutional structure, without clear and prior definition of the social goals. That is to say, only with the adequate institutional diagnosis and defined social objectives, one can think of normative designs that can structure appropriate institutions.

Institutional design thus becomes a strategic decision. The normative configuration of the institution must, above all, be strategically adequate to obtain the desired result. Considerations about the intentionality of the legislator, or of the political agent, are inadequate to obtain the effectiveness of normative-institutional mechanisms designed to achieve the previously determined purpose.

On the other hand, in this strategic design of legal institutions, legal institutions designers must mind the fact that different institutional normative elements have different effects in reality. Each normative element contributes in a different way to generate regulated behaviours. According to Grief, rules specify behaviours and establish a sharing of cognitive systems, coordination and information, while beliefs and norms provide motivations to follow them. Organizations, in this sense,

[28] G. BELLANTUONO, *op. cit.*, p. 27-28.

[29] O. GOODENOUGH, *Values, mechanism design, and fairness*, in P. ZAK (ed.), *Moral Markets: The Critical Role of Values in the Economy*, 2008, p. 394.

formal or informal, would have three interrelated roles: a) producing and disseminating rules, b) perpetuating beliefs and norms, and c) influencing the set of possible behavioural beliefs. In the synthesis of Grief, "In situations in which institutions generate behaviour, rules correspond to the beliefs and norms that motivate it, whereas organizations contribute to this outcome in the manner previously mentioned"[30].

It should be added to this "strategic institutional design" scenario some problems identified, for example, by Pildes and Sunstein[31], which point to the existence of some paradoxes in the construction of institutions or, in the case they examine, in the "reinvention" of the Regulatory State. The first paradox would be the conflict between perception and reality about risks. The second is the marked difference between the judgments of non-experts and experts regarding the risks that exist in the regulated situation. Finally, it points to the paradox arising from public frustration with the bureaucracy, whose solution points to two opposing paths: frustration with bureaucratic redundancy, which leads to the need for centralization of control; and the frustration stemming from disregarding the values of the people involved in the regulated situation, which suggests a greater need for participation and, consequently, decentralization of decision-making structures. That is, this third paradox involves the desire for centralization, coordination and hierarchical control, on the one hand, and the need for participation and democratic deliberations on the other[32]. The identification of these paradoxes by Pildes and Sunstein in the diagnosis of the institutional reality they studied is an example of the necessary care for the strategic adaptation of the institutional design.

Despite the challenges presented in the strategic design of institutions, Pildes and Sunstein conclude that

> More importantly, policy-making tools must be evaluated pragmatically, not theoretically. Here, as elsewhere, the best should not be made

[30] A. GREIF, *Institutions and the path to the modern economy: Lessons from medieval trade*, Cambridge, 2006, p. 37.

[31] R. PILDES, C. SUNSTEIN, *Reinventing the regulatory state*, in *The University of Chicago Law Review*, v. 62, n. 1, p. 1-129, 1995.

[32] R. PILDES, C. SUNSTEIN, *op. cit.*, p. 39.

> the enemy of the good. The method of policymaking should not be condemned because it suffers from certain theoretical limitations. Any limitations must be weighed against those that characterize the potential alternatives. Even a method that suffers certain limitations may generate better policy than the alternatives[33].

That is, the institutional design should not be subjected only to tests of theoretical consistency, but, more importantly, to pragmatic evaluation tests. If there are several theoretically possible institutional designs, and it is impossible to make the best theoretical alternative, one must seek the best possible alternative, which produces the best possible results.

This pragmatic and strategic approach is possible using the tools of game theory. Game theory presents itself as a useful methodological resource in the strategic design of institutions, because it is appropriate to design normative mechanisms for obtaining results. As Goodenough has pointed out, a branch of game theory called "mechanism design" has as its object the process of creating normative structures. Particularly aimed at designing computer programming mechanisms and auctions, the fundamental problem of "mechanism design" is the creation of imperative normative structures imposed by a powerful and recognized third party, as a customer with specific needs[34]. The applicability of his techniques to the legal structuring of institutions goes beyond mere analogy.

As described by Papadimitriou

> If Game Theory strives to understand rational behaviour in competitive situations, the scope of Mechanism Design (an important and elegant research tradition, very extensive in both scope and accomplishment, and one that could alternatively be called "inverse game theory") is even grander: Given desired goals (such as to maximize a society's total welfare), design a game (strategy sets and payoffs) in such a clever

[33] R. PILDES, C. SUNSTEIN, *op. cit.*, p. 86.

[34] O. GOODENOUGH, *Values, mechanism design, and fairness*, cit., p. 241.

way that individual players, motivated solely by self-interest, end up achieving the designer's goals[35].

Ostrom identified game theory as a powerful method for predicting expected behaviours of individuals in specific situations. She pointed out that, in order to identify the relevant structural elements in a game, and predict the outcome, one must have: 1) number of actors; 2) positions that they occupied (for example, player of line or column); 3) amount of information available to an actor; 4) set of actions that actors could take on specific nodes in a decision tree; 5) a set of functions that map actors and actions at decision nodes in intermediate or final results; 6) results that the actors affected together; and 7) benefits and costs attributed to actions and results[36]. As the diagnosis proposed by Ostrom has seven useful parts, by proposing also seven types of rules can affect the situation of action, as outlined:

1. Boundary rules that specify how actors are to be chosen to enter or leave a situation
2. Position rules that specify a set of positions and how many actors hold each one
3. Information rules that specify channels of communication among actors and what information must, may, or must not be shared
4. Authority rules that specify which actions are assigned to a position at a node
5. Aggregation rules (such as majority or unanimity rules) that specify how the decisions of actors at a node are to be mapped to intermediate or final outcomes
6. Scope rules that specify the outcomes that could be affected
7. Payoff rules that specify how benefits and costs are distributed to actors in positions[37].

Also note the precise warning of Ostrom in another paper, which draws attention to the fact that, "(…) we have learned from medical research, all prescribed cures may have unanticipated effects, depend-

[35] C. PAPADIMITRIOU, *Algorithms, games, and the internet*, in *Proceedings of the thirty-third annual ACM symposium on Theory of computing*, 2001, p. 751.

[36] E. OSTROM, *The institutional analysis and development framework and the commons*, in *Cornell Law Review*, v. 95, p. 807, 2009, p. 810.

[37] E. OSTROM, *op. cit.*, p. 811.

ing on the combination of remedies used"[38]. Likewise, the study of public policies should record not only the successes, but also the failures and dangers already identified. In the same way that there is no panacea, there is also no ideal time to start rigorous and useful research on comparative normative-institutional systems.

It should also be noted that, seen as a game of social interaction, institutions play the role of normative structures that interfere greatly in the outcomes. In the same sense is the conclusion of Picker, which states

> The punch line here is that game structure matters, and often matters a lot. Identification of the game itself is of great importance. Misidentification usually occurs when the small, freestanding game is viewed as the game. (…) The larger game structure should be understood, as these rather stylized games suggest. (…) it is critical to understand the context in which a particular game occurs and the extent to which it is embedded in a larger game. Understanding that may make it clear that the form of the game is up for grabs[39].

Finally, it should be noted that the structure of the institutional game is dynamic, and it has feedbacks. That is, institutions and society interact and change over time, as suggested by North[40] and also concluded Goodenough "Institutions, wherever imbedded, are the structural piece of the puzzle that must be solved simultaneously with output. And the genesis of those institutions leads us back to values"[41].

On the need to consider the dynamic nature of institutions in their strategic design, Goodenough also states

> We usually think of institutions as the product of conscious design. Indeed, the game-theory subdiscipline of mechanism design, which can be viewed as a kind of workshop for institutions, generally supposes the existence of an active, intentional designer (Parkes, 2001). While such

[38] E. OSTROM, *A diagnostic approach for going beyond panaceas*, in *Proceedings of the National Academy of Sciences*, v. 104, n. 39, 2007, p. 15186.

[39] R. PICKER, *An introduction to game theory and the law*, in *Coase Lecture Series*, 1994, p. 19.

[40] D. NORTH, *Economic performance through time*, cit.

[41] O. GOODENOUGH, *Values, mechanism design, and fairness*, cit., p. 242.

> may often be the case, evolutionary processes also lead to the emergence of institutions and their instantiation in a variety of forms and locations (Goodenough, 2008)[42].

In summary, one can identify that the design of mechanisms through methodological tools of game theory presents an adequate and useful form for the strategic use of legal institutions. Legal scholars with the objective of studying and creating legal structures consistent with development results should find a useful and adequate tool in the mechanism design tools of game theory.

4. Some applications

Design of mechanism is a tool that can be used for legal studies for both diagnostics (descriptive) and for prognostics (normative) studies. One can use mechanism design to understand certain legal structures that do not work properly, looking for malfunctioning legal structures. One the other hand, the same tool can be used in exploratory studies, trying to set grounds to formulate new legal institutions. Both applications should be addressed, as examples.

In a descriptive use, for example, we could investigate the design of the Brazilian "Provisional Measure" (Medida Provisória)[43] derived from the Italian "Law Decree" or *Decreti legge* from art. 77 of Italian Constitution[44]. Nevertheless, although with the same formal legal insti-

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[42] O. GOODENOUGH, *Institutions, emotions, and law: a Goldilocks problem for mechanism design*, in *Vermont Law Review*, v. 33, 2008, p. 395.

[43] CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL, Art. 62. Em caso de relevância e urgência, o Presidente da República poderá adotar medidas provisórias, com força de lei, devendo submetê-las de imediato ao Congresso Nacional.

CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, Article 62. In relevant and urgent cases, the President of the Republic may adopt provisional measures with the force of law and shall submit them to the National Congress immediately.

[44] COSTITUZIONE DELLA REPUBBLICA ITALIANA, Art. 77. Il Governo non può, senza delegazione delle Camere, emanare decreti che abbiano valore di legge ordinaria. Quando, in casi straordinari di necessità e d'urgenza, il Governo adotta, sotto la sua responsabilità, provvedimenti provvisori con forza di legge, deve il giorno stesso pre-

tution, mechanism design can help us understand the political outcomes.

For that observation, we should note that the institution of Parliamentarianism in Italy is fully compatible with Italian Provisional Measure. The political influence of Parliament over the Executive is reinforced by legal powers like the "motion of no-confidence" (*mozione di sfiducia*, art. 94 of Italian Constitution). It means that if the chief of executive in Italy defies the Parliament, he might lose his position. And this structure is enough to explain why the Prime Minister wouldn't issue Provisional Measures defying the Majority of Parliament very often.

On the other hand, Brazil is under a Presidential regime. And the same institute would result in the freedom of the Executive to adopt provisional measures, which would seem to set some unbalance between legislative and executive powers. One could imagine that the Executive branch could issues laws with immediate effect, defying the will of the majority of the Parliament. Aiming to correct this unbalance, Brazilian Congress approved a Constitutional Amendment in 2001. However, as the source of the apparent unbalance was not changed it could be suggested that the abuse of Executive legislation still occurs.

But, surprisingly, some speculation about data collected from Brazilian Provisional Measures may show that, in reality, the Brazilian Provisional Measure works in a very similar way to its Italian inspiration. We observed, in a yet to be published paper, that the majority of the Brazilian Parliament may be the force behind the use of this legal institute by the executive. The diagnostic study of the legal institution would show that it might be used to divert from possible discussions and possible obstacles that could be imposed by legislative minorities.

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sentarli per la conversione alle Camere che, anche se sciolte, sono appositamente convocate e si riuniscono entro cinque giorni (…).

CONSTITUTION OF THE ITALIAN REPUBLIC, Art. 77. The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction (…).

After all, it would work just like the Italian Provisional Measure. Thus, the Provisional Measure would be similar to a mechanism called "Institutional Bypass". The "Institutional Bypass" is a mechanism described by Prado and Trebilcock[45] as one that "seeks to create a new pathway around existing institutions", in this case, the powers of the minorities in legislative procedure.

On the other hand, the design of mechanisms has also been used as a tool for prospective or normative legal investigations.

It is possible to carry out legal research in order to identify one or more forms of regulation according to the desired purpose. In this context, one must set the values pursued and the goals of the regulation.

Take, for example, the approach by Cooter and Garoupa[46] examining ways to make efficient rules to repeal bribery. One way would be to "monitor and punish". Other possibility would be to design "salaries incentives", as proposed by Becker and Stigler[47]. One may also argue that morals would solve this problem.

But if the game in which the public agent and the bribing citizen are when bribery occurs is correctly understood, a mechanism that changes the incentives and, therefore, the outcomes may be proposed. Observing that bribery depends on trust between public officer and bribing citizen, Cooter and Garoupa propose to sew the distrust amongst criminals, with a rule stating that

> The first party to report giving or taking a bribe receives amnesty and a bounty larger than the benefit from the bribe. Consequently, the debtor and the agent cannot trust each other to give or take a bribe. The mechanism converts a game where bribery is Pareto superior for agent and

[45] M. PRADO, M. TREBILCOCK, *Institutional Bypasses: a strategy to promote reforms for development*, Cambridge, Forthcoming November 2018.

[46] R. COOTER, N. GAROUPA, *The virtuous circle of distrust: A mechanism to deter bribes and other cooperative crimes*, in *Berkeley Program in Law & Economics*, *Working Paper Series*, 2000.

[47] G. BECKER, G. STIGLER, *Law enforcement, malfeasance, and compensation of enforcers*, in *The Journal of Legal Studies*, v. 3, n. 1, p. 1-18, 1974.

debtor into a prisoner's dilemma where mutual distrust inhibits bribery[48].

Establishing prospective or normative legal studies using the tool of mechanism design may impact reality much more effectively and with lower costs.

5. Concluding remarks

Institutions, especially legal institutions, as normative structures, have a right impact on economic and social development. Because they are object of legal deliberation and construction, the institutions can be object of strategic design with the purpose of optimizing the intended results.

For instance, Acemoglu using these tools of mechanism design proposes a model of emergence and persistence of inefficient institutions[49].

Legal scholars have in this tool of mechanism design from the game theory an important resource that can provide constructions of adequate and balanced normative structures, resulting in efficient regulation aimed at economic and social development.

[48] R. COOTER, N. GAROUPA, *The virtuous circle of distrust: A mechanism to deter bribes and other cooperative crimes*, cit., p. 20.

[49] D. ACEMOGLU, *A simple model of inefficient institutions*, in *The Scandinavian Journal of Economics*, v. 108, n. 4, p. 515-546, 2006.

POPULAÇÕES TRADICIONAIS AMAZÔNICAS: AFIRMAÇÃO E DESCONSTRUÇÃO DE DIREITOS

Girolamo Domenico Treccani

ÍNDICE: *1. O passado: o genocídio dos povos indígenas, a escravidão negra e a "invisibilização" das demais populações tradicionais. 1.1. O genocídio dos povos indígenas. 1.2. A escravidão negra. 1.3. A "invisibilização" das demais populações tradicionais. 2. A mobilização das populações tradicionais lhes garante a conquista de direitos. 3. O presente: conflitos ambientais territoriais. Terra do capital x territórios dos povos. 3.1. Flexibilização das normas. 4. Reconhecimento dos direitos territoriais: legislações favoráveis, mas resultados deficitários. 4.1. Povos Indígenas. 4.2. Criação de Projetos Especiais em favor de populações tradicionais. Conclusão.*

1. O passado: o genocídio dos povos indígenas, a escravidão negra e a "invisibilização" das demais populações tradicionais

Durante séculos o poder público não levou em consideração que a Amazônia era uma região que, além de apresentar uma riquíssima biodiversidade, única no mundo, detinha uma grande etno-sóciodiversidade: centenas de povos indígenas, dezenas de comunidades remanescentes de quilombos e milhares de comunidades agroextrativistas. As políticas públicas se baseavam na ideia de "vazio demográfico" que na realidade se devia a invisibilização destas populações[1]. Esta política de não reconhecer o papel destes povos na construção das identidades nacionais, não é algo limitado ao Brasil. Se referindo à presença dos

[1] E.C.P. MOREIRA, *Justiça Socioambiental e Direitos Humanos*, *Uma análise a partir dos direitos territoriais de povos e comunidades tradicionais*, Rio de Janeiro, 2017, p. 16, diferencia entre "invisibilidade", entendida como uma condição perene dos atores, e "invisibilização", que é uma escolha de terceiro que opta por não ver alguém.

negros no Peru, a Viceministra de Interculturalidade do Ministério da Cultura do Peru, Patricia Balbuena Palacio[2], assim escreveu:

> A presença afrodescendente no Peru tem sido muito pouco estudada, isso parece estar associado com a particular situação de subalternidade em que estas populações se inserem no cenário colonial peruano […]. Esta situação impede que se possa identificar com facilidade o conjunto de pessoas notáveis, conhecimentos ancestrais e tradições culturais de origem afroperuana, assim como os aporte que eles ofereceram para a configuração da nação peruana. Como consequência disso existe uma *invisibilização* da população afroperuana que implica no não reconhecimento da importância desta no desenvolvimento da republica e cultura peruana, levando a que, muitas vezes, se coloque em questão o status do povo afroperuano como parte constitutiva da nação […]. A situação de invisibilidade deste grupo representa uma dívida pendente da sociedade nacional com o povo afroperuano (tradução e grifo nosso).

Esta realidade não se aplica só aos negros e quilombos, mas, também, aos demais povos tradicionais nos diferentes países latino-americanos.

1.1. O genocídio dos povos indígenas

Passados mais de quinhentos anos da "descoberta", desconhece-se a data da chegada dos povos indígenas no continente americano. Adota-se aqui a definição apresentada por Luciano[3] como tendo sido elaborada pela Organização das Nações Unidades em 1986 que destaca o caráter de "invasão do continente e colonização do continente":

> As comunidades, os povos e as nações indígenas são aqueles que, contando com uma continuidade histórica das sociedades anteriores à invasão e à colonização que foi desenvolvida em seus territórios, consideram a si mesmos distintos de outros setores da sociedade, e estão decididos a conservar, a desenvolver e a transmitir às gerações futuras seus

[2] P.B.PALACIO, *Apresentação*, in M.A.BARRANTES, J.A.C. AGUILAR, *La presencia afrodescendiente em el Perú. Siglos XVI-XX*, Lima, Ministério da Cultura, 2015.

[3] G.S. LUCIANO, *O Índio Brasileiro: o que você precisa saber sobre os povos indígenas no Brasil de hoje*, Brasília: Ministério da Educação, Secretaria de Educação Continuada, Alfabetização e Diversidade; LACED/Museu Nacional, 2006, p. 27.

> territórios ancestrais e sua identidade étnica, como base de sua existência continuada como povos, em conformidade com seus próprios padrões culturais, as instituições sociais e os sistemas jurídicos.

Os estudos que apontavam que descenderiam de populações de caçadores advindas da Ásia há mais de onze mil anos atrás, estão sendo hoje questionados pela descoberta de vestígios arqueológicos que indicariam datações mais antigas[4]. Tampouco existe consenso sobre o número de pessoas que moravam no Brasil no momento do contato com os povos ibéricos: pesquisadores apresentam estimativas que variam entre um e dez milhões de habitantes, 5.600.000 deles na Bacia Amazônica.

Qualquer que tinha sido sua origem, a data de sua chegada e seu número, precisa se rechaçar a ideia de "vazio demográfico" que orientou as políticas públicas até recentemente. A baixa densidade demográfica não é fruto do acaso, mas de um preciso processo histórico de genocídio como reconheceu José Bonifácio[5] durante o processo constituinte de 1823:

> Faz horror reflectir na rápida despovoação destes miseráveis depois que chegamos ao Brazil: basta notar, como refere Padre Vieira: *que em 1615*, em que se conquistou o Maranhão, havia desde a Cidade até o Gurupá *mais de 500 aldeias de Índios*, todas numerosas, e algumas d'ellas tanto, que deitavão quatro a cinco mil arcos; mas quando o dito Vieira chegou *em 1652 ao Maranhão já tudo estava consumido e reduzido a mui poucas aldeotas*, de todas as quaes não pôde André Vital de Negreiros ajuntar 800 Índios d'armas. *Calcula o Padre Vieira que em*

[4] Segundo Niède Guidon as pinturas rupestres no parque de São Raimundo Nonato (Piauí) datariam de mais de 60 mil anos fato que, junto com a descoberta de "Luisa, um esqueleto negroide em Minas Gerais", colocaria em crise seja a datação da chegada dos seres humanos na América do Sul seja o lugar de onde teriam vindo. Ver N. GUIDON, *As ocupações pré-históricas do brasil (excetuando a amazônia)*, in M.C. CUNHA (org.), *História dos Índios no Brasil*, São Paulo, Secretaria Municipal de Cultura, FAPESP, 1992, p. 37-52, disponível em http://etnolinguistica.wdfiles.com/local--files/hist%3Ap37-52/p37-52_Guidon_As_ocupacoes_pre-historicas_do_Brasil.pdf, acesso em 15 de julho de 2018.

[5] J.B. ANDRADE, *Apontamentos para a Civilização dos Índios Bravos do Império do Brazil*, in http://www.obrabonifacio.com.br/colecao/obra/1072/digitalizacao/pagina/10, acesso em 08 de março de 2011.

> *30 anno*s pelas guerras, captiveiros e moléstias, que lhes trouxerão os Portuguezes, *erão mortos mais de dois milhões de índios* (*sic*) (grifo nosso).

Destaca-se que São Luiz era capital do Grã Pará e Gurupá a última cidade portuguesa antes de se adentrar no território reconhecido aos reis da Espanha pelo Tratado de Tordesilhas.

Desde o primeiro contato a relação entre europeus e indígenas da Amazônia foi marcada pela exploração dos nativos e pelo saque de suas riquezas. Segundo Aluisio Leal[6], quando em janeiro de 1500, o espanhol Vicente Yañez Pinzon chegou à foz do Rio Amazonas, teria capturados 36 índios que foram vendidos como escravos na Europa.

Nos séculos seguintes foi elaborada uma legislação mais favorável aos índios, mas isso não impediu que eles fossem escravizados, mortos e espoliados de suas terras. Por isso Perrone-Moisés[7] chegou a afirmar que: "A política e a legislação portuguesa relativa aos índios foi: contraditória, oscilante e hipócrita". Apesar de reconhecer formalmente o: "direito os índios, primários e naturaes senhores delas [terras]" (Alvará de 01 de abril de 1680)[8], o sistema jurídico foi, e continua sendo utilizado, como um dos instrumentos para usurpar as terras e os direitos indígenas.

1.2. A escravidão negra

Se no começo o sistema colonial adotou o genocídio e a pratica da escravização dos povos indígenas, já no século XVI o tráfico de negros promoveu a maior e mais prolongada transmigração forçada de povos

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[6] A.L. LEAL, *Uma Sinopse Histórica da Amazônia*, Belém, Universidade Federal do Pará, 1991, p. 3.

[7] B. MOISÉS-PERRONE, *Índios livres e índios escravos. Os princípios da legislação indigenista colonial (séculos XVI a XVIII)*, in M.C. CUNHA (org), *História dos índios no Brasil*, São Paulo, 1992, p. 115.

[8] A legislação portuguesa e imperial apresentava várias normas que reconhecem os direitos territoriais dos povos indígenas, normas, na maioria dos casos, sem eficácia: *Alvará* de 26 de julho de 1596, *Diretório que se deve observar nas Povoações dos Índios do Pará*, de 18 de agosto de 1758, *"Regulamento das Missões" (Decreto 426, de 24 de julho de 1845). Decreto 1.318*, de 30 de janeiro de 1854.

registrada pela história. Segundo Chiavenato[9], de 1502 até 1870, teriam entrado no Brasil 3.532.315 escravos africanos, representando 37,6%, dos 9.385.315 escravos trazidos neste período para as Américas. Por isso se pode afirmar que *o Brasil foi o campeão americano na importação de africanos do século XVI ao XIX*.

A "resistência negra" começava ainda na África com guerras e fugas. Várias revoltas foram registradas reunindo escravos urbanos e rurais no Brasil: Malês (Bahia, 1807-1835), Balaiada (Maranhão, 1838-1841) e a Cabanagem (Pará, 1835-1840). Em livro anterior sobre a resistência negra Treccani[10] documentou dezenas de revoltas negras no continente americano, fato que nos leva a afirmar que *a história da escravidão dos negros está profundamente entrelaçada com a história das rebeliões contra o regime escravagista*.

No caso do Brasil o processo de libertação dos escravos foi "lento e gradual", tendo demorado setenta anos. É importante destacar como, ainda hoje, alguns livros de história apresentam acriticamente este processo enaltecendo leis que, na realidade, apresentavam aspectos restritivos pouco conhecidos e divulgados. O fim do tráfico, por exemplo, foi previsto por várias normas[11], apesar disso Eltis[12] afirma que *758.561*

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[9] J.J. CHIAVENATO, *O Negro no Brasil: da senzala à abolição*, São Paulo, 1999, p. 122.

[10] G.D. TRECCANI, *Terras de Quilombo caminhos e entraves do processo de titulação*, Belém, Secretaria Executiva de Justiça, Programa Raízes, 2006, p. 36.

[11] Ver: a) *Tratado de Comércio e Navegação*, de 19 de fevereiro de 1810 no qual Portugal se comprometia com a Inglaterra a "abolição gradual do tráfico e da escravidão"; b) Decreto imperial de 13 de março de 1827 no qual o Brasil se comprometia a tratar o tráfico como pirataria e determinar o fim do comércio negreiro no prazo máximo de quatro anos; c) *Código Criminal de 16 de dezembro de 1830*, cujo art. 179 tipificava o delito de escravizar uma pessoa livre; d) Portaria de 21 de maio de 1831 e a Lei de 7 de novembro de 1831 que determinavam a condenação dos criminosos e a libertação dos escravos; e) *Lei n° 581,* de 04 de setembro de 1850, conhecida pelo nome de seu autor, *Eusébio de Queiroz* Coutinho Mattoso Câmara, que voltou a *proibir o tráfico negreiro considerando-o como "pirataria"*; f) *Lei Nabuco de Araújo*, de 05 de julho de 1854, que reiterou a norma anterior.

[12] D. ELTIS, *The Nineteenth-Century Transatlantic Slave Trade: an Annual Time Series of Imports into the Americas Broken down by Region*, Hahr, 67(1), pp. 109-138, in J. RODRIGUES, *O Infame comércio: propostas e experiências no final do tráfico de africanos para o Brasil (1800-1850)*, Campinas (SP), 2000, p. 215.

escravos teriam sido introduzidos no Brasil, entre 1830 e 1852, quando tratados internacionais e leis nacionais já proibiam o tráfico. 37.700 deles nos últimos três anos: em lugar de diminuir, o tráfico chegou a recrudescer devido à total inoperância dos sistemas de controle brasileiros.

A *Lei nº 2.040*, de 28 de setembro de 1871, denominada "Lei do Ventre Livre", reconhecia que: "Os filhos da mulher escrava que nascerem no Império desde a data desta lei, serão considerados de condição livre", mas determinava que, se o senhor não fosse indenizado, o menor teria que trabalhar para ele até os vinte e um anos (art. 1°, § 1°).

Também a *Lei 3.270*, de 28 de setembro de 1885, conhecida como *a Lei do Sexagenário* ou *Lei Saraiva Cotegipe*, obrigava os sexagenários a indenizar seu antigo senhor postergando sua efetiva libertação trabalhando por eles durante três anos (art. 3°, § 10º).

A tão celebrada *Lei Áurea, Lei n° 3.353, de 13 de maio de 1888*, que "Declara extinta a escravidão no Brasil", não foi acompanhada por qualquer tipo de ações afirmativas, provocando a expulsão de milhares de negros das fazendas, obrigando-os a ocupar os espaços urbanos ou a perambular à procura de trabalho em condições miseráveis.

Verifica-se, portanto, que estas normas na realidade, apesar de outorgarem uma igualdade formal, não promoveram mecanismos que permitissem efetivar estes direitos.

1.3. A "invisibilização" das demais populações tradicionais

A discussão sobre a identidade dos que hoje são denominados: "populações tradicionais" nasceu das lutas populares das décadas de oitenta e noventa do século passado. A partir da "Aliança dos Povos da Floresta" que agregou seringueiros, coletores de castanha do pará acreanos e paraenses e alguns povos indígenas, iniciou-se um intenso debate que culminou na criação de normas que reconheciam suas territorialidades diferenciadas. Um dos primeiros desafios encontrado foi o de identificar quem seriam os "sujeitos destes direitos". Várias listagens foram elaboradas reunindo elementos étnico-culturais (povos indígenas e comunidades remanescentes de quilombo, ciganos, pomeranos, caiçaras), e características ligadas a uma determina forma de utilização dos recur-

sos naturais (seringueiros, coletores de castanha, pescadores artesanais[13], quebradeiras de coco babaçu[14], catadoras de mangaba[15], palmiteiros, piaçabeiros, coletores de açaí, etc.) ou a sua permanência em determinadas localidades (moradores de fundos de pastos[16], ribeirinhos, vazanteiros ou barranqueiros[17], pantaneiros, geraizeiros[18] e faxinais[19])[20]. O § 2º do artigo 4º do Decreto nº 8.750, de 9 de maio de 2016, apresenta os representantes da sociedade civil do Conselho Nacional dos Povos e Comunidades Tradicionais - CNPCT:

[13] O Movimento de Pescadores do Brasil coletou assinaturas apresentando no Congresso Nacional um Projeto de Lei de Iniciativa Popular que *dispõe sobre o reconhecimento, proteção e garantia do direito ao território de comunidades tradicionais pesqueiras, tido como patrimônio cultural material e imaterial sujeito a salvaguarda, proteção e promoção, bem como o procedimento para a sua identificação, delimitação, demarcação e titulação.*

[14] A Lei do Estado do Maranhão nº 9.428, de 02 de agosto de 2011, *institui o Dia Estadual das Quebradeiras de Coco.* Segundo J. SHIRAISHI NETO, *Novos Movimentos Sociais e padrões jurídicos no processo de redefinição da região Amazônicai*, in J. SHIRAISHI NETO (org.), *Meio Ambiente, território & práticas jurídicas: enredos em conflito*, São Luis, 2011, p. 52, existem uma dezena de normas municipais e estaduais, sobretudo no Maranhão e Tocantins que permitem o acesso aos "*babaçuais livres*". O mesmo autor afirma que: "A Câmara Municipal de Antonio Gonçalvez no Estado da Bahia, aprovou o Projeto de Lei n° 04/2005, que cria a Lei do Licuri Livre ou lei do ouricuri sua preservação, extrativismo e comercialização".

[15] A Lei nº 7.082, de 16 de dezembro de 2010 do Estado de Sergipe reconhece as catadoras de mangaba como grupo cultural diferenciado e estabelece o autoreconhecimento como critério de identificação.

[16] Os fundos de pasto estão presentes na área de caatinga. Segundo a Articulação Estadual dos Fundos de Pasto, na Bahia: "existem atualmente 329 (trezentas e vinte e nove) áreas, distribuídas em 22 (vinte e dois) municípios, totalizando aproximadamente dezoito mil famílias". Ver S.C.S. DIAS, *Trajetória dos Fundos de Pasto na Bahia*, in Anais Eletrônicos, VI Encontro Estadual de História, ANPUH/BA, 2013.

[17] Populações que habitam as ilhas e barrancos de rios como São Francisco, Tocantins e Araguaia.

[18] Populações tradicionais que ocupam a área de transição entre o cerrado e a caatinga.

[19] População que ocupa a região Centro-Sul do Estado do Paraná e adota um sistema agrosilvopastoril.

[20] Os estudos de Antonio Carlos Diegues revelam a construção destes conceitos.

I - povos indígenas;
II - comunidades quilombolas;
III - povos e comunidades de terreiro/povos e comunidades de matriz africana;
IV - povos ciganos;
V - pescadores artesanais;
VI - extrativistas;
VII - extrativistas costeiros e marinhos;
VIII - caiçaras;
IX - faxinalenses;
X - benzedeiros;
XI - ilhéus;
XII - raizeiros;
XIII - geraizeiros;
XIV - caatingueiros;
XV - vazanteiros;
XVI - veredeiros;
XVII - apanhadores de flores sempre vivas;
XVIII - pantaneiros;
XIX - morroquianos;
XX - povo pomerano;
XXI - catadores de mangaba;
XXII - quebradeiras de coco babaçu;
XXIII - retireiros do Araguaia;
XXIV - comunidades de fundos e fechos de pasto;
XXV - ribeirinhos;
XXVI - cipozeiros;
XXVII - andirobeiros;
XXVIII - caboclos; e
XXIX - juventude de povos e comunidades tradicionais.

Comparando com normas anteriores aumentou de maneira significativa a heterogeneidade dos grupos representados no Conselho.

Constata-se que a grande maioria destas populações eram, e em muitos casos, continuam sendo, "invisibilizados" como se pode ver na

denúncia publicada em 2015 pelo Instituto Sócioambiental[21] sobre a situação criada pela barragem de Belo Monte:

> *Os ribeirinhos, as populações tradicionais da região* que dependem do uso do rio para sua subsistência física e cultural, *foram ignorados no processo de licenciamento*. Apesar de, durante as audiências públicas prévias ao licenciamento do empreendimento, ter sido solicitada a realização de uma análise detalhada dos impactos socioambientais relativos às populações beiradeiras que moram no entorno de Altamira e as comunidades que vivem nas Reservas Extrativistas (Resex) da Terra do Meio, *nada foi feito* (grifo nosso).

Sanz[22] atesta a invisibilização dos ribeirinhos atingidos pela Barragem de Belo Monte causando-lhe sérios prejuízos econômicos e sociais:

> Os ribeirinhos e seu modo de vida tradicional foram invisibilizados no processo de licenciamento ambiental da barragem de Belo Monte. Igualmente, seus direitos foram invisibilizados nos momentos em que deveriam ser expostos e que deveriam ser apresentadas soluções de como efetivar, reparar ou compensar danos a esse grupo. Como consequência dessa invisibilização seus direitos foram violados.

Mudam os momentos históricos e os governos, mas as políticas de exclusão social permanecem.

2. A mobilização das populações tradicionais lhes garante a conquista de direitos

As Populações Tradicionais se engajaram no processo de redemocratização do Brasil inserindo entre as demandas da sociedade o reconhecimento de seus direitos territoriais. A partir da segunda metade da

[21] INSTITUTO SÓCIOAMBIENTAL, *Dossiê Belo Monte. Não há condições para Licença de Operação*, São Paulo, 2015, p. 15.

[22] F. SANZ, *Ribeirinhos expulsos por Belo Monte: violação e recomposição de direitos socioambientais*, Dissertação de Mestrado, Belém, Programa de Pós-Graduação em Direito da Universidade Federal do Pará, 2018, p. 11.

década de oitenta a pressão destas populações sobre o poder público federal e sobre os institutos de terras estaduais conseguiu a edição de um conjunto de normas que permitiram a instauração de vários processos de reconhecimento de seus direitos territoriais.

Podemos classificar estas diferentes *f*ormas de acesso à terra como étnico-culturais e agro-ecológicas. As formas étnico-culturais dizem respeito aos *Povos Indígenas* (art. 231 da CF) e aos *Remanescentes das Comunidades de Quilombo* (art. 68 do ADCT e Decreto 4.887, de 20 de novembro de 2003). Já as *formas agro-ecológicas de acesso à terra se destinam as demais populações tradicionais e são:* a) *Reserva Extrativista* (RESEX: art.18 da Lei nº 9.985, de 18 de julho de 2000); b) *Reserva de Desenvolvimento Sustentável* (RDS: art.20 da Lei nº 9.985, de 18 de julho de 2000); c) *Floresta Nacional* (FLONA: art.17 da Lei nº 9.985, de 18 de julho de 2000); d) *Projeto de Assentamento Agro-extrativista* (PAE: Portaria/Incra/nº 269, de 23 de outubro de 1996); e) *Projeto de Desenvolvimento Sustentável* (PDS: Portaria/Incra/nº 477, de 4 de novembro de 1999); f) *Projeto de Assentamento Florestal* (PAF: Portaria INCRA nº 1.141, de 19 de dezembro de 2003); g) *Projeto de Assentamento Especial Quilombola* (PAEQ: Portaria INCRA nº 307 de 22 de novembro de 1995)[23].

Destaca-se que todas as figuras jurídicas acima, apesar de terem cada uma sua peculiaridade, tem algo em comum: limitam o uso da terra por meio de acordos costumeiros ou escritos (Plano de Uso ou de Manejo, Acordo de Pesca) onde constam "penalidades" em caso de descumprimento do foi acordado, fazendo uma verdadeira "gestão territorial"; utilizam "limites de respeito" para identificar os espaços de uso familiar (casa, quintal e roça); definem conjuntamente os espaços de utilização coletiva (matas, rios e igarapés); têm organizações comunitárias próprias; utilizam a noção de "território" para identificar os espaços pretendidos e controlados por elas. Nesta estratégia é prevista a possibilidade de acolher quem adota o mesmo modelo de vida, mas re-

[23] Vários Estados criaram formas próprias de assentamentos especiais reconhecidos pelo INCRA e integrados ao PNRA: Projeto Estadual de Assentamento Agroextrativista e o Território Estadual Quilombola no Pará; os fundos de pasto na Bahia e faxinais no Paraná e as Reservas de Desenvolvimento Sustentável no Amazonas.

chaçam-se os "intrusos" que possam vir a deturpar sua maneira de viver.

A luta pelo reconhecimento dos direitos territoriais promovida pela "Aliança dos Povos da Floresta" foi muitas vezes articulada com os movimentos sociais que lutavam pela reforma agrária: ao lado dos Projetos de Assentamento (PA), criados a partir da desapropriação de imóveis para fins de reforma agrária ou da destinação de áreas previamente arrecadadas, foram reconhecidos como beneficiários do Plano Nacional de Reforma Agrária as populações que vivem em projetos especiais[24] e em unidades de conservação de uso sustentável, sobretudo na região amazônica. Este fato ampliou de maneira significativa o número de projetos e de família que tiveram acesso a crédito subsidiado, assistência técnica e infraestrutura.

Possivelmente o ponto mais alto deste processo de reconhecimento de direitos se deu com a promulgação da Constituição Federal de 1988, a primeira a adotar o multiculturalismo como referência jurídica. O Brasil se reconheceu como um país pluriétnico e defendeu a necessidade de proteger os diferentes grupos sociais: "participantes do processo civilizatório nacional" (art. 215 e 216).

Nos últimos anos amplos setores da sociedade se mobilizaram para dar eficácia a este avanço. Além das normas citadas acima se podem lembrar o *Decreto 4.887*, de 20 de novembro de 2003, que *regulamenta o procedimento para identificação, reconhecimento, delimitação, demarcação e titulação das terras ocupadas por remanescentes das comunidades dos quilombos de que trata o art. 68 do Ato das Disposições Constitucionais Transitórias* e o *Decreto nº 6.040*, de 7 de fevereiro de 2007, que *institui a Política Nacional de Desenvolvimento Sustentável dos Povos e Comunidades Tradicionais*. Seu art. 3°[25] define quem são os Povos e Comunidades Tradicionais:

[24] O Parágrafo único do artigo 10 do Decreto 9.311, de 15 de março de 2018, considera como: "ambientalmente diferenciadas as seguintes modalidades de projetos: Projeto de Assentamento Agroextrativista – PAE; Projeto de Desenvolvimento Sustentável – PDS e Projeto de Assentamento Florestal – PAF".

[25] Art. 2°, IV da *Lei nº 13.123*, de 20 de maio de 2015 utiliza este mesmo conceito.

> Art. 3º, I - *Grupos culturalmente diferenciados* e que se reconhecem como tais, que possuem *formas próprias de organização social*, que *ocupam e usam territórios e recursos naturais como condição para sua reprodução cultural, social, religiosa, ancestral e econômica, utilizando conhecimentos, inovações e práticas gerados e transmitidos pela tradição*.

Ambos os conceitos adotam o critério da autoatribuição previsto na Convenção 169 da Organização Internacional do Trabalho - OIT.

No campo fundiário se conseguiram estabelecer *critérios de destinação de terras públicas* quando as mesmas estejam sendo disputadas por diferentes grupos sociais: em primeiro lugar as posses tradicionalmente ocupadas pelos índios; em seguida as áreas necessárias à proteção dos ecossistemas naturais e as ocupadas pelas populações tradicionais; depois as glebas de terras destinadas à reforma agrária (propriedade familiar) e finalmente as áreas destinadas a atividades agroambientais (agricultura, pecuária, extrativismo ou misto) exercidas em imóveis médios e grandes. Estes critérios estão presentes, por exemplo, no parágrafo 6º do artigo 231 da CF que prevê a nulidade de todos os registros incidentes em terras indígenas, no art. 4°, II da Lei n° 11.952, de 25 de junho de 2009, que retira as mesmas do processo de regularização fundiária na Amazônia e no art. 8° da mesma Lei que determina que, em caso de conflito, deve ser priorizada a titulação das populações locais[26].

3. O presente: conflitos ambientais territoriais. Terra do capital x territórios dos povos

Nas últimas décadas, o grito das populações tradicionais ressoou nos mais diferentes recantos brasileiros, denunciando as diferentes situações de injustiça sócioambientais. Já em 2009, analisando os dados de conflitos envolvendo as disputas pela terra e água sistematizados pela Comissão Pastoral da Terra, Almeida chamava a atenção sobre o

[26] Em 2017 o STF, na ADI 4269, vedou a titulação de terceiros em terras ocupadas por quilombolas e demais populações tradicionais.

fato que muitos conflitos tinham como vítimas populações tradicionais. No Relatório "Conflitos no Campo Brasil 2014" da CPT, Medeiros[27] escreveu:

> Os dados sobre conflitos fundiários e violência no campo no Brasil no ano de 2014 indicam a permanência de um *padrão de conflitualidade que é constitutivo da nossa história* e *cujo cerne é*, como diversos pesquisadores têm apontado, *o acesso à terra*. As disputas em torno desse bem revestiram-se de diversas formas ao longo do tempo, mas *sua raiz está no processo de transformação da terra em equivalente de mercadoria e, portanto, na criação de condições para sua livre compra e venda no mercado e apropriação da renda fundiária. A mercantilização subjuga e tende a diluir outros significados dados à terra pelos que nela vivem* (grifo nosso).

Muitas das conquistas alcançadas nas últimas décadas graças à ação conjunta dos movimentos sociais e de setores expressivos da sociedade, estão sendo colocadas em risco em nome de um projeto de desenvolvimento que continua a confundir propositalmente o "progresso" com um pretenso crescimento econômico que não leva em consideração a sustentabilidade social e ambiental. As preocupações ambientais que tinham sido incorporadas nos discursos governamentais sobretudo depois da Conferência Internacional sobre Meio Ambiente (Rio 92), perderam espaço frente a intensificação da exploração econômica da região amazônica. O pensamento geopolítico vigente no período militar relativo a "integração nacional", ou até mesmo a "inclusão nacional" na medida em que pregava a necessidade de estreitar os vínculos da região com o resto do país, está sendo modernizado. A tentativa de inserir a região amazônica na frente de expansão capitalista continua reapresentando as mesmas antigas promessas de estimular o progresso econômico, a geração de empregos e melhores condições de vida para conquistar os setores mais empobrecidos da sociedade brasileira. Recentemente este "canto da sereia" prometeu solucionar a "pobreza extrema" existente no pais. O apoio governamental aos grandes projetos (construção de hidrelétricas, pavimentação de rodovias, construção de ferrovias e

[27] L.S. MEDEIROS, *Conflitos Fundiários e Violência no campo*, in CPT, *Conflitos no Campo Brasil 2014*, Goiânia, CPT, 2015, p. 26.

hidrovias, reforma de portos, e demais obras de infraestrutura, favorecimento ao agronegócio, de maneira especial aos agrocombustíveis, o apoio aos projetos de mineração e a apropriação de terras por parte de grupos econômicos nacionais e transnacionais) sem qualquer planejamento prévio do impacto ambiental e fundiário destas políticas, tem como consequência a espoliação dos territórios ocupados por populações tradicionais flexibilizando, quando não desconstruindo seus direitos.

Se nas décadas de setenta e oitenta do século XX os conflitos eram travados entre camponeses e projetos agropecuários[28], atualmente a disputa se dá entre diferentes modelos de desenvolvimento. É necessário denunciar as contradições de um sistema que, em nome de um pretenso "desenvolvimento", mascara profundas injustiças ambientais. A concentração de propriedade nas mãos de empresas nacionais e estrangeiras, a grilagem de terras públicas[29], a extração ilegal e predatória da madeira, a manutenção da pecuária extensiva como instrumento de especulação imobiliária, a invasão das terras indígenas e quilombolas, a expulsão de famílias, a criminalização dos movimentos sociais, são práticas antigas que permanecem atualmente em empreendimentos que, apesar de se qualificarem como "modernos", produzem os mesmos impactos sociais e ambientais de seus antecessores para os quais a Amazônia era um "vazio de gente". A estes empreendimentos se somaram recentemente a introdução das monoculturas para exportação (soja, cana-de-açúcar e eucalipto) e os agro combustíveis (dendê) que disputam territórios tradicionalmente ocupados por agricultores familiares, assentados da reforma agrária e comunidades quilombolas, isto é, colocam em risco aqueles grupos sociais que se autodefinem por critérios de identidade étnicos-sociais.

A luta pela terra ganha definições de modelos de desenvolvimento: o que considera a terra como mercadoria, um espaço reservado ao capital que não conhece qualquer tipo de fronteira e o que considera a "Mãe

[28] A Comissão Camponesa da Verdade do Estado do Pará registrou o assassinato de 588 camponeses no Estado do Pará entre 1964 e 1988.

[29] Em 16 de agosto de 2010 o Corregedor do Conselho Nacional de Justiça, Ministro Gilson Dipp, determinou o cancelamento de milhares de matrículas irregulares no Pará.

Terra"[30]. Para as empresas a ocupação da terra se traduz na transformação do espaço em unidades de propriedades privadas, "atomizadas", parcelas perfeitamente identificáveis por meio de memoriais descritivos e mapas que podem ser livremente comercializadas. Um modelo colonialista no qual, apesar de adotar um moderno discurso ecológico, o papel do estado continua a ser o de atrair o capital para a região, conceder incentivos fiscais, facilitar a compra das terras, mascarando uma política imperialista que tenta reestruturar a realidade ao serviço do capital.

Graças ao apoio da bancada ruralista, de setores do governo federal, e de boa parte dos governos estaduais, a legislação ambiental é flexibilizada, como por exemplo o Código Florestal, e estão sendo reduzidas as prerrogativas dos órgãos de licenciamento e fiscalização. Estas políticas têm como consequência a expropriação de territórios tradicionais e, na medida em que se concretiza o deslocamento compulsório da população, leva à desterritorialização e ao desenraizamento das populações tradicionais. Os novos territórios onde estas populações são confinadas não têm as mesmas características físicas dos anteriores impossibilitando a retomada dos modos originais de vida e das relações sociais que regiam as anteriores. Trata-se de uma desestruturação econômica e social destes grupos, pois transforma não só seus modos de produção, mas também sua identidade cultural.

Esta situação foi bem retratada pela *Carta Aberta do 1º Encontro das Comunidades Tradicionais do Baixo São Francisco sobre Terra e Território*[31] que identificava quem devia ser considerado responsável pela violência:

[30] Ver os Preâmbulos da Constituição da República do *Ecuador* (2008); "CELEBRANDO a la naturaleza, la *Pacha Mama*, de la que somos parte y que es vital para nuestra existência […] e da *Bolívia* (2009): "Poblamos esta sagrada *Madre Tierra* con rostros diferentes, y comprendimos desde entonces la pluralidade vigente de todas las cosas y nuestra diversidad como seres y culturas. Así conformamos nuestros pueblos, y jamás comprendimos el racismo hasta que lo sufrimos desde los funestos tiempos de la colônia".

[31] *Carta Aberta do 1º Encontro das Comunidades Tradicionais do Baixo São Francisco sobre Terra e Território* (Propriá - SE, 18 de setembro de 2011).

> As grandes obras são concebidas sem nenhuma preocupação referente aos impactos socioambientais. Na verdade, tais obras atendem aos interesses de grandes corporações e exportadores, vinculados a atividades econômicas concentradoras de riqueza como o agronegócio, mineração e a produção de biocombustíveis […].
> Neste cenário, *o Governo se sobressai como o maior provocador destes conflitos* e fragmentador das políticas públicas, inclusive estimulando a violência com seus projetos e não priorizando a reforma agrária e a demarcação dos territórios tradicionais (grifos nossos).

Segundo Carvalho[32] esta experiência não é exclusivamente brasileira:

> Seria exagero afirmar que toda a Pan-Amazônia está completamente atravessada por disputas envolvendo diferentes atores sociais que lutam para garantir o acesso, uso e o controle de seus territórios? Esta parece ser uma das principais características do momento histórico que vivenciamos […].
> Se tempos atrás [os conflitos] estavam concentrados em determinadas áreas, hoje eles estão disseminados por toda a Pan-Amazônia. Essa é outra característica importante da expansão do capital nesta parte do continente.

Este clamor se associou à realização de vários mapeamentos dos territórios pretendidos por estas populações que estão em disputa com outros setores da sociedade brasileira. Hoje várias mobilizações visam dar visibilidade a estas reivindicações, mas nem sempre conseguem muito êxito. Um instrumento importante para identificar e divulgar os Territórios Tradicionais é "Projeto Nova Cartografia Social" que, conforme informa Almeida[33], procura: "descrever etnograficamente as situações sociais de conflito e tensão. Dezenas de comunidades amazônicas e de

[32] G. CARVALHO, *Grandes Projetos de Infraestrutura, Conflitos e Violação de Direitos na Pan-Amazônia*, in *Revista Latinoamericana de Derecho y Políticas Ambientales*, Año 2, n° 2, Agosto de 2012, p. 5 e 7.

[33] A.W.B. ALMEIDA, *Cartografia Social da Amazônia: os significados de território e o rito de passagem da "proteção" ao "protecionismo"*, in N. SIFFERT, M. CARDOSO, W.A. MAGALHÃES, H.M.M. LASTRES (org.), *Um olhar territorial para o desenvolvimento: Amazônia*, Rio de Janeiro, BNDES, 2014, pp. 359.

outras regiões do Brasil[34], mapeiam seus territórios e reivindicam o reconhecimento dos mesmos. Não se trata tão simplesmente de dar uma dimensão cartográfica aos pleitos, mas registrar como se dá a dinâmica da territorialização destes grupos sociais.

3.1. Flexibilização das normas

As conquistas e os direitos consagrados na Constituição Federal de 1988 estão sendo combatidos pela ação do Poder Executivo, seja federal que de vários governos estaduais (vale lembrar aqui a redução das Unidades de Conservação na Amazônia[35] e o avanço da construção da barragem de Belo Monte, no Pará, apesar do evidente descumprimento das condicionantes sociais e ambientais) e por um Congresso Nacional onde as forças conservadoras olham a natureza como um bem a ser mercantilizado, como ficou patente na reforma do Código Florestal, no avanço nas diferentes comissões da PEC 215[36], continuou nos debates do Código Mineral e na Lei nº 13.465, de 11 de julho de 2017, que dispõe sobre a regularização fundiária rural e urbana.

Um Manifesto contra a PEC 215, divulgado em 15 de novembro de 2015, apresenta assim as consequências se a mesma for aprovada[37]:

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[34] Acselrad e Végas analisaram 284 experiências de cartografia realizadas no Brasil entre 1992 e 2012. 33% das mesmas terras indígenas e 27% outras terras tradicionalmente ocupadas. Ver H. ACSELRAD, R.N. VIÉGAS, *Cartografias sociais e território - um diálogo latino-americano*, in H. ACSELRAD (Org.), *Cartografia social, terra e território*, Rio de Janeiro, 2013.

[35] A lei n° 12.678, de 25 de junho de 2012, *alterou os limites dos Parques Nacionais da Amazônia, dos Campos Amazônicos e Mapinguari, das Florestas Nacionais de Itaituba I, Itaituba II e do Crepori e da Área de Proteção Ambiental do Tapajós* desafetando parte de suas áreas para o estabelecimento de Projetos de Assentamento Sustentáveis e as áreas de alagamento do lago artificial a ser formado pelas barragens da Usina Hidroelétrica de Tabajara, Santo Antônio e dos canteiros de obras da UHE de Jirau e Jatobá.

[36] A demarcação de toda e qualquer terra indígena, o reconhecimento de domínio das terras ocupadas pelas comunidades remanescentes de quilombo e a criação das unidades de conservação teria que passar pela aprovação do Congresso Nacional burocratizando ainda mais estes processos.

[37] Manifesto contra a PEC215 e a favor de propostas de solução para Conflitos assinado por APIB - Articulação dos Povos Indígenas do Brasil; Cimi - Conselho Indige-

> A eventual aprovação desta PEC representaria um retrocesso sem precedentes na nossa história recente e um obstáculo adicional para a efetividade de direitos determinados pela Constituição. Levaria à virtual paralisação dos processos administrativos de materialização desses direitos. Com isso, ficariam agravados e pendentes de solução os conflitos atualmente existentes, gerando outros, tanto no campo como nos embates jurídicos que se perpetuam no Judiciário e no Executivo.

Se isso acontecer a situação de conflito contra os povos indígenas e os quilombolas irá se agravar ainda mais.

Setores do Poder Judiciário estão acompanhando esta política, como provam as recentes decisões do Supremo Tribunal Federal em relação aos direitos territoriais dos povos indígenas, por exemplo nas TI Guyraroká – MS[38] e TI Porquinhos – MA[39] onde é utilizado como referência o marco temporal de 1988, apesar dos povos indígenas terem sido esbulhados de suas terras, e das comunidades remanescentes de quilombos não se permitindo o reconhecimento ou a ampliação destes territórios.

Neste caso é interessante o depoimento da liderança indígena *Ava Kaaguy Rete Guarani-Kaiowá*: "A coisa está tão absurda que, hoje, querem nos penalizar por termos sido expulsos de nossos territórios. *Querem que assumamos a culpa pelo crime deles*".

Nesta disputa as populações tradicionais não aceitam mais ter que sucumbir frente a empreendimentos que comprometem seu presente e ameaçam destruir seu futuro. A assessoria prestada a várias comunidades tradicionais, de maneira especial aos remanescentes das comunidades de quilombo e comunidades ribeirinhas, nos leva a afirmar que os conflitos territoriais muitas vezes fortalecem os laços existentes entre os diferentes grupos sociais, fazendo com que cada grupo redescubra suas raízes, revitalize sua história e lute por seus direitos.

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nista Missionário; CTI - Centro de Trabalho Indigenista; IEB - Instituto Internacional de Educação do Brasil; ISA - Instituto Sócio-Ambiental.

[38] Ver RMS 29087/DF: DEMARCAÇÃO DE TERRAS INDÍGENAS. O MARCO REFERENCIAL DA OCUPAÇÃO É A PROMULGAÇÃO DA CONSTITUIÇÃO FEDERAL DE 1988.

[39] Ver RECURSO ORD. E M MANDADO DE SEGURANÇA 29.542 DISTRITO FEDERAL.

Nos conflitos se fortalecem os laços grupais e se criam mecanismos de defesa que procuram salvaguardar a memória do grupo, valorizar o sentido de pertencimento àquele território específico. A memória coletiva passa a ser utilizada como um instrumento que confere legitimidade à luta pela defesa do território que ganha a dimensão de preservar a identidade étnico-cultural nas suas dimensões econômicas, sociais e culturais. Não se trata meramente de resgatar fatos do passado, mas valorizar uma tradição viva que permita a reprodução da comunidade garantindo sua sobrevivência.

4. Reconhecimento dos direitos territoriais: legislações favoráveis, mas resultados deficitários

4.1. Povos Indígenas

Analisando o Censo de 2010 apresentado no site da FUNAI[40] se verifica que no Brasil *896.917 pessoas se declararam indígenas, destes 517.383 ainda vivem em aldeias, representando 57,7% do universo*. A parcela de indígenas que vive nas cidades já é expressiva (379.534), mas ainda minoritária. Olhando-se a distribuição espacial nas diferentes regiões brasileiras se percebe como a *Região Norte* concentra o maior número de indígenas aldeados: *342.836 (73,5% do total regional)*, seguida da *Região Centro-Oeste com 143.432 (72,5% aldeados)*. Já a Região Sudeste apresenta a maior taxa de índios cujo domicílio se localiza nas cidades: 84%. Destaca-se que das *773 terras indígenas que constam no site da FUNAI, que somam 118.205.950,0098 hectares, 433 se localizam na Amazônia, com uma área de 116.139.005,7399 ha. Isto é a Amazônia concentra 59,07% das terras indígenas do Brasil e 98,25% da área*[41].

Os números acima e as diferentes situações de conflitos apresentadas anteriormente, mostram a importância do reconhecimento dos direi-

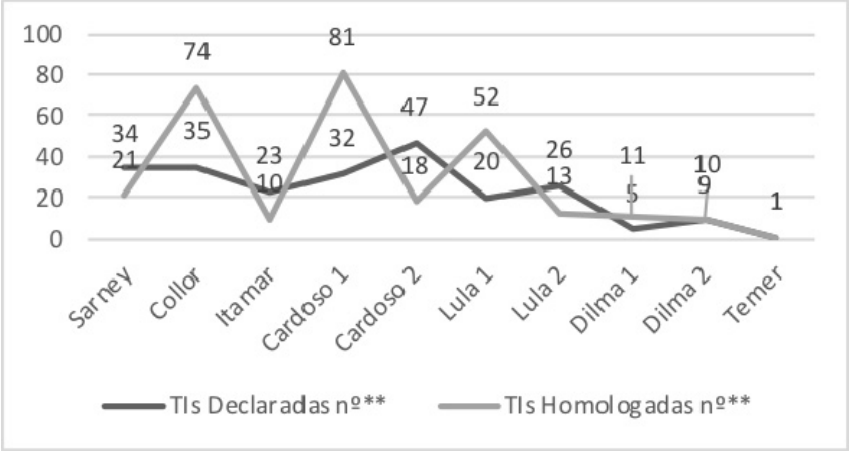
[40] Fonte: http://www.funai.gov.br/arquivos/conteudo/ascom/2013/img/12-Dez/encarte_censo_indigena_02%20B.pdf acesso em 04 de novembro de 2015.

[41] Ver http://www.funai.gov.br/index.php/indios-no-brasil/terras-indigenas, acesso em 15 de julho de 2018.

tos territoriais dos povos indígenas. Ao mesmo tempo as organizações dos povos indígenas se fortaleceram transformando estes povos em atores sociais que reivindicam seus territórios. Infelizmente se assiste sempre mais a acentuada queda nos processos de demarcação destas terras. Decorridos trinta anos desde que a Constituição estabeleceu: "Art. 67 ADCT. A União concluirá a demarcação das terras indígenas no *prazo de cinco anos* a partir da promulgação da Constituição", os números mostram a desaceleração deste processo conforme mostra o quadro a seguir.

As informações relativas às terras indígenas declaradas e homologadas desde 1985 permitiram elaborar o gráfico 01 que mostra como, se dividíssemos os números dos tamanhos de áreas declaradas e homologadas pelos dias de governo de cada um dos últimos seis presidentes, o governo Temer teve o pior desempenho.

Gráfico 01[42]*: Brasil Terras Indígenas Declaradas e homologadas (15/03/1985 a 15/07/2018).*



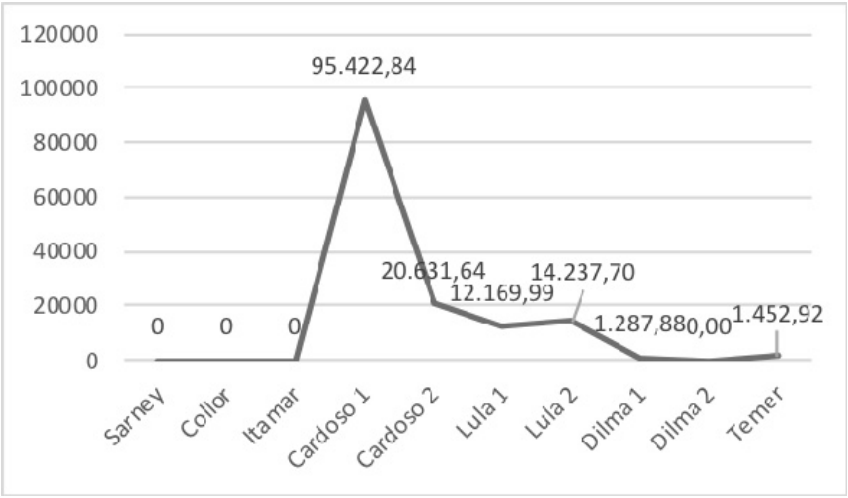
Fonte: https://pib.socioambiental.org/pt/Situa%C3%A7%C3%A3o_jur%C3%ADdica_das_TIs_no_Brasil_hoje acesso em 15 de julho de 2018. Gráfico elaborado pelo autor.

[42] Data dos mandatos dos presidentes: José Sarney [abr 85 | mar 90]; Fernando Collor [mar 90 | set 92]; Itamar Franco [out 92 | dez 94]; Fernando Henrique Cardoso 1 [jan 1995 a dez 1998]; Fernando Henrique Cardoso 2 [jan 1999 a dez 2002]; Luiz Inácio Lula da Silva 1 [jan 2003 a dez 2006]; Luiz Inácio Lula da Silva 2 [jan 2007 a dez 2010]; Dilma Rousseff 1 [jan 2011 a dez 2014]; Dilma Rousseff 2 [jan 2015 a mai 2016]; Michel Temer [mai 2016 a julho 2018].

4.2. Remanescentes das Comunidades de Quilombos

A desaceleração do reconhecimento dos direitos territoriais dos remanescentes das comunidades de quilombo, a nível federal, segue o mesmo processo de redução do ritmo de titulações, conforme se pode verificar no gráfico a seguir que apresenta a área das comunidades tituladas de 15 de abril de 1995 a 15 de julho de 2018.

Gráfico 2: Amazônia: área títulos quilombolas (04/1985 a 07/2018) (ha)



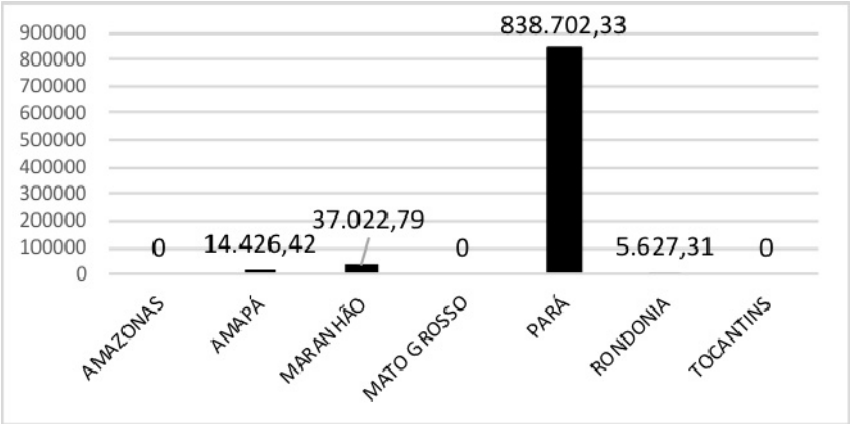
Fonte INCRA, CPI-SP e informações pessoais, gráfico elaborado pelo autor

Verifica-se como os resultados estão muito aquém do desejável, de maneira espacial devido à excessiva burocratização imposta pela Instrução Normativa n° 57 do INCRA que regulamentam o decreto.

Comparando os títulos quilombolas expedidos na Amazônia, o Estado do Pará se destaca com 67 títulos (135 comunidades), seguido pelo Maranhão (55 títulos e 59 comunidades) Amapá (3 títulos e 3 comunidades) e Rondônia (1 título, 1 comunidade). O Pará reconheceu 93,63% das terras quilombolas da Amazônia.

Também no Pará se assiste a uma desaceleração das titulações: a Superintendência Regional de Santarém que foi a primeira no Brasil a emitir título em favor dos quilombos, mas desde 1997 deixou de titular.

Gráfico 3: Área títulos quilombolas na Amazônia (20/11/1997 a 15/07/2018) (ha)



Fonte INCRA, CPI-SP e informações pessoais, gráfico elaborado pelo autor

O site do INCRA apresenta o volume geral de terras quilombolas em processo de titulação federal: 2.532.431,2962 ha. Muito menos que a metade foi titulada.

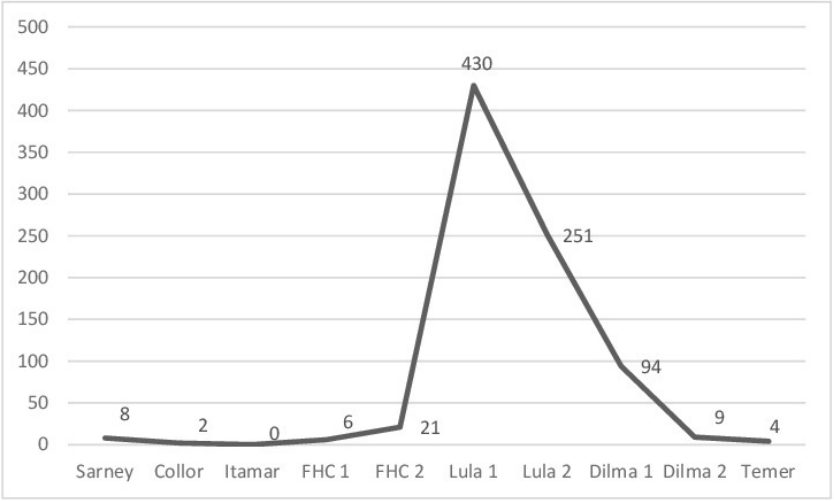
4.2. Criação de Projetos Especiais em favor de populações tradicionais

Analisando-se a política de criação de assentamentos se verifica que os 825 assentamentos especiais[43] ocupam 44.932.628,59, enquanto os 8.557 assentamentos de reforma agrária detêm 43.046.791,17 ha. A área média muito maior dos projetos especiais (54.463,79 ha contra 5.034,71 ha) das demais modalidades de projetos, pode ser explicada parcialmente explicada pelo fato que nelas se agregam o reconhecimento de unidades de conservação onde é computada a área total e não só a efetivamente ocupada pelas famílias que passaram a integrar a 'relação dos beneficiários'.

[43] Além das três modalidades citadas acima (PAE, PDS e PAF), agregamos os Projetos de Fundos de Pasto da Bahia que merecem um tratamento diferenciado por serem coletivos e as RESEX e FLONAs.

Nos oito anos do governo Lula (681), seguido pelos cinco anos e cinco meses da presidente Dilma (103) foi muito maior o número de projetos especiais criados.

Gráfico 4: Número de projetos especiais criados no Brasil



Fonte INCRA e informações pessoais. Gráfico elaborado pelo autor

Tabela 1: Distribuição espacial dos projetos de assentamentos especiais

REGIÃO	N°	ÁREA (HA)	% ÁREA	PESSOAS	% PESSOAS
NORTE	597	43.852.762,03	97,60	178.224	87,06
NORDESTE	187	870.762,41	1,94	22.349	10,92
CENTRO-OESTE	15	127.868,86	0,28	1.627	0,79
SUDESTE	25	79.911,86	0,18	2.488	1,22
SUL	1	1.444,00	0,00	19	0,01
BRASIL	825	44.932.528,59	100,00	204.707	100,00

Fonte INCRA e informações pessoais. Gráfico elaborado pelo autor

A Amazônia detém 97,60% da área destinada e abriga 87,06% da população. Na Bahia destacam-se os 154 Projetos de Fundo de Pasto com uma área de 231.748 ha, beneficiando 4.838 famílias.

Conclusão

Somando-se as terras indígenas (*118.205.950,0098*) e quilombolas (*2.532.431,2962* ha) com os assentamentos especiais (*44.932.528,59*), mais de 165 milhões de hectares são mantidos fora do mercado de terras, como terras públicas de usufruto dos povos indígenas e comunidades tradicionais ou propriedades inalienáveis (quilombos). A disputa entre Populações Tradicionais, as obras de infraestrutura e as grandes empresas continuará a se dar nos mais de 55 milhões de terras públicas existente na Amazônia[44] que foram arrecadas nas décadas de 1970 e 1980 sem serem ainda destinadas e que estão num rápido processo de apropriação desordenada.

Urge que as populações tradicionais possam sair da "invisibilidade" para mostrar no Cadastro Ambiental Rural onde se localizam as áreas que ocupam e terem seus direitos territoriais reconhecidos.

Acredita-se que o próximo passo para garantir os direitos territoriais das populações tradicionais será o de *registrar as áreas coletivas já tituladas* como os territórios quilombolas *e as que já foram regularizadas de um ponto de vista fundiário*: reservas extrativistas, projetos de assentamento especiais criados pelo INCRA ou pelos órgãos de terra estaduais *no Cadastro Ambiental Rural – CAR*. Trata-se de terras já consolidadas em termos fundiários, o CAR seria utilizado como uma ferramenta de gestão ambiental permitindo planejar o uso dos recursos.

[44] Este número foi divulgado numa palestra proferida por Sérgio Lopes, Coordenador do Programa Terra Legal em Palmas (TO) em 14 de outubro de 2015.

COMPARATIVE LAW FOR WHAT KIND OF DEVELOPMENT?

Giuseppe Bellantuono

1. Introduction

The law and development field has had a troubled relationship with comparative legal studies. More often than not, comparative legal scholars have criticized both the scientific underpinnings and the political strategies that studies on law and development are assumed to endorse. Over the past decades, the crisis of the law and development field and its multiple failures in promoting effective legal reforms have been repeatedly denounced. This debate did not only concern methodological disagreements, but involved broader challenges to the Western concept of development and to the capitalist system it supports. Undeterred by these criticisms, both the international donor community and law and development scholars have kept searching for new and improved approaches to legal reform in developing countries.

The research question addressed in this chapter is whether the eruption on the global scene of the Sustainable Development Goals (SDGs), unanimously adopted by the UN General Assembly in 2015 and heralded as the major driver of development policies in the next decade, should prompt a reassessment of the relationship between law, development and comparative legal studies. On an optimist tone, the SDGs «may be an important step in the longer-term development of more widely shared norms of sustainability around which states can craft policies, actors can mobilize, and institutional mechanisms can adapt and

support»[1]. A more pessimist view is that the SDGs still rely on a concept of development which cannot be decoupled from environmentally unstainable practices and social injustice[2]. Given that controversies on development are not going to end any time soon, the argument could be made that the SDGs cannot help the community of law and development scholars to coalesce with the community of comparative legal scholars around a shared research agenda.

The view advocated in this chapter is that the limits of the SDGs are the main reason why the legal dimensions of development should be addressed in a comparative perspective. The starting point should not be the search for widespread consensus on concepts of development, but the planetary ecological crisis and the growing global inequalities within and between countries[3]. The SDGs may or may not contribute to mitigate both problems. Perhaps they will fail to mobilize the financial resources needed to implement them[4]. Still, they include two innovative features which offer the opportunity to move past current disagreements. Firstly, the SDGs propose a universal approach to development,

[1] N. KANIE ET AL., *Introduction: Global Governance Through Goal Setting*, in N. KANIE, F. BIERMANN (eds.), *Governing Through Goals: Sustainable Development Goals as Governance Innovation*, Cambridge, Mass.-London, UK, 2017, p. 23.

[2] W. SACHS, *The Sustainable Development Goals and Laudato si': Varieties of Post-Development?* 38(12) *Third World Q.* 2573 (2017); S. ADELMAN, *The Sustainable Development Goals, Anthropocentrism and Neoliberalism*, in D. FRENCH, L.J. KOTZÉ (eds.), *Sustainable Development Goals: Law, Theory and Implementation*, Cheltenham, 2018, p. 15.

[3] See W. STEFFEN ET AL., *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 347 *Science* Issue 6223, 13 February 2015 (evidence about planetary boundaries being transgressed); F. ALVAREDO ET AL., *World Inequality Report*, 2018 (showing that since 1980 inequality has increased both within countries and at global level). Global inequalities and climate change are linked in multiple ways: see, e.g., the contributions collected in B.M. HUTTER (ed.), *Risk, Resilience, Inequality and Environmental Law*, Cheltenham, 2017.

[4] The range of estimates is quite large and goes from $2 to $7 trillion per year: see references in T. VOITURIEZ ET AL., *Financing the 2030 Agenda for Sustainable Development*, in N. KANIE, F. BIERMANN, *op. cit.*, p. 259; L. GEORGESON, M. MASLIN, *Putting the United Nations Sustainable Development Goals into Practice: A Review of Implementation, Monitoring, and Finance*, 5(1) *Geography and Environment* 1, 15 (2018).

which also applies to developed countries. This means that legal change is being promoted within a common framework across radically different institutional contexts. This new round of legal reforms could provide a natural experiment to test alternative concepts of development and ways to implement them. But a necessary condition is that information about local experiences is collected and analysed with sound comparative methodologies. Secondly, the collective effort to implement the SDGs will make available new communication channels, new monitoring mechanisms and new accountability systems. All of them will prompt research questions about institutional change and inertia, effectiveness of legal reforms, explicit and implicit assumptions embedded into the SDGs implementation machinery. Both law and development scholars and comparative legal scholars should be attracted to such questions.

The view advocated here does not try to bracket the most controversial issues on development. It tries instead to suggest that the most radical criticisms of Westernized concepts of development (and of the rule of law) should be employed to foster the dialogue among legal scholars in the Global South and in the Global North. Amidst the fragmented and heterogeneous approaches to development themes, the aim to be pursued should not be convergence toward common solutions, but stronger awareness of the impact of contextual differences. This aim could be achieved in several different ways. A focus on the SDGs could have the advantage of shifting the debate toward more practical goals. Of course, some scholars will argue that nothing short of the demise of capitalism will help address ecological crises and global inequalities[5]. Though, even these scholars should be willing to acknowledge that a comparative framework could help identify the stated and unstated assumptions behind the measures implementing the SDGs. Without this kind of knowledge, it is hard to see how alternative views of development could be proposed.

[5] See, e.g., DA. KENNEDY, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*, Princeton, 2016, p. 15 («People propose institutional reforms … as if a lever to move the world had been identified, while remaining intensely aware that this is more aspiration than reality»).

In the following sections, I flesh out some proposals for the comparative analysis of the SDGs. Section 2 reviews the criticisms that comparative legal scholars addressed to law and development studies. I argue not only that these criticisms have to be taken seriously, but that they provide the foundations for a broader research agenda on comparative law and development. The next three sections provide examples of research topics related to the implementation of the SDGs. Section 3 focuses on the comparison of interpretive practices for the SGDs. The explicit premise here is that the debate on the meaning of development will not end, so different meanings have to coexist. Identifying interpretive practices is of crucial importance to select the right implementation measures. Section 4 turns to contextual analysis. Here the research problem is to find ways to take into account the lessons of legal pluralism about the complexity of local cultures. The comparative approach should clarify when a specific context could support or hamper the implementation of the SDGs. Section 5 discusses the evaluation problem: how can comparative law help establish which implementation measures are successful? I try to go beyond the stalled debate about the possibility to use comparative law for policy purposes and suggest that the main long-term contribution should be the improvement of learning processes. Section 6 provides a summary of the arguments presented in the chapter.

2. Addressing criticisms

Mathias Siems usefully summarized the four main criticisms levelled against the proponents of law reform projects as the main engine of development[6]. Firstly, cultural or political factors could drive development, thus relegating law reform to a secondary role. Secondly, top-down approaches, often employed in foreign aid programs, disregard local specificities and the role of informal community norms. Thirdly, trying to use Western legal models in developing countries is doomed to failure. Fourthly, development is not fostered by promoting the

[6] M. SIEMS, *Comparative Law*, 2nd ed., Cambridge, 2018, p. 352-362.

wrong type of reforms, for instance those which only pay attention to the dismantling of barriers to competition and overlook resource preservation and social rights.

It is not surprising that development themes arouse vigorous debates. But something more than scientific disagreements seems to be at stake here. The whole law and development enterprise is accused of being an attempt at exporting American, or more generally Western, models, the ultimate goal being to control the global economy and preserve the status quo. Consider, for example, Jedidiah Kroncke's wide-ranging critique of efforts to export American law during the twentieth century[7]. He argued that the law and development field completely overlooked three of the most important lessons stemming from the comparative law literature. Firstly, attempts at exporting American law were depicted as technical solutions devoid of any political meaning. Secondly, American law was said to be easily transferable to foreign legal systems, no matter how different their institutional, political, economic and cultural features. Thirdly, what was transferred was an idealized package of institutional solutions, a long way off the historical dynamics that shaped American law and completely oblivious to the lively domestic debates that influence the meaning of the institutions whose export was, and is, actively promoted. According to Kroncke, the deep roots of this mistaken approach to law and development can be traced back to the cultural influence of Christian missionaries in the early twentieth century. In a few decades, such influence was converted into a foreign policy which, both before and after the Second World War, saw the export of American law as one of the main ways to ensure the protection of national interests and the containment of Soviet and Chinese expansion. Although Kroncke devotes most of his attention to the relationship between the US and China, he argues that the same approach was used in Latin America, Africa and the Middle East. In all cases, attempts at exporting American law are judged to be a complete failure. Note, however, that Kroncke does not deny the possibility of legal transplants. He argues instead that no persuasive evidence has

[7] J. KRONCKE, *Law and Development as Anti-Comparative Law*, 45 *Vand. J. Trans. L.* 477 (2012); J. KRONCKE, *The Futility of Law and Development: China and the Dangers of Exporting American Law*, Oxford, 2016.

been provided about the contribution of American law to development in any of the countries in which this strategy has been adopted. The identification of law and development with the export of American law leads Kroncke to conclude that the whole enterprise of promoting legal reforms abroad should be abandoned. He maintains that reviving comparative legal studies in the US is the only way to stop the endless cycle of optimist and delusion which characterized the law and development field in the last decades.

Kroncke is not alone in criticizing the law and development field from the vantage point of comparative law. Ugo Mattei and Laura Nader argued that «Ruling elites in Europe and the USA have imposed and still impose the social costs of their development on weaker people, at home and abroad, and the rule of law effectively and elegantly serves this practice»[8]. If a close association is detected between global inequalities and Western legal models, no common ground can be identified on which to start a discussion about the details of legal reforms. This problem is not confined to the contents of the reforms, but is said to involve the methodology of comparative law. Mattei argued that during the Cold War the whole methodological debate in comparative legal studies suffered from much the same problems that Kroncke had identified in the American approach to international relations[9]. The taxonomy of legal families, the description of the similarities between civil law and common law countries, the elaboration of the concept of a Western Legal Tradition, the almost exclusive focus on private law, as well as the discussion about the comparability of capitalist and communist countries, were deeply influenced by the need to affirm the superiority of Western law. From this point of view, the law and development field did not overlook the lessons of comparative law. The latter partook of the same approach which led to multiple rounds of failures in legal reform efforts.

There are at least three possible reactions to these criticisms. The first one is to locate the contrast in the insiders/outsiders framework

[8] U. MATTEI, L. NADER, *Plunder: When the Rule of Law is Illegal*, Malden, Ma., 2008, p. 197.

[9] U. MATTEI, *The Cold War and Comparative Law: A Reflection on the Politics of Intellectual Discipline*, 65 *Am. J. Comp. L.* 1 (2017).

proposed by David Kennedy. Law and development scholars who work on improving global governance can be perceived as the insiders, while comparative legal scholars are called to play the role of outsiders who contest patterns of domination and denounce inequalities. Each camp employs its own vocabulary and relies on methodologies the other camp finds unacceptable. This framework might describe what has happened in the last few decades, but it does not suggest that the divide between insiders and outsiders will be a stable and permanent one[10]. Therefore, a second reaction could be to use comparative law to promote alternative concepts of development.

For a number of reasons, this is no easy task. To begin with, alternative concepts of development should be grounded on the analysis of the causes of the problems to be addressed. So far, criticisms of law and development have only focused on Western exploitation. For example, Mattei and Nader direct attention to one crucial source of world inequalities when they argue that "underdevelopment is a historically produced victimization of weaker and more closed communities and not the disease of lesser people"[11]. Though, they also suggest that exploitation from Western countries is the only problem to be addressed. If we take a more long-term view of development, this approach looks too monolithic. Factors other than Western domination need to be included in the analysis. For instance, transatlantic slave trade and colonialism did play a crucial role in Africa, but they interacted in complex ways with the history of local institutions. Their effects were not the same everywhere. To explain not only why Africa became poor, but also why it stayed poor, geographical, kinship and religious factors have to be taken into account as well[12].

Secondly, which alternative concepts of development should comparative legal scholars support? It is possible that, by coming into con-

[10] DA. KENNEDY, *op. cit.*, p. 103-107 (on the insiders/outsiders distinction), 153-159 (boundary work leading to revise acceptable arguments in a specific field). Indeed, this chapter can be understood as an attempt to modify the boundaries between law and development and comparative law.

[11] U. MATTEI, L. NADER, *op. cit.*, p. 6.

[12] See M. MCMILLAN, *Understanding African Poverty Over the Longue Durée: A Review of* Africa's Development in Historical Perspective, 54(3) *J. Econ. Lit.* 893 (2016).

tact with legal cultures in developing countries, comparative legal scholars are able to identify alternative ways to organize economic and social relationships. Consider, for example, the recognition of the Nature, or Mother Earth, as a legal subject in some Latin American constitutions[13]. An alternative concept of society is visible here. It explicitly embraces the main tenets of indigenous traditions, namely the rejection of the duality between man and the environment, the primacy of intergenerational duties over the right to exploit natural resources, and the ideas of collective responsibility and solidarity. This alternative concept animated the debate on the possibility of an economic model that rejects the capitalism modes of production. More generally, the indigenous view of modernity is contrasted with the Western view and the economic organization it has historically produced. It is argued that contemporary economies should not become more sustainable, but replace the ideas of growth and progress with a perspective that grants priority to the preservation of natural resources.

The comparative legal scholar has a role to play in clarifying the origins of indigenous concepts and their legal implications. There are, however, two risks to be avoided. The first one is the acritical adhesion to alternative concepts of development. If exporting Western concepts to developing countries is plainly wrong, trying to suggest that indigenous concepts could be used to transform capitalism in developed countries does not appear to be supported by any theory of legal change[14]. Furthermore, it is widely acknowledged that indigenous concepts are still struggling to transform the economic and institutional frameworks of Latin American countries. Thus, the object of comparison should be

[13] See, e.g., the discussion in S. LANNI, *Il diritto nell'America Latina*, Napoli, 2017, p. 149ff. (on Nature as a legal subject), p. 157ff. (on indigenous law as the foundation for a new economic order).

[14] For example, F. CAPRA, U. MATTEI, *The Ecology of Law*, Oakland, Ca., 2015, p. 29, 156, 175 argue that a cultural revolution is needed to replace the traditional concept of economic growth with a relational order in which all the living inhabitants share equal access to global commons. To achieve this goal, the best legal practices capable of implementing the values of power diffusion, social justice and ecological sustainability should be identified. The problem with this view is that it might be understood as replacing the universalist bias of Western countries with another universalist bias, this time rooted in alternative concepts of development.

the attempts carried out in both developed and developing countries to remedy the distortions affecting current economic systems. The working hypothesis should be that both the problems to be addressed and the paths to be followed differ to a significant extent.

The second risk to be avoided is the illusion that alternative understandings of modernity can live in separate spheres. The world societies and economies are too intertwined to hold such a belief. This is acknowledged by post-developmental scholars when they suggest that indigenous communities are able to engage selectively with markets and technologies, without however being completely dominated by them[15]. But interdependencies among developed and developing countries are also said to be the main factor driving aid policies after the end of the Cold War[16]. Therefore, comparative legal scholars cannot limit themselves to contrast alternative concepts of development. They have to explore their multiple interactions both within and outside national contexts.

None of the observations made above is meant to suggest that comparative legal scholars cannot play an advocacy role[17]. What they do suggest, however, is that the insiders/outsiders dichotomy does little to clarify the multiple ways to combine an interest in development themes with a comparative perspective. Besides criticizing the naïve optimism of those who maintain that the rule of law can foster development and advocating alternative concepts of development, comparative legal scholars should also acknowledge their role in fostering a dialogue among legal scholars in the Global North and the Global South. This is, indeed, the third possible reaction to the above mentioned criticisms of

[15] See, e.g., G. ESTEVA, A. ESCOBAR, *Post-Development @ 25: on 'Being Stuck' and Moving Forward, Sideways, Backward and Otherwise*, 38(12) *Third World Q.* 2559 (2017).

[16] See S. BERMEO, *Targeted Development: Industrialized Country Strategy in a Globalizing World*, Oxford, 2018 (suggesting that rich countries use development policy to protect themselves from the negative spillovers of underdevelopment).

[17] See, e.g., R. SACCO, *Antropologia del diritto*, Bologna, 2007, p. 85-88 for a discussion of the defense of ethno-law in legal pluralism literature; R. PRICE, *The Anthropologist as Expert Witness: A Personal Account*, in J.A.R. NAFZIGER (ed.), *Comparative Law and Anthropology*, Cheltenham, 2017, p. 415 for examples of direct involvement in legal disputes on the rights of local communities.

the law and development field. Kroncke hints at this possibility when he observes that engaging in a dialogue with foreign scholars could help avoid 'unproductive generalizations' of one's own legal system and to better understand common challenges[18]. However, he is more interested in reviving US comparative legal studies and does not explain how such a dialogue could be supported. I argue that the dialogue could avoid the faulty import/export framework and shift the debate toward learning processes. More specifically, a two-pronged strategy can be devised: firstly, the criticisms of comparative legal scholars have to be taken seriously; secondly, a common ground to discuss the plurality of development paths shall be identified.

With regard to the first prong, I single out three lessons about what should be absolutely forbidden to law and development scholars:

1) You cannot argue that law is just a neutral technology

2) You cannot argue that Western law is superior to non-Western law

3) You cannot use the export-import metaphor.

I maintain that most, if not all, contemporary law and development scholars would agree with the above mentioned list of «do nots». It could be more difficult for international development organizations to explicitly subscribe to these lessons. But it seems something is starting to change. In its 2017 World Development Report, the World Bank accepts some of the arguments raised by its critics and seems willing to engage in a dialogue which over time could lead to deeper revisions of its aid strategies. Legal pluralism is acknowledged as a real-world feature of both developed and developing countries, not inherently good or bad, and equally capable of generating challenges and opportunities. Criticisms of Doing Business indicators are widely endorsed, thus suggesting the consolidation of strongly different views within the World Bank. Specific attention is devoted to institutions which redistribute resources and rents, as well as more generally to the relationship between growth and inequalities. Finally, the effectiveness of aid programs is openly discussed, its variable impact is acknowledged and

[18] J. KRONCKE, *The Futility*, cit., p. 236.

more efforts to identify interactions between aid and local contexts are recommended[19].

The Report provides a balanced presentation of the evidence supporting the above mentioned arguments. Though, some critical issues shall be highlighted. Firstly, there is no hint that alternative concepts of development can find their way into the World Bank strategies. This could mean that the critical branch of development studies will always reject any invitation to make proposals on how to reform aid strategies. Secondly, the acknowledgement of legal pluralism does not lead to a reflection on the relationship between state and non-state law. The ultimate aim seems to be a behavioural change, to be achieved through the reduction of pluralism. Thirdly, the Report does not emphasize rule of law projects, but relies on economists' understanding of the role that law could play. The drawback is that much of the complexity related to legal change is lost. Fourthly, when positive and negative experiences with development reforms are discussed, no real comparative exercise is undertaken to explain the reasons for success and failure. This may relate to the lack of detailed legal knowledge about those reforms.

Should the list of do nots be longer? For instance, should criticisms of capitalism be embraced? Or should the instrumental use of law for development purposes be rejected? I maintain that these aspects should be part of the research agenda, but in a positive and not in a negative way. It is possible to disagree on these aspects while contributing to a common research agenda. As far as criticisms of capitalism are concerned, it has been proposed to detach the analysis of legal reform from the definition of what counts as social progress in a given country[20]. The problem with this approach is that any comparative legal analysis has to start with the type of development sought. Omitting this aspect leads to analyses that are too abstract or too dependent on implicit assumptions. Therefore, any comparative analysis has to accept that what needs to be explored are the implications of each concept of develop-

[19] WORLD BANK, *Governance and the Law*, World Development Report, 2017, p. 84, 87f., 119-122, 167ff., 266-273.

[20] See Y.-S. LEE, *General Theory of Law and Development*, 50 *Cornell Int. L. J.* 416, 432 (2017).

ment[21]. How this approach could affect the interpretation of SDGs is explained in section 3. With regard to instrumental uses of law, it has been observed that they were directly affected by American approaches borne in the heyday of legal realism, but exported to other institutional contexts they legitimized the authority of the state and reduced the autonomy of the legal sphere from the political sphere[22]. However, alternative scenarios are possible. Even a strongly instrumental method like law and economics can be used in the United States to restrain state interferences with markets, in Europe to promote regulatory reforms and in developing countries to challenge corruption. It can be added that non-instrumental methods, e.g. those emphasizing distributive justice dimensions, could also negatively affect domestic legal debates in developing countries by delegitimizing formal legal structures[23]. It is thus preferable for a comparative analysis to stay open to consider all kinds of instrumental and no-instrumental methods.

Turning now to the search for a common ground, it cannot be denied that legal reforms supporting the achievement of the SDGs could start a new cycle of optimism and delusion. Though, participating to the debate about the SDGs does not mean to accept at face value anything that international organizations and national governments do to implement them, much less to agree on a universal concept of development. If the goal is to foster the dialogue among scholars in the Global South and the Global North, using the SDGs as a starting point has several advantages. The UN 2030 Agenda introduced a wholly new governance machinery, affecting all aspects of development policies. The machinery included new roles for institutions at international, national and subnational levels, new concepts and new indicators. Therefore, downplaying the novelty of the SDGs risks missing opportunities to inject new ideas in the law and development debate. Moreover, starting with the SDGs might help avoid two problems previously encountered in North-

[21] See, e.g., A. ZIAI, *'I am not a Post-Developmentalist, but…' The Influence of Post-Development on Development Studies*, 38(12) *Third World Q.* 2719, 2727f. (2017) (rejection of development as single path).

[22] L. PES, *Teorie dello sviluppo giuridico*, Trento, 2012, p. 109.

[23] See J.L. ESQUIROL, *Legal Latin Americanism*, 16 *Yale Human Rights & Dev. L. J.* 145, 161-163 (2013).

South or South-South dialogues. The first problem is the disconnected representations that the international legal literature and the national legal communities make of legal systems in developing countries. This divergence leads to overlooking both the effects of using specific legal methods and how such methods could distort the direction of legal change[24]. The second problem is that law and development studies supported the use of empirical methods, but did not make any sustained attempt at using comparative methodologies. The lack of interest for a comparative perspective prevented broad processes of horizontal learning across developing countries[25].

Both problems could be managed if the comparative approach to the SDGs is understood as an open debate across legal and non-legal disciplines about the desirability of each goal and the ways to achieve them. The purpose of the research endeavour should be to assess the SDGs implementation process and its relationships to the institutional context of each country. Less divergence between international and national legal discourses can be expected because both would use the SDGs as a starting point. Moreover, the universal character of the SDGs should foster interest in identifying similarities and differences in implementation processes.

In the sections that follow, I discuss three areas in which the SDGs could help develop a shared research agenda:

a) How should the SDGs be interpreted? If they cannot be supposed to have a single meaning, who can decide about the interpretation to be prioritized? At which level (global, national, local) should interpretations be chosen? Whose interests should be taken into account? How should the relationships among SDGs be described and embedded in the chosen interpretation?
b) How should the SDGs be implemented? If local institutional contexts matter, how can their components be identified?

[24] J.L. ESQUIROL, cit., p. 148ff.

[25] See D.M. TRUBEK, *Scan Globally, Reinvent Locally: Can We Overcome the Barriers to Using the Horizontal Learning Method in Law and Development?*, 258 *Nagoya J. L. and Politics* 11 (2014) for the observation that the complexity of comparison was one of the barriers to South-South learning, but suggesting that the problem was the lack of empirical skills, not the lack of comparative methodologies.

c) According to which criteria should the achievement of the goals be assessed? Comparative law does not have criteria to propose. But a comparative analysis of evaluation processes could be useful to critically discuss the methodologies, assumptions and concepts which are being used to identify successful and unsuccessful attempts at implementing the SDGs.

These three areas are by no means the only relevant ones. But they are broad enough to start a dialogue among different scholarly points of view. Even though no agreement will ever be reached, what is required from all scholars involved is to make transparent choices on the way to explore the relationship between local contexts and concepts of development. This kind of debate should avoid risks of Westernization to a larger extent than was the case with previous law and development literature.

3. Comparing interpretations

The unanimous Resolution of the UN Assembly on the SDGs did not end the development controversy[26]. It could even make it more polarized. Radical criticisms pinpoint the conventional, Westernized foundations of the SDGs. Economic growth and global trade are not put into question, and the root causes of global inequalities are not addressed. Milder criticisms point out that no consistent definition of sustainable development can be drawn from the SDGs. Scholars with a more supportive stance acknowledge that the implementation of each goal will entail several difficult choices.

These contrasting positions suggest that the SDGs might set in motion a process whose final outcome will not be determined by the agreement reached in 2015. A multiplicity of actors, located at multiple levels, will propose their own interpretation of the SDGs and try to influence other actors. Much the same confrontation was already at work in the consultation and drafting phases. Even though wide-ranging con-

[26] UN GENERAL ASSEMBLY *Res.* 70/1 (September 25, 2015), *Transforming Our World: the 2030 Agenda for Sustainable Development*.

sultations made room for the voices of a large number of constituencies and for technical expertise outside the UN system, many SDGs did not go much further than vague compromises[27]. A case in point is the discussion about the rule of law. The most ambitious proposals were to mainstream it in all the SDGs or identify two separate goals, one for peace and security and one for governance and the rule of law. Both proposals failed, in no small part because the universal character of the rule of law and its relationship to economic growth were contested. The final version of SDG 16 only refers to access to justice, with promotion of the rule of law becoming one of targets and linked to indicators that can measure none of the dimensions debated in the last decades[28].

While the vagueness of the SDGs may cast doubts on their implementation, I argue instead that it could pave the way for more open-ended interpretative processes. Comparing interpretations should lead to ask questions on the implicit and explicit assumptions about the role of legal reform, the reasons why specific legal tools are chosen, the kind of development to be supported and its impact on different groups. Of course, the development controversy can be expected to map almost perfectly onto the different interpretations. But the value added of the comparative analysis lies in linking critical arguments and proposed interpretations. For example, a specific interpretation of one SDG could be said to reflect an Euro-American bias, or a concept of development which does not foster sustainable practices. In this case, alternative interpretations, and alternative legal interventions, could be proposed. Emphasising the interpretative aspect of the SDGs precludes attempts to shift the debate toward purely technical arguments. Furthermore, it

[27] While the Millennium Development Goals (MDGs) emerged out of the confrontation between major donor countries in the OECD Development Assistance Committee and the UN development agenda, broad consultations led by the UN prepared the SDGs. See R. BRENNER, *Global Goal-Setting: How the Current Development Goal Model Undermines International Development Law*, 24(1) *Mich. St. Int. L. Rev.* 145, 154-164 (2015).

[28] SDG 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. Target 16.3: Promote the rule of law at the national and international levels and ensure equal access to justice to all. On the negotiation of this goal see N. ARAJÄRVI, *The Rule of Law in the 2030 Agenda*, 10(1) *Hague J. Rule of Law* 187 (2018).

can be suggested that openness to interpretations matching accepted perceptions of identity and common good could be one of the conditions contributing to the effectiveness of the SDGs[29].

To be sure, critical development scholars could argue that the SDGs already foreclose some interpretations because of explicit references to economic growth and the benefits from trade. Economist Jeffrey Sachs, advisor to the UN Secretary-General both for the design of the MDGs and of the SDGs, provided the theoretical foundation for the approach that pursues the decoupling of economic growth from its negative environmental impact. Though, Sachs himself acknowledged that no country is on path to sustainable development. Moreover, he included the voluntary reduction of fertility rates among the conditions which would allow such decoupling[30]. While he meant to provide an optimistic message, omitting any critical analysis of the traditional concept of economic growth does not contribute to its persuasiveness. More generally, the complexity of the implementation process will constrain any attempt to use the broad statements of the SDGs as guidance. It is more likely that the real meaning of the SDGs will emerge from that process. Hence, the main interest of the comparative analysis lies in uncovering its inner dynamics.

The comparative perspective outlined here is only partially overlapping with the approach proposed by international law scholars. The SDGs explicitly adopt concepts and purposes of several legally binding international texts. This means that their interpretation needs to take into account the relationships with those legal instruments. A risk to be avoided is that the SDGs replace binding obligations[31]. It can be expected that the interpretation of each goal will be tested for its compatibility with the existing legal framework and that the SDGs implementation process will be exploited to overcome the weaknesses of binding

[29] See, in this vein, O.R. YOUNG, *Conceptualization: Goal Setting as a Strategy for Earth System Governance*, in N. KANIE, F. BIERMANN, *op. cit.*, p. 38f.

[30] J.D. SACHS, *The Age of Sustainable Development*, New York, 2015, p. 182, 217.

[31] See R. BRENNER, *op. cit.*, p. 173-175 (arguing that both the MDGs and the SDGs could create new priorities, take power away from existing legal frameworks, introduce parallel oversight processes and even modify the goals to be pursued).

instruments[32]. I argue, however, that compatibility with international law should not be the only factor affecting interpretations. A comparative analysis calls for a broader assessment, in which multiple benchmarks should play a role. More specifically, I suggest three possible focal points for such an assessment:

1) Comparing the interpreters
2) Comparing institutional levels
3) Comparing integration concepts.

Each aspect could be used independently as the focus of a comparative inquiry. But all together they should provide a deep understanding of the influence that the SDGs could have on legal reforms. Let us consider each in turn.

Who are the interpreters of the SDGs? Two processes look particularly interesting to understand the selection of meanings: the orchestrating activity of the High-Level Political Forum for Sustainable Development (HLPF) on one hand and the activities required by the Follow-up and Review Process on the other hand.

The HLPF was established in 2012 to replace the unsuccessful Commission on Sustainable Development[33]. The latter failed to attract high-level policymakers and was not endowed with adequate monitoring and review powers. The HLPF is not a new institution, but an intergovernmental forum meeting under the auspices of the UN General Assembly (every four years) and of the UN Economic and Social Council (ECOSOC) (every year). Unlike its predecessor, it received a broad mandate to coordinate initiatives within the UN system and to integrate sustainable development at all levels of decision-making. With the ap-

[32] See R.E. KIM, *The Nexus between International Law and the Sustainable Development Goals*, 25(1) *Rev. Eur. Comm. & Int. Env. L.* 15, 16f. (2016) (suggesting a two-way relationship between the SDGs and international legal frameworks); R. PAVONI, D. PISELLI, *The Sustainable Development Goals and International Environmental Law: Normative Value and Challenges for Implementation*, 13(26) *Veredas to Direito* 13, 30 (2016) (the SDGs could become a blueprint for the development of international environmental law).

[33] UN GENERAL ASSEMBLY *Res.* 66/288 (September 11, 2012), *The Future We Want*, par. 84; UN GENERAL ASSEMBLY *Res.* 67/290 (July 9, 2013), *Format and Organizational Aspects of the High-Level Political Forum on Sustainable Development*.

proval of the SDGs, the HLPF was granted a central role in overseeing a network of follow-up and review processes at global level[34].

From the perspective of political science, the HLPF is an orchestrator which tries to influence other intermediaries. The latter should then directly intervene on the final targets. The intermediaries that the HLPF should try to enlist can be UN bodies, regional organizations, networks of stakeholders, and transnational organizations of non-state actors. Targets can be other international organizations, states or non-state actors. Among the orchestration tools that the HLPF could use, ideational support is particularly relevant from the point of view of interpretation techniques. It is suggested that, by providing information and cognitive guidance, the HLPF should be able to help the intermediaries pursue their goals more effectively. One key resource should be the annual global development report. Besides reviewing progress, the report should provide evidence-based analysis about the links between development interventions and outcomes. Moreover, the HLPF could exploit its coordination role to solve inter-institutional disagreements[35].

The mismatch between its limited resources and its broad mandate might constrain the degree of coordination that the HLPF will be able to promote. But a more general issue is the weight to be attached to the interpretation of the HLPF. The orchestration approach emphasizes coherence and coordination. From this perspective, the HLPF will be successful to the extent its interpretation of the SDGs becomes widely accepted. Similarly, international law scholars argue that the HLPF should adopt a long-term definition of sustainable development and use it as an overarching principle in the interpretation of the SDGs. Such definition should aim at ensuring that the integrity of the earth's ecosys-

[34] UN GENERAL ASSEMBLY *Res.* 70/1, cit., par. 82-90.

[35] K.W. ABBOTT, S. BERNSTEIN, *The High-Level Political Forum on Sustainable Development: Orchestration by Default and Design*, 6(3) *Global Policy* 222 (2015); S. BERNSTEIN, *The United Nations and the Governance of Sustainable Development Goals*, in N. KANIE, F. BIERMANN, *op. cit.*, p. 213. On orchestration more generally see K.W. ABBOTT ET AL. (eds.), *International Organizations as Orchestrators*, Cambridge, 2015.

tem becomes universally accepted and guide the balancing of the needs of future generations against those of the present generation[36].

A comparative analysis of interpretations should adopt a different approach. If a meaningful dialogue among competing interpretations of development is to be promoted, the main purpose should not be to find a single interpretation, but to allow a thorough examination of the underlying premises of each proposed interpretation. To put it differently, the HLPF should not strive to gain a monopoly on interpretative activities, but make sure that each constituency contributes its own version of a long-term vision. This perspective is in line with the 2030 Agenda and could avoid the disengagement that led to the failure of previous coordination efforts[37].

The Follow-up and Review process, as first delineated in the 2030 Agenda and subsequently specified by the UN Secretary-General, confirms the need to make room for multiple interpretations. The Agenda explicitly acknowledges that primary responsibility for the implementation of the SDGs lies with the UN Member States[38]. Furthermore, monitoring progress and reporting about it is required at national, regional and international levels. Non-state actors should be involved as well. As far as Member States are concerned, the main reporting tool is the Voluntary National Review (VNR), to be drafted according to Secretary-General guidelines[39]. While the main purpose of the VNR is to

[36] R.E. KIM, *op. cit.*, p. 25; O.R. YOUNG, *Goal Setting in the Anthropocene: The Ultimate Challenge of Planetary Stewardship*, in N. KANIE, F. BIERMANN, *op. cit.*, p. 65-70.

[37] See, e.g., the acknowledgement of «different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities, to achieve sustainable development» (UN GENERAL ASSEMBLY *Res.* 70/1, cit., par. 59). Also see ABBOTT, BERNSTEIN, *op. cit.*, p. 228 for the observation that previous coordinating bodies failed to adequately represent women, indigenous people, youth and children and farmers, as well as to ensure the true multistakeholder character of most partnerships.

[38] UN GENERAL ASSEMBLY *Res.* 70/1, cit., par. 41, 47.

[39] See UN GENERAL ASSEMBLY *Res.* 70/1, cit., par. 72-90; REPORT OF THE SECRETARY-GENERAL, *Critical Milestones Towards Coherent, Efficient and Inclusive Follow-up and Review at Global Level*, A/70/684 (15 January 2016); UN GENERAL ASSEMBLY

assess the status of SDGs, the 2030 Agenda also refers to the establishment of national targets which should take into account national circumstances[40]. Although the relationship between the SDGs and the national targets is not clear, it can be argued that the Follow-up and Review process acknowledges the legitimacy of national choices about development pathways. Such choices need to be grounded on coherent interpretations about the possible meanings of the goals and targets[41]. Therefore, a comparative analysis of VNRs, as well as of other monitoring documents, should significantly contribute to a diffuse understanding of alternative concepts of development. Fears about conflicting interpretations should be downplayed: if the current state of the debate about development does not allow convergence on widely shared visions of the future, encouraging and supporting the plurality of interpretations seems the most effective way to avoid conflicts, not to foster them.

Much the same observation can be made about a comparative analysis focused on institutional levels. Instead of assuming that the interpretation proposed by a specific level should carry more authority, the focus should be on the type of interpretative process which takes place at each level. The kind of information available and relied on, the degree of participation and actual influence of different stakeholder groups, as well as the relationship between pre-existing (regional, national or local) priorities and new interpretations should be among the factors to be considered for each institutional level. The comparative analysis should not aim at identifying the level best equipped to impose its own interpretation, but at singling out the factors which each level is capable of taking into account. Two risks have to be avoided. The first one is the interpretative dominance of a few well-resourced actors. The second one is the instrumentalization of the SDGs in domestic political battles.

Res. 70/299 (July 29, 2016), *Follow-up and Review of the 2030 Agenda for Sustainable Development at the Global Level*.

[40] UN GENERAL ASSEMBLY *Res.* 70/1, cit., par. 55.

[41] See Å. PERSSON ET AL., *Follow-up and Review of the Sustainable Development Goals: Alignment v. Internalization*, 25(1) *Rev. Eur. Comm. & Int. Env. L.* 59 (2016) (observing that transformative action at national level will depend less on alignment with global indicators and more on the selection of nationally specific targets).

Both risks surface in the initiatives of the Global Taskforce of local and regional governments (GTF), a coordination and consultation mechanism which brings together the major national and international networks of local governments. While collecting useful information on subnational activities, the reports of the GTF also convey the impression that only the most important subnational institutions have a strong interest in participating to the implementation of the SDGs. Moreover, this interest has more to do with requests for internal reforms (e.g. fiscal decentralization) than with progress on the SDGs[42].

Finally, goal integration is going to play a crucial role. The Preamble to the 2030 Agenda refers to the crucial importance of interlinkages and the integrated nature of the SDGs. The three dimensions of economic development, social development and environmental protection are embedded in all targets[43]. Though, the relationships among the SDGs are extremely complex and lend themselves to different interpretations. In the early years of implementation, the prevalent focus has been on embedding the SDGs into national strategies. One of the consequences has been that each country has chosen to underline specific linkages and ignore other ones[44]. These differences are welcome if they allow to tailor development concepts to local needs. There is, however, the risk that some choices might be dictated by contingent governments' preferences. In some cases, they could even be attempts at dodging more radical transformations. UN bodies are trying to manage this risk by providing assessment toolkits and information about possible ways to integrate the SDGs, as well as about institutional reforms

[42] See, e.g., GTF, *Towards the Localization of the SDGs*, 2nd Report, 2018.

[43] See M. NILSSON ET AL., *Introduction: A Framework for Understanding Sustainable Development Goals Interactions*, in D.J. GRIGGS ET AL. (eds.), *A Guide to SDGs Interactions: From Science to Implementation*, International Council for Science, Paris, 2017, p. 20f.

[44] See, e.g., COMMITTEE FOR DEVELOPMENT POLICY, *Voluntary National Review Reports – What Do They Report?*, CDP Background Paper No. 46, July 2018, 9 (showing that most VNRs submitted until 2017 avoided discussion of difficult and politically sensitive trade-offs); J. TOSUN, J. LEININGER, *Governing the Interlinkages between the Sustainable Development Goals: Approaches to Attain Policy Integration*, 1(9) *Global Challenges* 1 (2017) (showing significant differences in the way six countries addressed goal integration in their VNRs).

which could support integration[45]. This cognitive support could have the unintended effect of decreasing recourse to alternative integration strategies.

With regard to goal integration, a comparative analysis could play at least three roles. Firstly, it should make sure that old mistakes about exporting Western models do no repeat themselves. Secondly, it should focus on ways to generate new integration options. Thirdly, it should help to openly acknowledge that there is no single answer to integration issues. The latter role appears to be of great relevance. Each methodology will provide a description of interlinkages which does not exactly match other descriptions. Differences may be due to assumptions, available data, scale or focus of the analysis. This means that policymakers need to be aware of these limitations and justify the use of each methodology when selecting legal interventions[46]. A more general issue is that the positive or negative nature of linkages across the SDGs depends on the institutional framework. Depending on how the latter is structured, synergies or conflicts can arise. For instance, increasing agricultural productivity is required to end hunger (SDG 2), but agricultural expansion could have adverse effects on the environment and health. This negative relationship could be turned into a positive one with adequate rules and enforcement institutions[47]. But the interest of a comparative analysis lies in identifying how to achieve this outcome. So far, most integration strategies pursued in a variety of fields and for projects with a smaller scale than the SDGs have had limited success.

[45] See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, *Rapid Integrated Assessment (RIA) to Facilitate Mainstreaming of SDGs into National and Local Plans*, 2017; UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *Working Together: Integration, Institutions, and the Sustainable Development Goals*, World Public Sector Report 2018.

[46] See, e.g., C. ALLEN ET AL., *Prioritising SDG Targets: Assessing Baselines, Gaps and Interlinkages*, *Sustainability Sc.* advance publication, 2 July 2018 (observing that semi-quantitative analysis can be useful for target prioritisation and building awareness of systemic interactions, less so for detailed policy evaluation).

[47] See M. NILSSON ET AL., *Mapping Interactions between the Sustainable Development Goals: Lessons Learned and Ways Forward*, *Sustainability Sc.* advance publication, 13 July 2018.

Some causes of these failures have an institutional dimension[48]. Therefore, comparative analyses which engage in a dialogue with non-legal scholars interested in integration strategies could contribute to the debate on the interpretation of SDGs by highlighting the legal dimension of those strategies.

4. Comparing implementation contexts

In one of his books on research methodology, American sociologist Howard Becker tells the story of his working experience in Brazil. He went to Rio in the seventies, during the military dictatorship. He needed a *visto* to work there, and also to leave the country when his stay came to an end. But the *visto* was not forthcoming through official channels, so his Brazilian colleagues decided to use a *despachante*. This is a middleman who knows how to get things done by the local bureaucracy. Indeed, Becker got his *visto* the day of his departure from Brazil. What he discovered from this experience is not only the existence of *despachantes*, but also the Brazilian concept of *jeito*, an «implied social know-how, those little bits of knowledge you had to have to make things come out the way you wanted them to»[49].

As suggested by Becker, this case does not show some kind of Latin American failing, but belongs to a broader class of situations in which expert knowledge is unevenly distributed or is difficult to access for some class of people. The differences between the Brazilian case and other cases of informal intermediaries in other countries may be used to

[48] See the review by J.J.L. CANDEL, *Holy Grail or Inflated Expectations? The Success and Failure of Integrated Policy Strategies*, 38(6) *Policy Stud.* 519 (2017).

[49] H.S. BECKER, *What About Mozart? What About Murder? Reasoning from Cases*, Chicago, 2014, p. 9-11, quote at p. 11. The concept of *jeito* is also discussed in the legal literature: see, e.g., K.S. ROSENN, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and Its Developmental Implications*, 19(3) *Am. J. Comp. L.* (1971); K.S. ROSENN, *O Jeito na Cultura Juridica Brasileira*, Rio de Janeiro, 1998; B. KOZOLCHYK, *Comparative Commercial Contracts*, St. Paul, Minn., 2014, p. 509. Note, however, that this literature can be criticized on the ground that it conveys the misleading impression of dysfunctional legal systems in all Latin American countries: see J.L. ESQUIROL, *op. cit.*, p. 152.

deepen our understanding of the general class of things both cases belong to. From a comparative perspective, the unfamiliar elements of each new case can be used to improve generalizations by identifying new things to add to the grid of variable elements that helps understand any case of that kind[50].

The approach proposed by Becker includes two aspects which can be useful in the debate on the implementation of the SDGs. Firstly, there is a general recognition that contextual aspects have to be taken into account when designing policies for sustainable development. For example, the «localization» of SDGs is understood to require a focus on sub-national contexts in the achievement of the 2030 agenda[51]. Similarly, the «contextualization» of SDGs «involves moving towards a bottom-up approach whereby local stakeholders inform SDG prioritisation and implementation tailored to their needs»[52]. At the same time, we have seen in section 2 that critics of the law and development field have long maintained that contextual differences prevent any attempts at linking legal reforms and development. Conversely, Becker suggests that a contextual approach allows to take into account the largest possible number of differences. Secondly, the example proposed by Becker touches upon the dimension that makes contextual analysis especially difficult to carry out, namely the distinction between formal and informal institutions. The relevance, and sometimes the prevalence, of the informal dimension in economic and social relationships makes it hard to believe that implementation measures exclusively addressed to the official public sector will allow to make progress on the SDGs.

The main underlying tension running throughout the development debate is between assuming that contexts are unsurmountable barriers to reform initiatives and assuming that they can be controlled to achieve the desired ends. These conflicting positions are clearly reflected in the literature on legal pluralism. Some scholars argue that non-state institutions express a specific idea of legality. Development programs should

[50] H.S. BECKER, *op. cit.*, p. 14, 20.

[51] GTF, *op. cit.*, p. 14.

[52] F. MACHINGURA, S. NICOLAI, *Contextualising the SDGs to Leave No One Behind in Health: A Case Study from Zimbabwe*, Overseas Development Institute Briefing Note, May 2018, p. 3.

not try to replace it with a unified approach to state legality[53]. Other scholars display more optimism on the possibility to design institutional hybrids which mediate different types of legal reasoning[54]. In a more long-term perspective, it has been observed that since the early modern period legal pluralism entailed the strategic use of multiple enforcement fora, but there was no stark divide between state and non-state legal processes. The main implication for todays' legal reforms is that the latter will produce legal change in developing countries by modifying the permeable boundaries among jurisdictions[55]. Thus, legal pluralism is not going to disappear, should not be perceived as a problem, but does not lend itself to policy prescriptions that can be easily translated into development policies.

Close analogies to these positions can be found in the literature on the informal economy[56]. Not only informality is created, and sometimes supported, by the state. It can also represent an alternative way to structure economic relationships. Large informal sectors are present in countries of the Global North, although they are usually larger in the Global

[53] See, e.g., B.Z. TAMANAHA, *The Rule of Law and Legal Pluralism in Development*, in B.Z. TAMANAHA ET AL. (eds.), *Legal Pluralism and Development*, Cambridge, 2012, p. 46 (the bulk of ordinary social intercourse better dealt with through local tribunals); G.R. WOODMAN, *The Development "Problem" of Legal Pluralism*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 129 (legal pluralism may lead to stop attempts at imposing some principles through development policies); J. FAUNDEZ, *Legal Pluralism and International Development Agencies*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 177 (attempts by external agents to regulate non-state justice systems may disrupt fragile political equilibria between communities and governments).

[54] See, e.g., K. JAYASURIYA, *Institutional Hybrids and the Rule of Law as a Regulatory Project*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 145 (suggesting to use civic and customary legal regimes not as an alternative to state law, but to change the meaning of regulation).

[55] L. BENTON, *Historical Perspectives on Legal Pluralism*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 21.

[56] In what follows I draw on T. GOODFELLOW, *Urban Informality and the State: A Relationship of Perpetual Negotiation*, in J. GRUGEL, D. HAMMETT (eds.), *The Palgrave Handbook of International Development*, Cham, 2016, p. 207; A. POLESE ET AL., *Introduction: Informal Economies as Varieties of Governance*, in ID. (eds.), *The Informal Economy in Global Perspective*, Cham, 2017, p. 1.

South[57]. Moreover, informality can involve both the poor and the rich. The complex interactions between the formal and the informal economy counsel against the adoption of universal solutions. The idea of conferring official status to informal titles or legal positions, until a few years ago widely embraced by donor organizations, is now considered misleading. Formal legal rights might be of little value to the poor if they are too costly to use. Similarly, shifting to official market transactions might devalue previous use rights on the same resources[58]. These observations confirm that informality cannot be simply eradicated, but has to be managed to redress the direst situations of risk and vulnerability. Furthermore, the relationship between the state and the informal economy may be modified by global economic and technological trends that affect the opportunities offered to informal agents. Some of them will innovate and stay in the informal sector, some will move, partially or totally, to the formal economy[59].

Legal pluralism and informality do not completely overlap, but it is plausible to hypothesize a two-way relationship. On one hand, the availability of non-state institutions increases the probability they are used to support the informal economy. On the other hand, the expansion of the informal economy might foster the creation of new non-state institutions. The implementation of the SDGs cannot ignore these phenomena. But incorporating them in development policies could require several revisions to the current understanding of the SDGs. For instance, the promotion of the rule of law cannot lead to the replacement of non-state legal orders. Its meaning should be assessed in light of evi-

[57] See L. MEDINA, F. SCHNEIDER, *Shadow Economies Around the World: What Did We Learn Over the Last 20 Years?*, IMF Working Paper 18/17, January 2018, for data on the shadow economy in 153 countries between 1991 and 2015. Regions with the largest average size of the shadow economy (above 36 per cent) are Latin America and Sub-Saharan Africa.

[58] J.L. ESQUIROL, *Formalizing Property in Latin America*, in M. GRAZIADEI, L. SMITH (eds.), *Comparative Property Law*, Cheltenham, 2017, p. 345-349.

[59] See B. HARRIS-WHITE, *Rethinking Institutions: Innovation and Institutional Change in India's Informal Economy*, 51(6) *Modern Asian Stud.* 1727 (2017) for a discussion of examples of transformations induced by new communications technologies, new financial markets, long-distance worker mobility and education systems in India, the country with the largest informal economy in absolute terms.

dence about the role played by non-state institutions and their relationship with official ones. As long suggested by legal anthropologists, the distinction between what is legal and what is illegal should not be taken for granted, but identified through a contextual analysis of each case[60]. More generally, legal pluralism and informality should be taken into account in each reform proposal aimed at implementing any SDG. A comparative approach could provide the overarching framework to integrate contributions from the disciplines interested in exploring the porous borders between state and non-state institutions. A few suggestions on how to carry out such comparative inquiry are proposed here.

To begin with, a wide-ranging definition of the implementation context should be adopted. This is because non-state institutions usually rely on deeply held views of morality, often rooted in religious traditions. Therefore, factors affecting how people behave in the informal economy have to be found in this social dimension. The drawback is that knowledge of non-state institutions may be limited or even inaccessible to outsiders[61]. This problem may be more or less difficult to overcome with additional investments in field research. But even a limited knowledge is better than filling gaps with universal concepts.

The complexity of the interplay between the formal and informal dimensions could also be mitigated to some extent by the adoption of a diagnostic framework which, along the lines proposed by political scientist Elinor Ostrom and her co-authors, tries to identify the relationships among the main actors involved in a specific field. For example, Ostrom pointed out that development cooperation involves systematic interactions among donors, recipients, implementing organizations (non-governmental organizations or private contractors), interest groups and civil society organizations within donor and recipient countries, targeted beneficiaries. For development projects and programs to have any chance of succeeding, the incentives involved in all these relationships need to be taken into account. Each actor could possess crucial

[60] L. NADER, *Whose Comparative Law? A Global Perspective*, in J.A.R. NAFZIGER, *op. cit.*, p. 31 («[c]rime is a socio-cultural construct»).

[61] See R. SACCO, *Il diritto muto*, Bologna, 2015, p. 135f., for the remark that non-state legal orders may lack legal terminology, so that attempts at translating their rules may lead to misleading results.

information about the effectiveness of the projects in a specific context. But how this information is shared and used depends on the incentives each actor faces[62]. While no development initiative can rely on perfectly aligned incentives, focusing on the relationships among the actors involved could prove useful to understand the role of non-state institutions in the process of implementing the SDGs. Let us explore this perspective with the example of proposals which try to decrease the costs faced by informal African traders when crossing national borders.

Informal cross-border trade contributes 30-40 per cent of intra-regional trade in Southern and Eastern Africa. Most informal traders are women and youth. Trade goes beyond basic agricultural products and extends to manufactured goods and services. Compared to formal trade, informality proved crucial in resisting food crises and other economic shocks. A multitude of unofficial micro, small and medium-sized enterprises contributes to reducing social exclusion and alleviate poverty. It can be argued that informal cross-border trading helps achieve SDG 1 (end poverty), SDG 2 (end hunger, achieve food security) and SDG Target 8.3 (promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation). Though, this thriving informal sector is also plagued by endemic problems: custom procedures too complex to cope with for partially literate or illiterate traders, border infrastructures which increase insecurity and slow-down procedures, limited access to finance, corruption and harassment at the hands of state authorities, limited business management skills[63]. Proposals to address these problems invariably go in the direction of increasing formalization, that is to reduce the size of the informal economy[64]. For example, simplified trade regimes have

[62] E. OSTROM ET AL., *An Institutional Analysis of Development Cooperation*, in S. BARRETT ET AL. (eds.), *Environment and Development Economics*, Oxford, 2014, p. 117.

[63] See P. BENTON, C. SOPRANO, *Small-Scale Cross-Border Trade in Africa: Why It Matters and How It Should Be Supported*, ICTSD Bridges Africa, 5 June 2018; L. SOMMER, C. NSHIMBI, *The African Continental Free Trade Area: An Opportunity for Informal Cross-Border Trade*, ICTSD Bridges Africa, 5 June 2018.

[64] See FAO, CUTS INTERNATIONAL, *Formalization of Informal Trade in Africa*, 2017. The second half of SDG Target 8.3 refers explicitly to encouraging «the formali-

been introduced to reduce the costs of complying with custom procedures and allow some unofficial enterprises to enter the formal trading system. The aim is to increase the competitiveness and the productivity of the informal sector. This approach relies on the idea, widely publicized by the World Bank Doing Business indicators, that what hampers cross-border trade are inefficient customs procedures[65]. It can be argued that this approach risks repeating the mistakes of the past by not considering the wide range of relationships involved in informal trading.

Firstly, activities in the informal economy are heterogeneous. Sometimes they are carried out for survival reasons, sometimes because they allow independence and self-employment, sometimes because they are linked to the formal economy[66]. Therefore, the problems to be addressed, as well as the benefits of informality, can vary a lot across different types of traders. Formalization may be recommended in some cases but not always[67]. Secondly, the formalization approach does not take into account the role that the informal economy plays in supporting the formal economy, for instance through subcontracting. It may well be that national or local authorities do not have any incentives in reducing the size of the informal economy because of presumed or real negative effects on the formal economy. The informal economy could even be said to be «created» by state economic policies which lead to price

zation and growth of micro-, small- and medium-sized enterprises, including through access to financial services».

[65] For the theoretical underpinnings see S. DJANKOV ET AL., *Trading on Time*, 92(1) *Rev. Econ. Stat.* 166 (2010). The annual Doing Business reports rank countries according to the cost and time involved in export/import procedures.

[66] See E. ARYEETEY, *The Informal Economy, Economic Growth, and Poverty in Sub-Saharan Africa*, in A. MCKAY, E. THORBECKE (eds.), *Economic Growth and Poverty Reduction in Sub-Saharan Africa*, Oxford, 2015, p. 165f.

[67] For example, interviews to African female traders signal two reasons why the simplified trade regime is under-used: some goods that are traded cross-border are not included in the regime and the additional costs and time of compliance, however small, make it more difficult to compete with informal traders (UNCTAD, *Borderline: Women in Informal Trade Want to Do Business Legally and Become More Prosperous*, 5 March 2018, available at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1675). Other reasons could be present on other borders. It is unlikely that formalization will be able to address all of them.

differentials with neighbouring countries. Thirdly, formalization does not consider the needs of those involved in informal trading, for example women. The flexibility made possible by informality contributes to the economic empowerment of female workers, but formalization could reduce their opportunities. Fourthly, formalization does not reflect African customary perceptions of exchange relationships. Strong communitarian links support the creation of trust and make it possible to ensure that reciprocity is the guiding principle[68]. This communitarian perception is not reflected in the projects on the harmonization of African commercial law promoted by OHADA[69]. If formalization means replacing the trust-supporting relationships with official contract rules, it can be expected that the divide between the informal and formal dimensions will increase.

Instead of suggesting formalization as the only way forward for informal cross-border trade, a comparative analysis grounded on a diagnostic approach could help sort out the impact of different relationships. Here is a non-exhaustive list of possible research foci:

a) The relationship between informal traders and public authorities. If trading takes place according to stable social relationships, allowing a free space in which they can unfold would explicitly recognize their public value[70]. Such space should be well-defined, both to en-

[68] Ethnic groups living across national borders increase informal trade and deeper integration of communities (FAO, CUTS INTERNATIONAL, *op. cit.*, p. 12; S. GOLUB, *Informal Cross-Border Trade and Smuggling in Africa*, in O. MORISSEY ET AL. (eds.), *Handbook on Trade and Development*, Cheltenham, 2015, p. 190f.). More generally, on the communitarian view of African contractual relationships see D. BURBIDGE, *Connecting African Jurisprudence to Universal Jurisprudence Through a Shared Understanding of Contract*, in O. ONAZI (ed.), *African Legal Theory and Contemporary Problems: Critical Essays*, Dordrecht, 2014, p. 93; A. HUTCHISON, N. SIBANDA, *A Living Customary Law of Commercial Contracting in South Africa: Some Law-Related Hypotheses*, 33(3) *South African J. Human Rights* 380 (2017).

[69] See J. BASHI RUDAHINDWA, *OHADA and the Making of Transnational Commercial Law in Africa*, 11(2) *Law and Dev. Rev.* 371 (2018) (OHADA texts inspired to Western models may give rise to local resistance through high levels of informality).

[70] For a similar proposal of an informal property regime see J.L. ESQUIROL, *Formalizing Property*, cit., p. 348 («an 'informal' regime could signal a zone of de facto regulation or differential regulation», leading to a separate low-income housing market). With regard to the management of natural resources, A. TELESETSKY, *Legal Plu-*

sure that it does not strengthen existing power relationships and that it serves the goal of increasing trust in public authorities. The informal trading regime should take into account all the agents which the literature on the informal economy has analysed, namely the traders and their networks, trade and union organizations, cooperatives, intermediaries, and border authorities.

b) The relationship between donors and recipients. The widely acknowledged low level of aid effectiveness could be improved with supporting measures catering for the needs of specific categories of traders[71]. Instead of linking aid to conditions that satisfy the interests, or the institutional views, of the donor, comparative analyses could show which reform paths are feasible and what kind of foreign aid could support them. The New Development Consensus proposed by the European Commission in 2016 goes in this direction when it states that strategic responses grounded in quality analysis of the country context will be developed, that stronger partnerships beyond governments should be forged and that development action must vary according to the capacities and needs of developing countries[72]. However, it is still not clear whether the new EU strategies will leave room for alternative concepts of development. Moreover, previous commitments to work with a wide range of local actors proved challenging to implement[73].

c) The relationship between official law and non-state rules. Informality should not be confused with the lack of organized structures and widely followed social norms. The latter form a non-state legal regime which replaces the state one. In some cases, religious or ethnic

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ralism – Linking Law and Culture in Natural Resource Co-management and Environmental Compliance, in J.A.R. NAFZIGER, *op. cit.*, p. 116 suggests that compliance with formal law can be increased by acknowledging the legitimacy of non-state rule-making systems.

[71] On the debate on foreign aid see M.J. TREBILCOCK, M. MOTA PRADO, *Advanced Introduction to Law and Development*, Cheltenham, 2014, p. 202-213.

[72] EUROPEAN COMMISSION, *Proposal for a New European Consensus on Development: Our World, Our Dignity, Our Future*, COM(2016)740 of 22 November 2016.

[73] See AECOM INTERNATIONAL DEVELOPMENT EUROPE, *Effective Development Cooperation: Has the European Union Delivered?*, December 2016, p. 96-99.

ties support informal business networks across continents[74]. Whether these networks foster flexibility and provide an escape route from poverty, or are used to discriminate vulnerable groups, should be assessed through empirical research[75]. When evidence on the positive effects of informality is available, it could be extremely useful to identify the legislative, judicial and administrative channels through which customary trading concepts and norms find recognition in official law.

d) The relationship between regional and continental-wide agreements and the informal economy. No reference is made to the informal economy in the African Continental Free Trade Area Agreement, signed in March 2018, in the OHADA harmonization texts, or in the founding agreements of the African Regional Economic Communities. The latter put in place several initiatives aimed at reducing the size of the informal economy. This means that they have added another layer of regulation in an already crowded institutional environment[76]. What is missing is a sustained attempt at discussing how official trade-related rules could exploit the networks of social relationships on which the informal economy is built[77].

All these aspects could be explored with a comparative approach which aims at providing insights on the role of the informal economy, its relationships to the formal economy and the non-state legal regimes underpinning it. Similarities and differences could be assessed across

[74] See S. GOLUB, *op. cit.*, p. 186f. On the factors affecting the structure of trade networks see also O.J. WALTHER, *Business, Brokers, and Borders: The Structure of West African Trade Networks*, 51(5) *J. Dev. Stud.* 603 (2015).

[75] On power dynamics in informal cross-border trade see, e.g., V. VAN DEN BOOGAARD ET AL., *Norms, Networks, Power, and Control: Understanding Informal Payments and Brokerage in Cross-Border Trade in Sierra Leone*, International Centre for Tax and Development, Working Paper 74, February 2018.

[76] See O.C. RUPPEL, K. RUPPEL-SCHLICHTING, *The Hybridity of Law in Namibia and the Role of Community Law in the Southern African Development Community*, in J.A.R. NAFZIGER, *op. cit.*, p. 85, for a discussion of the interplay between the regional economic communities and customary law.

[77] See O.J. WALTHER, *op. cit.*, p. 617, for the argument that place-specific development policies could take into account the variety of trade networks and shape the development potential of cross-border trade.

African states, across developing countries in different continents, or across developed and developing countries. The guiding principle for the selection of cases to be compared should not be the identification of supposed best practices, but the search for the factors contributing to context-dependent adaptations of the formal and informal dimensions.

5. Comparing evaluation processes

The crucial role that measurement systems play for the SDGs can hardly be overemphasized. It has been argued that the peculiar form of indirect governance promoted by the SDGs needs to rely on measurability as a substitute for the lack of legally binding force[78]. In 2017, the UN General Assembly endorsed the 230 indicators laid out by the Inter-Agency and Expert Group within the UN Statistical Commission[79]. They will not only provide the main reference point to assess progress on each SDG target, but also significantly affect the selection and design of development programs.

An evaluation process which relies heavily on quantitative indicators is nothing new. It reflects quantification trends that have been taking place at least since the nineteenth century and gained more traction in the second half of the twentieth century. Sociological studies pointed out that indicators of various types served to consolidate the authority of the nation-state. More recently, their widespread adoption in a variety of fields has been prompted by processes of internationalization, technological standardization, and bureaucratic management, as well as by the quantification turn in several scientific disciplines[80]. As far as the

[78] F. BIERMANN, N. KANIE, *Conclusion: Key Challenges for Global Governance Through Goals*, in ID., *op. cit.*, p. 296.

[79] UN GENERAL ASSEMBLY *Res.* 71/313 (July 6, 2017). On the process employed to work out the indicators see UN ECONOMIC AND SOCIAL COUNCIL, *Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators*, Note by the Secretary-General, 15 December 2016.

[80] See R. DIAZ-BONE, E. DIDIER, *The Sociology of Quantification – Perspectives on an Emerging Field in the Social Sciences*, 41(2) *Historical Social Research* 7 (2016) (on French studies pioneered by the statistician Alain Desrorières); M. LEHTONEN, *Indicators: Tools for Informing, Monitoring or Controlling?*, in A.J. JORDAN, J.R. TURN-

development field is concerned, quantification of macroeconomic data in the fifties started the theoretical reflection on development economics and is likely to have shaped the decision-making processes of the donor community[81]. Since then, two parallel phenomena can be observed: on one hand, the production of indicators has steadily increased at international level; on the other hand, their legitimacy and credibility have been widely contested. For instance, the UN were accused of manipulating the MDGs indicators to show that some progress had been made[82].

What about the quantification of the legal dimensions of the SDGs? In the early twenty-first century, the use of quantitative indicators to measure various aspects of legal phenomena prompted a vigorous debate[83]. Criticisms have been addressed to the low quality of the information on which legal indicators rely and to the lack of transparency of the decision-making processes in which indicators are used. More radically, indicators have been said to reflect standards and values imposed by the Global North and to ignore the values and preferences of people in developing countries[84]. Criticisms sometimes lead to improvements in the technical quality of indicators, but widely contested indicators

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PERRY (eds.), *Tools of Policy Formulation*, Cheltenham, 2015, p. 76 (on subsequent waves of indicators).

[81] D. SPEICH CHASSÉ, *The Roots of the Millennium Development Goals: A Framework for Studying the History of Global Statistics*, 41(2) *Historical Social Research* 218 (2016).

[82] See J. HICKEL, *The True Extent of Global Poverty and Hunger: Questioning the Good News Narrative of the Millennium Development Goals*, 37(5) *Third World Q.* 749 (2016) (showing that UN reports misrepresented both the extent and the increasing trends of poverty and hunger after the MDGs). Also see A. BROOKS, *The End of Development*, London, 2017, p. 183-201 (showing that, despite the «Africa Rising» narrative of the early twenty-first century, very limited progress towards alleviating poverty has been achieved).

[83] See M. SIEMS, *op. cit.*, p. 180ff., for an overview of the literature on methods to collect and ways to use quantitative legal information.

[84] M. GOODWIN, *The Poverty of Numbers: Reflections on the Legitimacy of Global Development Indicators*, 13(4) *Int. J. L. in Context* 485 (2017); D. RESTREPO AMARILES, *Transnational Legal Indicators: The Missing Link in a New Era of Law and Development*, in P. FORTES ET AL. (eds.), *Law and Policy in Latin America*, London, 2017, p. 95.

show a surprising resistance. Furthermore, there is no sign that their use is going to decrease. One of the reasons is that indicators help the organizations producing or using them to achieve their goals. It has been observed that measurement systems are «conservative, slow-changing aspects of governance». Maintaining a high level of consistency over time is prized higher than taking into account the negative impact of the current mode of development[85]. Another reason is that indicators can represent a useful form of empirical knowledge. None of these reasons can lead to the unconditional acceptance of indicators. The latter select a specific portion of available data and discard all data that cannot be included in the chosen quantitative variables. This means that indicators select the kind of information public and private actors are interested in producing and using[86].

Where a comparative analysis of evaluation processes might prove useful is in helping identify the assumptions undergirding each measurement system. In the current debate on sustainable development, the accuracy of indicators from the point of view of social sciences methodologies is often the only factor taken into account. Science institutions trying to influence policymakers engage in legitimation strategies which rely on claims of independence, representation of a wide range of scientific, geographic or gender perspectives, or participation from non-academic actors[87]. The problem with these strategies is that they leave no room for additional evaluations to be carried out according to

[85] L. PINTÉR ET AL., *Measuring Progress in Achieving the Sustainable Development Goals*, in N. KANIE, F. BIERMANN, *op. cit*., p. 102.

[86] See, on the two-way relationship between knowledge and power, K.E. DAVIS ET AL., *Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance*, in S.E. MERRY ET AL. (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and the Rule of Law*, Cambridge, 2015, p. 1f. Of course, indicators are also used by grassroots and advocacy groups to challenge dominant institutions and worldviews: see R. ROTTENBURG, S.E. MERRY, *A World of Indicators: the Making of Governmental Knowledge through Quantification*, in R. ROTTENBURG ET AL. (eds.), *The World of Indicators*, Cambridge, 2015, p. 4.

[87] S. VAN DER HEL, F. BIERMANN, *The Authority of Science in Sustainability Governance: a Structured Comparison of Six Science Institutions Engaged with the Sustainable Development Goals*, 77 *Env. Sc. and Pol'y* 211 (2017).

specific legal standards[88]. It seems preferable to set apart the debate about the authority of scientific results from the use of scientific expertise in the policymaking process. The latter can and should be the object of discussion. The aim should be to foster the debate about the available options, not to close the door to additional contributions and points of view[89].

Three additional factors suggest that indicators should not be the exclusive measurement system for SDGs. Firstly, it is still unclear whether the financial and organizational resources required by the indicators will be available in all countries by 2030[90]. This means that indicators alone might not provide a reliable description of progress on the SDGs. Secondly, a variety of evaluation processes is now available. In several fields, non-state initiatives arose as a reaction to the perceived lack of independence of centralized measurement systems. Recourse to non-official data sources has also been discussed in the context of SDGs implementation[91]. Although not immune from defects, non-state evaluations could provide a critical perspective and alternative views[92]. Thirdly, evaluation processes based on indicators can be oblivious to

[88] D. NELKEN, *Conclusion: Contesting Global Indicators*, in S.E. MERRY ET AL., *op. cit.*, p. 329 («law gives its blessing to the enterprise of indicators by treating science as more capable of producing knowledge free from challenge than is really possible»).

[89] H. STRASSHEIM, *Trends Toward Evidence-Based Policy Formulation*, in M. HOWLETT, I. MUKHERJEE (eds.), *Handbook of Policy Formulation*, Cheltenham, 2017, p. 504 (arguing that a public debate is needed on different kinds of expertise).

[90] See L. GEORGESON, M. MASLIN, *op. cit.*, p. 13 («no country is currently capable of measuring against all indicators, let alone with full disaggregation»). The cost of putting in place statistical systems capable of measuring the SDGs in lower-income countries was estimated to be $1 billion per year (SUSTAINABLE DEVELOPMENT SOLUTIONS NETWORK, *Data for Development*, April 17, 2015), but in 2015 financial support to developing countries for all areas of statistics only amounted to $541 million (UN ECONOMIC AND SOCIAL COUNCIL, *Progress Toward the Sustainable Development Goals*, Report of the Secretary-General, E/2018/64, 10 May 2018).

[91] For instance, the Cape Town Global Action Plan for Sustainable Development Data, adopted by the UN Statistical Commission in March 2017, includes among its key actions the development of a mechanism for the use of data from alternative and innovative sources within official statistics.

[92] J. SCHOENEFELD, A. JORDAN, *Governing Policy Evaluation? Towards a New Typology*, 23(3) *Evaluation* 274 (2017).

the timing of legal change. In organizations like the World Bank, any project which does not produce tangible results in three-five years is unlikely to find support[93]. Much the same bureaucratic constraint seems to be imposed by the short cycle of progress assessment required by the SDGs indicators. These factors point to the need to devise a comparative approach in which the evaluation processes are analysed and their assumptions on the relationship between law and development unveiled. Such an approach could focus on two phases usually involved in any evaluation which relies on indicators, that is the conceptual definition of the indicator and its production.

When the indicator is conceptualized, the problem to be addressed is defined according to a specific underlying theory and the effects that interventions could produce[94]. In this phase, the main question is which development concepts are assumed as a starting point[95]. A comparative analysis should aim at showing the variety of concepts that could be employed to define the main dimensions of a legal concept. For instance, in 2015 the UN Statistical Commission created the Praia Group on Governance Statistics with the mandate to develop methodologies for governance indicators. When defining the dimensions of governance, the Group is likely to rely on what is already available in official statistics[96]. When measuring the rule of law dimension of governance, the Group will mainly seek statistical sources which provide data on access to justice, constraints on executive power, the independence of the judiciary, policing and trust in the courts. The main shortcoming of

[93] C. SAGE, M. WOOLCOCK, *Legal Pluralism and Development Policy*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 6 (international aid architecture provides limited support for development initiatives whose impact may not be apparent for multiple decades).

[94] K.E. DAVIS ET AL., *op. cit.*, p. 10-12, 21 («underlying theories affect how decisions are made: indicators that become dominant persuade decision makers to follow their models»).

[95] M.A. PRADA URIBE, *The Quest for Measuring Development: The Role of the Indicator Bank*, in S.E. MERRY ET AL., *op. cit.*, p. 133 (discussing the genealogy of World Bank indicators and the concepts of development they reflect).

[96] See, e.g., UN ECONOMIC AND SOCIAL COUNCIL, *Report of the Praia Group on Governance Statistics*, Report of the Secretary-General, E/CN.3/2018/34, 14 December 2017, which refers to S. GONZÁLEZ ET AL., *Governance Statistics in OECD Countries and Beyond*, OECD Statistics Working Papers 2017/03.

this approach is that it does not contribute to critically discuss unstated assumptions behind the most widespread concepts. Where a comparative analysis could make the difference is in suggesting that alternative concepts are available and that a variety of measurement systems could provide a richer understanding of the settings in which the indicators are assumed to operate.

The production phase of indicators is aimed at data collection. This process is not only affected by technical and resource challenges, but also by the need to measure the same thing in very different contexts[97]. When this standardization of data collection goes wrong, the indicators won't have any influence in the target country[98]. Though, standardization might be unavoidable to prevent the adoption of criteria linked to a specific society, or even to promote what is considered the best solution[99]. These conflicting perspectives suggest that contextualizing indicators might be an impossible task. An alternative approach could be to put in place a two-track system in which global and local indicators coexist. The two sets of indicators would not fully overlap, but it could be possible to ensure some degree of comparability while at the same time avoiding the disconnect from local priorities and values[100].

The two-track approach still relies exclusively on indicators. But a comparative approach could start from a different premise. All evaluation processes are aimed at assessing causal relationships. The latter cannot be observed directly, but have to be reconstructed. The general

[97] R. ROTTENBURG, S.E. MERRY, *op. cit.*, p. 11 («interpretation underlies all quantification systems»). A related consequence of the dependence of many political and economic choices on the measurement system is that the latter is generally difficult to change without producing multiple cascading effects: see L. PINTÉR ET AL., *op. cit.*, p. 107f.

[98] See, e.g., M. SERBAN, *Rule of Law Indicators as a Technology of Power in Romania*, in S.E. MERRY ET AL., *op. cit.*, p. 199, for the observation that rule of law indicators imposed by the EU on Romania's accession had a limited influence on the country's institutional context.

[99] D. NELKEN, *op. cit.*, p. 326f. On indicators as tools which create a universal language to make communication possible see R. ROTTENBURG, S.E. MERRY, *op. cit.*, p. 17f.

[100] On the need for national targets see Å. PERSSON ET AL., *op. cit.*, p. 67f., as well as the discussion in L. PINTÉR ET AL., *op. cit.*, p. 116-119.

question is: why did the intervention that was implemented have the observed impact? It is well known that this question never admits easy answers. This is partly due to the difficulty of disentangling the causal contribution of multiple factors. But above all, evaluation processes are embedded in institutional frameworks which bias their objectivity. While such bias can be somewhat moderated, it can never be completely avoided. Therefore, a comparative analysis could contribute to openly debate the features of different evaluation processes, thus fostering a debate on which reconstruction of causal relationships looks more reliable and on possible revisions. The spirit of this proposal is close to the approach of mixed methods research. The latter tries to integrate quantitative and qualitative data in a research design which overcomes the limits of single method research. In the development field, mixed methods research could provide more accurate evidence about contextual factors which quantitative approaches tend to overlook[101]. Much the same could be said about comparative legal analysis. Instead of relying on the standard concepts of quantitative studies, each development program aimed at implementing the SDGs could be supported with qualitative information about the legal factors which could influence its effectiveness. This kind of analysis could help identify the root causes of inequality, thus contributing to the social transformation that the SDGs endeavour to promote. To pick up one example among many: several SDGs targets refer to measures aimed at changing global production systems, for instance food production, food commodity markets and food waste (targets 2.4, 2.c and 12.3), diversification, technologic

[101] See N.A. JONES ET AL., *How Does Mixed Methods Research Add Value to Our Understanding of Development?*, in S.N. HESSE-BIBER, R.B. JOHNSON (eds.), *The Oxford Handbook of Multimethod and Mixed Methods Research Inquiry*, Oxford, 2015, p. 486, 497 (suggesting that mixed methods research can provide a «more contextualized and in-depth understanding of people's experiences of poverty, social inclusion, and development – which are hard to capture with more static quantitative instruments alone»). See also J.W. CRESWELL, R.C. SINLEY, *Developing a Culturally-Specific Mixed Methods Approach to Global Research*, 69 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 87 (2017) for the argument that mixed methods research should be tailored to the methodological orientation, research agenda, values and communication strategies of a specific community. This perspective fits comparative law focus on the culture of legal professionals in each legal system.

upgrading and innovation (target 8.2), financial services (targets 8.10 and 10.5), transport systems (target 11.2), and sustainability practices for transnational corporations (target 12.6). Instead of measuring progress with indicators only, qualitative research could provide case studies which shed light on the links between current legal structures and unsustainable production systems[102]. Drawing on this research, new indicators could be designed to assess the impact of reforms aimed at re-shaping the legal structure of current production systems.

Of course, how exactly to design the comparative analysis of evaluation processes and how to connect qualitative information to quantitative indicators will be open to debate and face several organizational and financial constraints[103]. Though, if evaluation processes are the places in which concepts and ideas about causal relationships are moulded, they could be one of the main terrains on which supporters and critics of the law and development field could engage in a constructive debate.

6. Conclusions

The fields of comparative law and law and development are not going to find easy points of contact in the near future. Perhaps the deepest reason for this state of affairs is that each field perceives the other one as pursuing different goals and employing incompatible methodologies. Or perhaps both fields tend to overemphasize the differences when vy-

[102] Evidence of links between the organization of global supply chains and Western models of corporate and contract law is already available: see, e.g., D. DANIELSEN, *Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law is Needed to Address Global Inequality and Economic Development*, in U. MATTEI, J. HASKELL (eds.), *Research Handbook on Political Economy and Law*, Cheltenham, 2015, p. 195; B. LOMFELD, *Sustainable Contracting*, in B. LOMFELD ET AL. (eds.), *Reshaping Markets: Economic Governance, the Global Financial Crisis and Liberal Utopia*, Cambridge, 2016, p. 257.

[103] How to integrate qualitative research into each stage of evaluation processes is discussed by A.M. ALCÁNTARA, M. WOOLCOCK, *Integrating Qualitative Methods into Investment Climate Impact Evaluations*, World Bank Policy Research Working Paper 7145, December 2014.

ing for research funding or the policymakers' attention. Be that as it may, the uneasiness between the two fields could entail a high cost in terms of delaying a shared understanding of planetary challenges. If the only interaction between the two fields is reciprocal criticism, a lot of room is left to global elites' definition of problems to be addressed[104]. This chapter has sought to suggest that a comparative approach could absorb the lessons of the past half-century and promote a research agenda in which the boundaries between the two fields become less relevant than they are today. The SDGs could provide a useful starting point not because of their underlying development model, but because they could set in motion a transformative process whose final outcomes cannot be fully controlled by the UN or the donor community. By analysing the interpretative practices, the implementation practices and the evaluation practices of the SDGs, a comparative approach could show that a multiplicity of development paths is possible.

[104] See DA. KENNEDY, *op. cit.*, p. 92 («today's insiders take as given a world with common problems demanding that they rise to the challenge of global management»).

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