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The legislator's strategic toolkit. The systemic construction of the New World Order

Edited by Natalia Brasil Dib and Sara Petroccia

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Prologue

*Natalia Brasil Dib and Sara Petroccia**

This special issue is focused on the paradigm shift of the systems theory and its consequences for social relations and the complexity of social phenomena and within the sociology of law, this is about a theoretical apparatus that is useful for the regulation this phenomenon, an important toolkit to manage the complexity of the social phenomena and or policymaking.

The approach of a theoretical apparatus of Luhmannian basis can offer an alternative of study to analyze and describe the social system, as well as it can provide a normative toolkit for the sociology of law, for instance, to help regulate the social relations based on social changes. The approach shared in this special issue is that of a theoretical apparatus of Luhmannian basis can offer an alternative of study to analyze and describe the social system, as well as it can provide a normative toolkit for the sociology of law, for instance, to help regulate the social relations based on social changes. The study of the system's theory and more specifically the paradigmatic shift is an important instrument for the analysis of the social system and, as a consequence, to the social changes that connectivity and interactions in the social systems emerge from. So, society's relations work horizontally and connectedly, regarding interactions and organizations. Then, the emergence of concepts of citizenship that derive from such interactions demand that the theory overcome the structural and

reductive method in order to deal with emergence of new phenomena in a systemic and global way.

This approach is that of a theoretical apparatus of Luhmannian basis to offer an alternative of study to analyze and describe the social system, as well as it can provide a normative toolkit for the sociology of law, for instance, to help regulate the social relations based on social changes.

In this sense, our starting point is the theory formulated by Pitasi that in which emerge what he denominates "Enormous Constellation System", which gives rise to a new perspective of social system. So, the emergence of highly connected and digitalized society demands that social sciences, especially sociology, provide a theoretical model that is able to deal with the complexity of changes and interactions, a shift of the system in which the concepts of "fluctuating constellation, reconfigurations, memetic complexity, catalogue, platform, and highly formalized proceduralization are inserted". Within the sociology of law, this is about a theoretical apparatus that is useful for the regulation of phenomena.

Therefore, this special issue is mostly a result of the effort to addresses some issues identified in social relations that emerge in the "Enormous Constellations System". Sort of the papers selected brings an important propose of a theoretical toolkit for the issue of the complexity of social relations in a Mundus/Global era. Then, established the foundation of the theory, the paradigmatic shift was addressed, resulting in the concept of the toolkit to

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manage legislator's strategic toolkit and the making of a world order.

In short, this special issue brings together a sort of contributions that addresses in different ways the

emergent paradigm of Social System, due to systemic approach. The main purpose is to provide readers a new perspective and a useful toolkit for the law and policymaker, as well.

Gli strumenti strategico-sistemici per la modellizzazione delle politiche e la legiferazione

Les outils stratégiques et systémiques pour la modélisation des politiques et le processus législatif

The Strategic Systemic Toolkit for Policy Modelling and Lawmaking

*Natalia Brasil Dib, Emilia Ferone, Sara Petroccia**

Riassunto

Il presente saggio vuole rispondere alla seguente domanda: cos'è una Costituzione? Sappiamo che essa costituisce la legge più importante di uno Stato, nella sua accezione tradizionalmente fornita dal comune senso politico del sistema legale nazionale. Tuttavia, gli stati nazionali hanno inteso le costituzioni in senso verticale (Pitasi) sia esso dall'alto che dal basso (Grundnorm). Ad un primo sguardo, nella migliore tradizione, sembra essere verticale, essa costituisce la cima, il punto più alto, non la base. Tuttavia, oggi questo potrebbe costituire un problema dato che si sono verificati in tutto il mondo slittamenti normativi in termini di globalizzazione del diritto e orizzontalizzazione delle costituzioni. Pertanto, in questo lavoro ne analizzeremo alcuni.

Résumé

Ce texte se consacre à la question suivante : qu'est-ce qu'une Constitution ? Nous savons que c'est la loi la plus importante, dans l'acception traditionnelle et politique commune du système légal national. Toutefois, que l'on parte du bas ou du haut (Grundnorm), les États Nationaux conçoivent les constitutions verticalement (Pitasi). Au premier abord, l'apparence est que ce qui est vertical est le haut, dans la meilleure tradition, et non le bas. Ce pourrait être un problème de nos jours car des changements ont eu lieu, en termes de mondialisation et d'horizontalisation des constitutions sur la planète, et nous allons dès à présent en analyser quelques cas.

Abstract

This paper is focused on the question what is a Constitution? We know it is the most important law of a traditionally meant by political common sense national legal system of course. Nevertheless, from the top or from the bottom (Grundnorm), National states meant constitutions vertically (Pitasi). It seems at first glance to be vertical in the best tradition, is the top, not the bottom. Nevertheless it might be a problem nowadays because some changes happened in terms of law globalization and horizontalization of constitutions on the planet and, here, we are going to analyze some of them.

Key words: constitution; strategic systemic toolkit; policy modelling; lawmaking.

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1. Law as a social system.

This paper focuses on the three fundamental sciences of law and their application in the global societies: general theory of law, focused on validity, philosophy of law, focused on justice and sociology of law, focused on efficacy or efficiency. We started introducing some key concepts of the systemic way of thinking the social system, where every system has a set we can call the code and the program. (Pitasi: 2017a). A code is a kind of door opening and door closing. The program, in turn, is the entire building, more in details, according to Luhmann's semantics (Luhmann, 1995), the code of the legal system is a recht/unrecht - consistent/not

consistent with the law and the program is the valid law, so we are going to introduce an important aspect to make sense of our systems of how systems works in Luhmann's theory (Luhmann, 1990, 2012, 2013). In Luhmann's theory there are not things like subsystems. One of the key points of Luhmann's theory is that there are systems and every system has a specific code and program. Therefore, the challenge is that they are not integrated just like it was in Parsons' Theory (Parsons, 1951), the LIGA pattern: latency, integration, goal setting, and adaptation. Each of them in Parsons's System was a function, a subsystem of the general system. We can represent LIGA in this way:

L	I
G	A

For Parsons we can shape an economical subsystem or pattern variable, which is an adaptation function. However, to be precise, in Parsons also the medical biological subsystem plays the adaptation functions, so we have two systems in the same quadrant. On the other side, integration function is played by the subsystem of law in Parsons. Latency is the function played by the cultural subsystem at large including education, culture, traditions, religion, family, which is all in one according to Parsons's concept of system under the agency for educating people all around the world. It finds them turning into norms, legal norms. It was Parsons greatest illusion that the latency system could be the present position of the integration system. The fourth and final subsystemic function is a goal setting, which is played by politics in Parsons and some way we can find the subsystems in Parsons and one of the most important paradigm shift in this system's theory was

that Parsons thought that the system as a whole composed from different parts/subsystems/pattern variables. Therefore, that some way the parts composed the unity of everything. The whole and there was a very consistent coherent system made of some parts and the sum of the parts should be turned into consistency, or coherency of the system. It means that Parson's system was coherent and thus not complex. The standard values of the society was and is a core concept, which draws a distinction between Parsons' and Luhmann's theory.

For Parsons' theory, a system exists according to latency. Latency creates what we could define as a kind of cultural integration, not a legal integration: the family, the church, the media, the group of peers, it is common sense of course. The key concept, which is the big difference between Luhmann and Parsons, is that according to Parsons culture, in the broadest meaning of the word of

culture, is the glue, the fundamental pillar of a system of a social system. Culture integrates the system. According to Luhmann (1993) culture does not exist systemically, but the more the Constitution is focus on culture, the more we have social conflicts. The more the Constitution is shaped by complexity the less we will have conflicts in Society or system. Parsons's system theory is and was very important for social sciences, but nobody would consider Parson's theory as a complex system theory. Complexity will enter later on in the debate. Parsons seldom used the word culture, but mostly used latency. In practice, the matter is culture because latency is the sum of all values we learn at church in our family, at school and our groups of peers while playing. Luhmann said this legion of a system is wrong because of a very simple reason. For example, first of all he takes for granted the way we are grown-up and our family, the way we are grown up at church, grown up at school, and among our peers with our peers, he is exactly, exactly the same value pattern. So there are no contradictions between the model we receive and our family and at school, but if we already have our mother who is politically left wing and our father who is right wing, the idea of integrated culture is gone.

For Parsons, systems are systems or rather subsystems are subsystems. Basically, integration and cooperation among the systems are taken for granted among the subsystem. Taking for granted as the presupposition of the existence of the system. If the subsystems do not work together or integrate, the system implodes. The general system implodes, it's not by chance that probably Parsons most important book publish and 1951 in the US was titled "The Social System" while the 1995 Luhmann book which shapes the pillars of his theory is titled

"Social Systems" and the difference between these titles there is a universe, it's just not that it sounded better. Social systems means that there are many and each system has its own code and program. What does it mean subsystems are part of the general system? For Luhmann, systems are differentiated: law, politics, religion, economics, science, education, and so on and each system is some way blind and deaf with the others. By chance, we will analyze what Luhmann calls a "structural coupling" and how each system has its own life: its own selection criteria and its own perspective. In addition, there is no way for example that politics can use (a metaphor) the glasses of law (Luhmann: 2004). Law could never be used as the glasses of science, the glasses means the code of the program.

Therefore, some way they can try to cooperate, sometimes they can try to couple. Nevertheless, on the other side, they are very different systems and they will never be able to put on the other system's shoes. How did we get to here? Law, as we told, has a code, is recht/unrecht. The program is the value below. Politics has a different code: government/opposition. The program is the reproduction of a political power, power in brief, nothing else. Just power. If a society is democratic or not, it is not a problem of the political system. So the political system is a system that generates power. The legal system produces value of laws. In the very old-fashioned version, there are politics, people meet, discuss, debate about political ideas, or proposals, and then they gradually turn into law and it is also the reason why, for example, Luhmann is very skeptical about social and political movements as a tool for social change. What happens in practice is that social movements in public spaces, complaining, manifesting, are

“environment” and noise, not system and meaningful communication. They just make noise, and according to the legal system, politics is noise, nothing else, there is no creation of legally valid meaning through politics.

Complex System Theory and most of the system theories about complexity are relatively recent. We can start thinking about System's theory in the 1940s, after the end of the Second World War. If we speak about strong System's Theory, means starting talking about the changes in science and technology after the Second World War. The link between Law & Society is much older than systems theory. However, one System Theory can change the perspective of the past. According to Luhmann (1993), culture does not exist systemically. When he said that was all the system for example, law, economics, and politics, which are just some of them. They in some way exploded, so they separated. More or less 1980, there was about 4,000 years of law and society linked, before this great explosion. Probably, many categories, we use, that we still use in everyday life, which depend on old theories, which common sense now considers science. That was science many years ago too.

When Luhmann speaks about there is no culture, there is no latency, there is no religion, that does not mean there is no religion in the world, but there is no religion making the system homogenous. Now let's go back to the matter of possible adjacent (Kaufmann, 2000) and the matter that leads to a great misunderstanding that reality exists. The police, crime, politics, political parties, buildings, cars, trains, bikes, are all things that do not exist in nature; they are constructions: law is exactly a construction. The point is, does it work or not? There is no real existence of laws and in the same time, the impact of law is extremely concrete and

real. It means that when we start talking about lawmaking, the most elementary way to make laws, and an ineffective way, was to turn socially shared values of a certain community into laws. Our social habits, our traditions are, we get the values and turn them into laws. Normally, it is the beginning of all wars. Because the more we focus on values, the more we focus on "us" and "them" and the border between our side and the other side becomes neater and neater. There is no foundation to date in law. Very often people do not work this way, because they still think like Parsons that law is the near translation to legal shapes of the social values. The more complexity increases, the more it is no longer true. When we want to design a law, and we think that we are shaping a kind of 18th camel, we have to consider some design principles. A principle is something different from a value. A value is something moral and principles are required just to design, for example, the law (Pitasi: 2014). There are some principles that are very useful for lawmaking, for designing and constructing laws, which we will deal with. The first one is the Malthus trap. He was a priest in a church and he began to write letters to other priests, saying when poor people come to our church for food, especially their children, let them starve. He shaped what is called the Malthus principle. It is a mathematical relationship between demographic increase and the food production. The food production rate should be higher and faster than the demographic rate. As he died before the industrial revolution, he could not know the changes that the revolution could provide. The point was that Malthus was right and wrong, at the same time. Malthus was wrong, because the prophecy of the trap did not happen. However, he was right because his mathematical relationship between demography and food was

right. Nevertheless, he was wrong because it was not a two variables relationship. It was three variable relationship, he could not see yet. The third variable was technology. We cannot consider laws of development, so legal shapes to empower and enforce development if we do not consider the three variable relationships among population/demography, food, and technology. In a law, we cannot be too much idealistic. We can make a general purpose, but if we write things, which are promises we cannot keep, it is worse. Because, it is a certain point that we get between law and politics increases. Moreover, politics starts to ignore law. Then corruption starts to become social practice.

The second one is Pareto's principle, the mathematical application and political vision, a concentration model, not a distribution model. What Pareto demonstrated was that concentration works, distribution does not. (Pitasi: 2003, 2008). Therefore, for short, concentration is technically speaking a kind of vicious cycle as a vicious loop. At a certain point, we may need redistribution. However, redistribution is a secondary function in the process. In the beginning, the concentration is what allows it to generate resources, also considering the principles of the composed interest in investment. The more we distribute, the more we destroy the composed interest. When we design a law, for example, and it is a kind of law economic principle, and we start setting distribution first, we are not making a moral mistake or a technical mistake. However, what was increasing? The more we increase wealth, the more our standards grow. There is a mathematical point, which connects growth, development, and distribution. If we distribute too early, we destroy capital. If we distribute too late, we have people killing each other. It is a more mathematical matter than a moral

matter. The deepest criticism, independent from corruption, was that he began distributing when the cycle was fueling.

2. Constructing and designing systems.

Scholars of different disciplines affirm that we are already in the third world war. The third world war is not based on traditional weapons. It is not based on an army with uniforms, is based on currencies. Currency wars are probably less violence from an external view, but in terms of social/political impact, they are extremely violent and powerful. These currently wars have always existed, there is nothing new. However, since the fall of the Berlin Wall, they began the most standard battlefield to discuss and decide any kind of political social matter. According to some authors, we are going to work out four possible scenarios.

The first scenario is the Multiple Reserve Currency Mode. The multiple reserve currency mode is what we experienced through the decades up to now. Many scholars are skeptical about that.

A second possible scenario is Chaos. It would be one of the worst, which would mean for everyone. We would also understand how small our planet is. Because there would be no part of the planet not impacted by this.

The third scenario is a more reductive scenario. Is the return of the Golden Rule Standard. In practice, it is just like playing monopoly.

The fourth scenario, which is the one we are the most supportive, but not in just being a fan of it, it the so-called Special Drawing Rights, SDR and it is a much more recent one. The SDR is mostly there to solve the currency wars by setting the maximum and the minimum monetary expansion. Which, turns into a paradox, because eventually, it will not disappear, but get to a higher level. Which is one of

the worst political fights. People, as public opinion, are complaining that sovereignty is disappearing from the Union (Pitasi: 2018b). Environmental noise produced i. e. they think that Germans, Spanish, French and if we think of the nationalist scale, we are wrong because our sensation that our state is losing sovereignty. On the other side, it is not disappearing, but moving to a higher rank. Because as a EU member, we/they are European, and it is a simple thing that most politicians in Europe do not understand. They do not understand the evolution of European sovereignty from the nation/state rank to the global rank. And it is probably something taken for granted.

In 1999, we still had the old currency inside the common area of the Union. However, in three years we had no national currencies. In three years was possible to use both, during a crazy time. In practice, the national currencies disappeared and it was very consistent with what Triffin wrote already in the 1960s. Triffin was a Belgian economist. However, afterwards, he became the first consultant and manager for the World Bank. Then, he invented the ECU which was the first European currency. It was an attempt to invent an official European currency. Because the ECU was a mutual currency adopted by banks. However, there was no store that would accept a payment in ECU. It was a little strange currency for us. This experiment failed and then the Euro was invented. What was the trick? It was to demonstrate what is now called Triffin's Dilemma (1960), which was not named by Triffin: the unlinear relationship between monetary expansion and sovereignty. The more monetary expansion, the lower number of currency and institutional actors turning into bigger and bigger global players. If there is one currency on the planet, this kind of war would be over. It would not

be just the dollar or euro, but it would be something completely new. It would be the average of everything. If the dollar or euro became the currency, it would be a case of financial imperialism. What was the matter of Triffin? In practice, he states that since the 1960s, our plan there were no countries, which might afford to be independent. They may have an independent government, of course, but he defends that no country could self-sustain. Nowhere has enough resources by itself, in practice, there is no country that can be independent. It may be sovereign, but that does not mean that we have resources. Since then, it began to become a clear that we were in the age of interdependence and convergence.

Many parts of the world, the prophecy of Triffin is taken for granted. Most recent studies spoke about four different possible scenarios, but probably SDR is considered the most likely, it is a kind of mathematical relationship, not just a political opinion. Every time we write a law, Triffin's dilemma could be just around the corner. Of course, to write and draft a law, it is not enough. We also have to let this law be accepted. Sometimes the debate if it is at the higher level, among the top politicians, top policymakers, and the general population is not much involved. Other times there may be a more popular mastermind behind it. Imagine a scenario demonstrating where we have to shape a law. This law interferes for some traditions, so we have stakeholders against we, and we can lose our law. Law is one of the possible kinds of our social innovation. Therefore, we have to deal with that problem of social innovation. How would we word our proposal to turn into law in order to be accepted? The speed of the cycle depends on the cycle itself divided the Roger's cycle by Williamson costs (Pitasi: 2014)

The slower the something, the slower the cycle. If know the debate about the ideal proposal for a job, and the matter of flexibility at work.

In add there is an institutional mobility/modeling. It could be split between historical modeling, sociological institutional modeling and economical institutional modeling. Nevertheless, institutional modeling is still considered a kind of the social economical political development of the country, and so institutions are the kind of solidification, shaping of a kind of historical process. It is not necessarily spontaneous, because we have more influential factors impacting this kind of process, but still institutionalism sees the state as a kind of historical and evolution of the social connections of behaviors.

There are many organizations, which are still featured this way, and this is not what are not usually called international. Any kind of international treaty is an example. In the past, also some international societies, the society for nations for example. The problem in this case is that we have a kind of bad balance between function and sovereignty. For example, CECA was a *neofunctional* construction, but it was inspired by international agreements among France, Germany and so on. The current EU is turning/switching into a *supernational* model. That is why the UK has no negotiation power, this power belongs to the international agreements, not to the *supernational* agreements. It is *supernational* because it is one step further in the downgrade of the sovereign states. International and Institutional models depend on social mobilization. Politicians take masses into the squares and for better or for worse. Social mobilization is a typical feature of these models. The other three *neofunctionalism* constructivism, federalism, and *supernational* model are focused on

social learning. Of course, it can has social learning in the other two and some slight social mobilization in these three. Social mobilization is much stronger in international and institutional process models and social learning is stronger in the other three. The difference is that with social learning.

Social learning focuses on emotions. These are typical patterns of social mobilization. They focus on the emotional life of people, basically on fear. They are very effective tools for strong political fight. Nevertheless, usually, they are not super effective for lawmaking. Social learning instead is not so effective in political terms that involve masses and manifestations, but it is rather effective for lawmaking. The more citizens are skilled and competent, the more they can be early adopters of the law. The more emotional, the weaker they are. The emotional impact on masses is what social science has known well. The scope of the action is to discharge energy, but not to create a new law or something, just discharging. That is why most people, most the specialists in policymaking say of course social mobilization is a tool, one of the strategies we can use to control masses. Actually, from this point of view, we have a more democratic society, if we want a more democratic society, then social learning is a better investment than social mobility. Social learning is often named participant democracy - everyone is free to say anything about it, regardless about how much know about it. Even those who know nothing, are able to tell their opinions.

3. Citizenship and development.

Citizenship and development is a complex and complicated matter. Between the term complex and complicated, there is a big gap. Complex scenarios are always to be preferred to complicated scenarios

(Pitasi: 2018a). This does not mean they are better mathematically or morally, but mathematically more effective. How do we measure development?

The problem is that more rights and democracy are something what we cannot decide about it. Many theorists are founded on assumptions about that. So, if we go to the heart of the theorem, we get to the core of human rights.

The problem is not to be for or against human rights. The paradox of human rights is that it was not the intention of the lawmakers of the UN declaration. Today, human rights is not becoming a chance to increase complexity, but a source of more complications. The good lawmaker who wants to have open marriage rights would never write specific articles for each type of couple, but maintain it more complex by saying it is based solely on a couple. Very simple to guarantee social human rights about marriage and we do not make things complicated. If we write the rights in a complicated way, in practice we destroy the function of law (Pitasi: 2013).

To be effective in more human rights, the paradox is the word more, the more we have, the less we have in reality. Imagine democracy, human rights, and GDP, each one has a binary code with a variety of scenarios. If we start, we prefer the scenario that we have democracy up, human rights up, and GDP down, which is one of the scenarios. In other scenario, we could have low democracy, low human rights, but a lot of money. Why would we prefer one scenario to the other? There are many combinations and ways they are linked and we try to explain how citizenship evolves. The first function is cosmopolitanism, the second is science intensity, the third is entrepreneurship, and fourth is social relations capacity.

What we might consider is how to turn this concept into indexes, as example Cosmopolitanism is from the combination and the cultural tradition. Cultural tradition means they are very rigid sequences for better or worse. The combinations mean these sequences are very soft and flexible. The more complicated, the less variety is able to manage and the less complexity is able to manage. The more loose citizenship is, the other way. The concept is the more we put rigid standards on traditions, the more selective, the more complicated it all becomes. The same is for science intensity. More educated people about science, the more able to demonstrate the increase in education corresponds to an increase in job, profession, wealth, and income. Giving more opportunities. The growth of cosmopolitanism, is the same too. It is one step about the expansion of citizenship. The citizens are able to apply what they know through science intensity, so the patents and intellectual property matters grow (Pitasi: 2015).

The third one is what we call entrepreneurial index. A lobby influenced a new law to check the validity of the train ticket for a certain amount of time and needed proof on a certain time and date. Moreover, in the internet ticket, it already were assigned a leaving and arriving time. However, they wanted to make these machines available in every station because the producer of the machine was one company that made an agreement with the Italian government. The matter of those machines were an agreement between the state and the company.

What Hypercitizenship (Pitasi: 2012) is, which is the expansion of citizenship on a global scale is something we can measure with the improvement or decrease of these four dimensions. We can have them all zeros, all ones, or just in the middle for these.

The more hyper we have the higher the sovereignty, which means higher the speed of this one. In this sense, we have no development without *leverage*. It is not enough to say that development is an increase of *leverage*, but it is an essential part.

The paradox of human rights is that sometimes the *leverage*, sometimes they don't. The more human rights leverage, the more positive theory, and probably the most effective link between development and citizenship (Pitasi: 2017a, 2017b, 2017c).

4. World order policy modelling and lawmaking.

The power of the theory, like complexity theory, is that we have a theoretical framework, which we can use almost about every topic, with principles and not values. Sometimes we speak about socialist societies for example. Sometimes we speak about federal societies or organizations. Sometimes we speak about communistic. What we usually consider is that they are a kind of random result of blind evolution, in history.

What we seldom consider is that of course we cannot plan anything 100% in life, especially in social sciences. On the other side, the planning side, is important, the planning side. The Marshal plan after WWII was an example, the people like Stalin were pros at these things. Yugoslavia was in some way shaped, a melting pot of all people of different groups, and so, Yugoslavia became the Western front of the Eastern world.

However, the more the world became complex, the more the turbulence in economy and military situations became apparent, the more that scholars they need a type of "engineering toolkit" to redesign the planet, or part of the planet, every time there is a problem. Law people, which is more interesting

for we, are among this legal, political, and social scientists and should learn a toolkit to design and redesign the planet, an exaggeration, but we understand. The EU came out of two big world wars with a lot of people dying and destruction. In 1951 the signature of CECA took place, CECA in which some European countries decided to share the energy resources - any kind of energy. If steel, energy, and carbon are together, they no longer belong to each country. Then it is more difficult to go back to war.

If we do not have each country having its own energy, then everyone controls the energy of everyone. The EU is artificial. It is not historical. Nowadays we are discussing to let Turkey or Morocco to enter the EU, but these do not correspond historically to Europe. If we think in terms of exchanges we could have Brazil and Canada entering the EU, because the EU would not just represent Europe. It is not designed to solve some problems. So, the word here is design. Yes, there are some politics and economics and they are called emergent phenomenon, but on the other side, do not have the illusion that the emergence is enough to shape the scenarios. Most of the scenarios are shaped by designers, lawmakers, who work in this way - *neofunctionalism*, constructivist, pragmatists, and systemic. In the tradition of the common law, mostly an American tradition, for example a judge is also a lawmaker, not the highest rank, but also a lawmaker. In the Roman civil tradition the judge is essentially a lawmaker. Therefore, in the first case, a judge can change the law with their decision. In the second case, a judge more or less demonstrates what a law decider has decided above. When we speak about civil law, commercial law, bankrupt law, we are just talking about operational law. When we are talking about

theory and philosophy of law, we are talking about the sciences of law. The sciences of law could appear as irrelevant for law operators because in their everyday professional life, they do not impact very much at the first glance. Nevertheless, they do affect, because operators are not lawmakers but operators deal with the design of the lawmakers. A model like we talk about is *neofunctionalism* and means that we are focused on functions and not on values. We are focused when we design a system on the key function and key principles in our system and we will have a great increase of variety.

Functionalism means the focus is on the function, it is not a view of who is better or worse, the problem is to have evolution of society, which decreases the risk of self-implosion. Constructivist means that it is something we design. As we remind the 18th camel, we are the problem setter and problem solver and in the sense that choosing the highest solution to fly high from a wider perspective and be able to turn around the little obstacles.

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Gli strumenti tattico-sistemici per la modellizzazione delle politiche e la legislazione

Les outils stratégiques et tactiques pour la modélisation des politiques et le processus législatif

The Tactic Systemic Toolkit for Policy Modelling and Lawmaking[♦]

Emilia Ferone, Alexandra Martin, Sara Petroccia[•]

Riassunto

Il presente saggio si concentra sulla visione sistemica e sull'importanza degli slittamenti sistemici nello studio della sociologia giuridica attraverso l'introduzione di concetti fondamentali tratti dalla teoria di Luhman, la variazione paradigmatica delle teorie sistemiche e l'idea di legge come sistema sociale.. Inoltre, l'articolo si prefigge di analizzare la costruzione e la progettazione di sistemi, di nuovi standard relazionali tra cittadini e sviluppo e di mostrare la nuova forma di un sistema sociale, cioè l'ipercittadinanza (Pitasi). Tali idee verranno illustrate tramite alcuni esempi, fornendo una nuova prospettiva.

Résumé

Cet essai est centré sur la vision systémique et l'importance des changements systémiques pour l'étude de la sociologie de la loi, à travers l'introduction de quelques concepts fondamentaux tels que la théorie de Luhmann, le changement paradigmatique des théories systémiques, et l'idées de loi en tant que système social (Luhmann). En outre, à travers la construction et la conception de systèmes, cet article traitera des nouvelles normes relationnelles entre citoyenneté et développement, dessinant également une nouvelle forme de système social, celle de l'*hipercitizenship* (Pitasi). Ces concepts et raisonnements seront illustrés par des exemples et fourniront une nouvelle perspective.

Abstract

This essay is focused on the systemic vision and the importance of systemic shifts for the study of sociology of law. Through the introduction of fundamental concepts such as Luhmann's theory, the paradigmatic shift of systemic theories, and the idea of law as a social system. Additionally, this essay will discuss constructing and designing systems, the new relational standards between citizenship and development, and showing the new shape of a social system, Hipercitizenship (Pitasi). These concepts and discussions will be illustrated with examples, providing a new perspective.

Key words: tactic systemic toolkit; policy modelling; lawmaking; hipercitizenship.

[♦] About this matter, we encourage the reader to access the book *Development as Citizenship Expansion – a systemic approach to the globalizing law system*, edited by Natália Brasil Dib, André Parmo Folloni, Sara Petroccia – Curitiba: Íthala, 2018. Specially the chapters 1, 2, 3, 6 and 7. Specifically the chapters 1,2, 3, 6 and 7. The reader could find a complete explanation about the theories pointed out in this short work.

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1. Ideas of Mass Control.

What is a constitution? The usual answer is that it is the most important law of a national legal system. An American sociologist named Christopher Lasch describes some changes in this context. He was born in 1932 and died in 1994. He was likely one of the most important sociologists from the 20th century in the United States. Some of his most important concepts include the *revolt of the elites* and the *minimal self*. Lasch's revolt of the elites was a response to a previous publication of the 1930s by Ortega y Gasset (2000), discussing the revolt of the masses. In the books by Lasch, we do not directly find the matter of the constitution. A revolution is essentially the revolt of the elites. What is the revolt of the elites? In order to answer this question, we provide an example drawing upon Karl Marx.

Two different theories of the literature of the elites and the masses exist. Both models initially focused on the idea that the elites and the masses were "married" forever. Lasch was the first to suggest the elites and masses can "divorce." For Parsons (1951), the relationship between the elites and masses were a whole. Within this whole society, there were parts - the elites and masses. Following the increased speed of globalization, they have become system and environment, as Luhmann clarified in his book about ecological communication. A large rate of powerful elites base their power on the independence from the masses, rather than the power of controlling the masses. Regardless of whether the power stems from concept or conflict, it still controls all masses.

Since the 1980s, the elites focused their power on independence. The connection of the masses with the elites could be good, bad, constant, or conflicting. In a more globalized world, we do not even know where the public square is. The more the

elites become invisible, the more the masses become comfortable. On one side, the masses may not feel as protected as they were from the past elites. On the other side, the masses may become more frustrated because if they want conflict, they have no idea against whom they should create the conflict. which is, more or less, the same difference as an official war and terrorism. So, the more the elites and masses separate, the more the masses feel uncomfortable because they are less protected and frustrated, and unable to manage a clear enemy. Ultimately, the masses feel something is wrong and is not working, but it is unclear whom to fight against. The more they feel under siege, alone, abandoned, and under attack, the more they wish to react, but do so in random ways. Therefore, the more the masses act this way, the more the elites escape from the masses. The more the distance grows, the more the constitution changes. As a result of the common vertical conception of the constitution, whether top or bottom, up or down, it was designed to keep the masses and elites together. But, the elites continue to escape from the masses and their power no longer depends on the masses. At the same time, masses are marginalized and free. For example, the emergence of populism in Europe, which is a very strong environmental noise producer. At the moment it has no systemic influence, but is the difference between the systemic elites and the environmental masses. Populism is very much affecting the masses, as a kind of psychological drug to make sense of something. It is a tool to remain in the comfort zone because it takes on a strong shape of cognitive sailing, only reducing the perception of uncertainty. A treaty, in a globalized law system, is supranational and goes beyond international agreements, which means that the borders of a state are not the legal

borders, therefore they are no longer shaped by a constitution. Then, when we design or redesign constitutions, we need to ask, what is a constitution. Since what Lasch called the revolt of the elites, the constitution is no longer the vertical document from bottom up or top down setting the borders of the limits of the legal system, but it is rather a kind of door which allows us to create the borders of the system more and more flexible.

So what does it mean to make a constitution horizontal? Let's get to this answer step by step.

Step 1: Cosmopolitanism is a scenario in which we have a strong combination of different symbols and memes, which manage to organize each other in a quite fitting way combining and recombining again and again (Beck, 2006). Multiculturalism is when we have it like in the 1960s, the Chinese town, the German town, the Irish town, they are all together, but separate and could be dangerous for different groups of people in different areas.

The answer could be Luhmann's theory (2012, 2013). So, if we speak about social environment, the outside of the system, we find that people who speak about globalization, we find a loophole talking about what they could mean as growth. The level of the common sense of the masses, what do we say about return of the globalization movements and globalism (Luhmann: 1997). It is the social something on a bigger scale of what we can write about the minimal self. The more people think they are fragile, the more uncertainty they feel, the more they need rigid distinctions between us and them. However, this is artificial and when we could connect on real time through technology all over the planet, we have an increase of symbols, means, cultures, so that the borders and distinctions between us and them become softer and softer. The more it turns into softer, the more some masses

react violently because they think they are losing their identity. These things are focused around the idea that the EU is already designed to reduce the risk that this kind of movement can transform themselves from social environmental noise into systemic organization. What should happen in this situation? Some politicians saying that let's average out the little monthly salary, salary of citizenship. To let these people have a survival amount. But, we prefer to give them some land, to stay home, and not to work, than to search for jobs for them. Because as they are obsolete in terms of skills, most of them don't want to work, it is less expensive. And let them stay home and hire better people from abroad than searching jobs for them, for which they would produce nothing. The second level of the problem is that they appoint a policy that mostly decides in Brussels for Italy or any other EU country (Pitasi: 2018a). In Brussels where most of the politicians serve, are high officer and high commissioner of affairs in Brussels is the person. If we think that human resources are obsolete, it is not trained for the current markets, it is easier to give a person some money to survive than to try to find a job for that person and we invest upon other resources that can be more competitive. It is what is happening in Europe, so to skip people from starving, it is important. No one wants Europeans to starve. However, at the same time, when such an increase in employment, it means that the economical assist and the production of wealth in society changed, but the human resources did not. Between the innocent and the guilty systems, which require more job and more efforts and more human resources? To understand the point, we have, ironically, to reduce unemployment, especially among the people with a degree in law, focusing the system on the principle of guilt, not of innocence,

and we hire a gigantic amount of bureaucrats. From this point of view, the choices between innocent or guilt principle, has nothing to do with the moral legal matters, it has to deal with the bureaucrats organization.

Another important concept was the of the typical approach of a traditional professor who teaches constitutional law still according to methodological nationalism and feels cosmopolitan merely talking about comparative law. We know that the pure doctrine for years and years the vertical idea of constitution, top down, or bottom up, with the constitution as the top of bottom. However, horizontalization of law leads to the matter of facing what the Germans used to call methodological naturalization. We are just summarizing what we said in the first part (Pitasi). For example, lawyers and most of our comments, are not wrong, but inspired by methodological nationalism. So, still focused on the concept that national state is vertically grounded, because the constitution is the top or bottom.

For conclusion, the key concepts in this paragraph are: the revolt of the elites and the minimal self. Which under pressure turns into mechanisms like black nationalism, which are evident at the level of the social environment, not at the systemic level, and probably the most side is that the separation between the elites and masses lead to the kind of horizontalization of law.

2. The few differences that makes the difference: the situation room.

Step 2: Traditional constitutions were designed vertically which means they were presented to shape clearly the different levels among the source in the law the hierarchy. The problem is that the vertical constitution treaties this with development and development is not a vertical concept. The problem between constitution and development is this kind of problem, we can have a step-by-step balance between theory and practice. We will start from the knowledge and wealth flow.

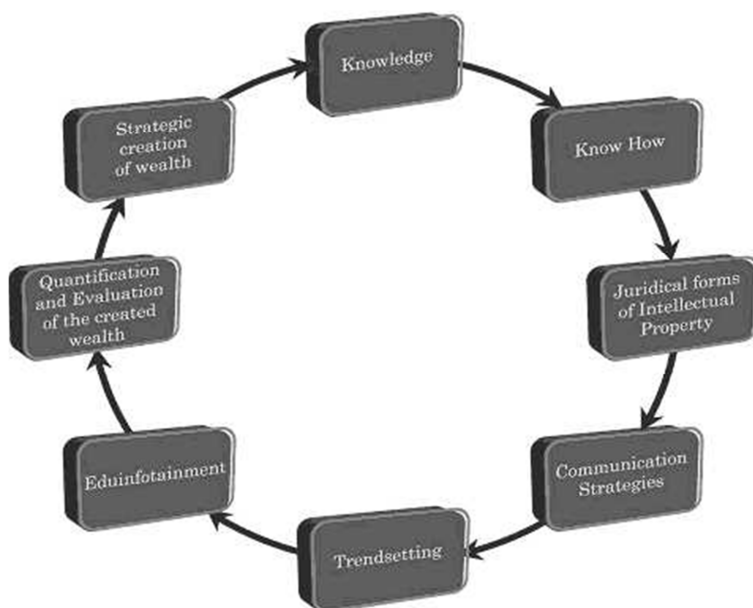


Figure n. 1: *Knowledge and Wealth Flow* (Pitasi, 2007)

Let us start from knowledge (Pitasi: 2007). Knowledge is general and knowledge is part of more challenges, that we turn knowledge into the how. The how is basically a procedure, only just made of motions. If there is not knowledge into a how, then knowledge would be obsolete because the problem is not that if something is scientific or something is something else, we need both. Nevertheless, historically, science was much more based on the how and not enough on knowledge, and vice versa the humanities was based too much on knowledge and not the how.

Every time we share knowledge, we share knowledge without an formal intellectual property agreement of any kind, we are destroying resources, we are turning the formal into the informal. Of course we have a different ways to balance the intellectual property rights, sometimes more focused on the rights of the author, sometimes more focused on the rights of the editor, the publisher, or the industrial machine, sometimes we can privilege the rights of the user. And, for women and men, that kind of advertisement is about the lifestyle in the product. It is not the product, it is what the symbol means of the product. And, the symbol means that the dream is produced every time. At every stage, something grows up and something dies. Some knowledge appears and some disappears. The best of them can be turned into an intellectual property. The best IPR can be turned into something tangible. We sell the dream before we sell the product. The next step is trend setting. After we start a communications strategy, if it is effective, we create a trend. The trend is something which is a collective phenomenon, let's say, that develops in a kind of Roger's cycle (1956), in a fast way. When we want to speed up what we call

Roger's cycle (1956), we want to enter education, information, and entertainment.

3. Demography and destiny.

In the following pages, we are trying to link some concepts. First of all, the matter of democracy, human rights, and globalization. What is called globalization, which we do not deny, could simply be, and likely is, a shift and not a shock. Nowadays, it is much more reinforced, as it never was in the past, because not only technology, demography, and currency are going the same direction, other things are also going in the same direction, the things that are no longer shaping an arrow, but a spiral. The spiral gets stronger and faster, and it is for better or worse, globalization. The leverage required to change the trend should be extremely powerful and violent, not mean physically violent. As lawmakers, we do not have to predict, we have to model. Laws, rules, regulations, so on, so that we can make the most effective advantage of the spiral. Where are human rights in democracy? Is democracy vertical or horizontal? Are human rights vertical or horizontal? Which means that we cannot even try to think about a democratic project or a human rights project on a nation-state scale only. There is no national way to shape human rights. The same story for democracy. If democracy means that every vote equals one, we might say that we are democratic, because everyone is given a vote. But, what kind of info or knowledge do we have about voting matters? Do we know what we are voting about? What kind of access do we have to compare our democracy with other democracies? Both democracy and human rights are part of the spiral. Democracy in the USA is kind of tricky, because the article about happiness in their constitution, which is similar to the one in Colombia constitution. But

the UN is not democratic for a simple reason, there are very small number of countries in the superior council, which decides, so they are about 200 countries, and about 4 of them count. However, to have a democratic order, and human rights, we cannot have them locally. They are a strategic tool of globalization because this is meant in a more technical way, is the top of the spiral. Which means that world order, that means just one world order. That means if it is democratic and not totalitarian, then it must be founded on the shared conception of human rights and shared conception of democracy.

Because once again, human rights and democracy are fundamental tools of a real globalization, not just a market globalization. That is why constitutions are either such a big shock that turns the trend around, and what may happen, because it happened in history. We are not saying it is forever, but to reverse a trend is not that easy. And, what could happen in media, when people fight in the streets, are simply shifts. The risk of these shifts they should increase, the Williamson's costs (1991), so they could make the cycle a bit slower. But, on a scale of 30 year cycle, or Roger's cycle, a delay of 2-3 years is nothing (Pitasi: 2013). That is why in terms of lawmaking, and the legislation, to consider things like the cycle, the spiral think in terms of the cycle, eventually we can focus on a 30 year time, eventually, we would revise the constitution about 30 years later.

But, we have to remember that all internal laws, lose before constitution and constitution nowadays, might lose in comparison to international treaties, when the EU and Canada signed the CETA, some months before the university in Munich, Germany had written a paper/report explaining why according to them, the CETA was against German

constitution, and the reply of Brussels, which has a lot of power, was, essentially, who cares? Because German constitution loses hierarchically before the treaty of Lisbon. The EU would never sign that agreement because if the EU signs an agreement like that, they shut down the customs, the thing would require a kind of alignment in politics, economics, and technology and everything in law, that it could not be changed one side.

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Les outils exécutifs et systémiques pour la modélisation des politiques et le processus législatif

The Execution Systemic Toolkit for Policy Modelling and Lawmaking

*Luisa Gabriela Morales Vega**

Riassunto

Il presente articolo ha come scopo quello di presentare gli elementi che un insieme di strumenti sistemico, volto all'elaborazione delle politiche e delle leggi, dovrebbe possedere. Il presente studio è focalizzato sull'America, sul cui territorio esercita la propria giurisdizione il Sistema Inter-americano dei Diritti dell'Uomo, dato che le norme sui diritti umani (promosse dall'ONU e dai sistemi regionali dei diritti umani) prevalgono nell'ambito dell'agenda legislativa e di politiche pubbliche. In modo più specifico, si considera che la dottrina, le idee e i principi stabiliti dalla giurisprudenza della Corte Inter-americana dei Diritti dell'Uomo (IAHCR) siano attualmente i modelli validi volti a spiegare i concetti e le tesi che guidano l'attività legislativa e delle politiche pubbliche in America. Inoltre il *"control de Convencionalidad"*, sviluppato nella regione, incoraggia le sentenze costituzionali emesse negli stati a riprodurre tali concetti e tali principi, i quali hanno l'effetto di disapplicare o espellere le norme legali e, tramite le sentenze normative o strutturali, i tribunali proiettano su specifiche politiche pubbliche; tutto ciò può essere considerato un sistema morfogenetico. In tal modo, le linee giurisprudenziali principali dell'IACHR e della Corte Suprema del Messico verranno analizzate in modo da estrapolare gli elementi e le loro qualità, le quali costituiscono l'insieme di strumenti sistemici per l'elaborazione delle politiche, per la legislazione e per l'identificazione di quei modelli comportamentali utilizzati nell'ambiente in grado di influenzare il sistema.

Résumé

Ce chapitre a l'objectif de présenter les éléments que l'ensemble d'instruments systémiques d'exécution pour la modélisation de politique et de législation devrait contenir. Cette section est centrée sur l'Amérique, sur laquelle le Système Interaméricain des Droits de l'Homme exerce sa juridiction, étant donné que le normativisme des droits de l'homme (promus par l'ONU et les systèmes régionaux des Droits de l'Homme) a la priorité dans l'agenda législatif et des politiques publiques des États. En particulier, on considère que la doctrine, les concepts et les principes établis par la jurisprudence de la Cour Interaméricaine des Droits de l'Homme (IAHCR) sont de nos jours des modèles valables pour expliquer les conceptions et les schémas de raisonnement guidant les activités inhérentes à la législation et aux politiques publiques en Amérique. De plus, le *« control de Convencionalidad »* développé dans la région encourage les décisions constitutionnelles prises aux sein des États à reproduire ces concepts et principes, qui ont pour effet la non-application ou le rejet des normes juridiques, et à travers des décisions normatives ou structurelles, les Cours conçoivent des politiques publiques spécifiques, donnant lieu à ce qui pourrait être considéré comme un système morphogénétique. C'est la raison pour laquelle il a été choisi d'analyser les grandes lignes jurisprudentielles de la IACHR et de la Cour Suprême du Mexique, ce qui permet d'en extraire les éléments et caractéristiques qui en font un outil de travail systémique pour la modélisation des politiques, le processus législatif et l'identification des modèles de comportement qui ont été rejetés dans le milieu qui influence le système.

Abstract

This chapter aims to present the elements that the execution systemic toolkit for policy modelling and lawmaking should contain. The study focuses on America over which the Inter-American System of Human Rights exercises its jurisdiction, given that Human Rights normativism (promoted by the UN and the Human Rights regional systems) prevails at the legislative and public policy agenda of the States. Specifically, it is considered that the doctrine, concepts and principles established by the jurisprudence of the Inter-American Court of Human Rights (IACHR), are nowadays the valid patterns to explain the conceptions and reasoning schemes that lead the legislative and public policy activity in America. Additionally, the *"control de Convencionalidad"* developed in the region, encourages the constitutional judgments issued within the States to reproduce these concepts and principles, which have the effect of the non-application or expulsion of legal rules and, through normative or structural judgements, the courts projects specific public policy, all of which could be considered a morphogenetic system. Thus, the main jurisprudential lines of the IACHR and the México's Supreme Court will be analyzed

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in order to extract the elements and their attributes that make up the systemic toolkit for policy modelling and lawmaking and identify which behavioral patterns have been displaced to the environment that affects the system.

Key words: execution systemic toolkit; policy modelling; lawmaking; Inter-American Court of Human Rights.

1. Introduction.

In the Americas, where the Inter-American System of Human Rights exercises its jurisdiction, the Human Rights normativism (promoted by the UN and the Human Rights regional systems) prevails at the legislative and public policy agenda of the States. Nowadays, it is considered that the doctrine, concepts and principles established by the jurisprudence of the Inter-American Court of Human Rights, are the valid patterns to explain the conceptions and reasoning schemes that lead the legislative and public policy activity in America.

Additionally, the “*control de Convencionalidad*” developed in the region, encourages and in some cases, like Mexico, compels to reproduce these concepts and principles, which have the effect of the non-application or expulsion of legal rules and, through normative or structural judgements, the courts projects specific public policy, all of which could be considered a morphogenetic system.

Thus, this article aims at presenting the elements that constitutes the systemic toolkit for Policy Modeling and Law Making in order to identify the behavioral patterns that have been displaced to the *environment* that affects the legislative Mexican *system*.

In first place, is offered a brief description of the Interamerican System not only from a historic or organic perspective but about the main criteria held by the Interamerican Court of Human Rights; later, the second section presents the “Control de Convencionalidad” which is a mechanism for reviewing the adjustment of authority acts to the American Convention of Human Rights and the way México has adopted it.

Finally, the third section is about constitutional judgments issued by Mexican Supreme Court to reveal the adoption of the interamerican criteria and how this issuing impacts directly to the legislative and police maker activities.

2. The development of the Interamerican System of Human Rights.

The Interamerican System of Human Rights protection, established by the Organization of American States (OAS), is constituted by two organisms: the Interamerican Commission of Human Rights and the Interamerican Court of Human Rights (ICHR).

Broadly speaking, the Commission of Human Rights (the Commission) is a principal and autonomous body of the Organization of American States (OAS) responsible for promoting the observance and defense of human rights and serving as an advisory agency to the OAS on the matter; its creation is foreseen in the American Declaration of the Rights and Duties of Man, which was the pioneer document of international character in the matter of Human Rights, approved in Bogotá, Colombia in 1948.

Years later, in the decade of the 60's, the Commission began to develop monitoring activities that possesses until today, such as on-site visits to observe the situation that human rights keep in specific places or as part of the investigation of a particular situation. Later on, its attributions allowed it to receive and process complaints or petitions raised individually, complaints that once it examines

them, can be adjudicate as cases to the Interamerican Court of Human Rights, if they meet the requirements. Thus, on the one hand, it has powers with political dimensions and on the other, it carries out functions with a quasi-judicial dimension.

The American Convention on Human Rights or “Pacto de San José” was approved in 1969 and entered into force in 1978. It has been ratified by 24 countries on the continent: Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. And twenty out of these, have accepted the contentious jurisdiction of the Court: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname and Uruguay. As can be seen, the insular states of the Anglo-Saxon Caribbean are those who, despite being part of the Convention, have not accepted the contentious jurisdiction of the Court and Venezuela, who denounced the Convention with effect from September 10, 2010.

The “*Pacto de San José*” is composed of two sections: 1) Defines the human rights that member states are internationally committed to respect and guarantee; and 2) the organization and powers of both the Commission and the Court.

The Inter-American Court is one of the three regional courts for the protection of human rights, together with the European Court of Human Rights and the African Court of Human and Peoples' Rights. It is an autonomous judicial institution whose objective is to apply and interpret the American Convention.

The Inter-American Court (IACHR) exercises a contentious function, within which is the resolution of litigious cases and the mechanism of its decisions fulfilment; and also exercises a consultative function; and the function of issuing provisional measures (<http://www.corteidh.or.cr/>).

Within the contentious function, the Court determines whether a State is internationally responsible for the violation of any of the rights enshrined in the American Convention or in other human rights treaties applicable to the inter-American system.

Within its advisory function, it is dedicated to issue pronouncements at the request of a member state on the conventionality of certain acts or standards, to date has issued twenty-five advisory opinions.

The work of the IACHR has generated a process of gradual change in the political and legal agenda of the entire continent. This dynamic, in accordance with the characteristics and historical and social context of the region, has brought together two major jurisprudential lines: one, which could be identified as “criminal” and which refers to the international responsibility of states in matters such as torture, extrajudicial executions, enforced disappearances, military jurisdiction and amnesty laws; and another one of “judicial protection of the social rights” and that has solved denunciations on the problems and the violations generated by the inequality and the social exclusion.

It has been even recognized the Court's ability, through its jurisprudence, to guide with standards and principles the actions of democratic States and the jurisprudence of national courts (Von Bogdandy, 2011), derived from the obligation to incorporate them into the actions of national authorities.

The Pact of San José is considered the main instrument in the matter of Human Rights in the region, whose first two articles allude, to the commitment of the States to respect the rights and freedoms recognized in it, and to guarantee the free and full exercise thereof to all persons' subject to its jurisdiction; and second; to the commitment to adopt legislative or other measures to enforce such rights and freedoms.

Accordingly, many constitutions attribute constitutional status to human rights treaties, and together with the profusion of jurisprudence of the IACHR and the way in which the highest national courts take it up again, it is possible to affirm that we are facing without doubts a situation of great practice transcendence, but also theoretical or doctrinal that can even generate the idea of being building a common constitution or at least common rules.

In fact, the judge himself Sergio García Ramírez, former president of the IACHR, recognized before the General Assembly of the OAS, that "If the protection of the human being is the fundamental decision in national Constitutions and in international texts, the dilemmas among them diluted and the coincidence arises naturally" (Von Bogdandy, 2011).

In the case of Mexico, it is necessary to refer to Article 1 of the Political Constitution of the United States of Mexico in force; This article contains fundamental rules regarding the obligations that Mexico must fulfill as a State. In effect, the first paragraph affirms categorically that the persons present in the national territory will enjoy the human rights recognized both in the Constitution itself and in the international treaties in which the State is party.

The third paragraph of the first constitutional article establishes the obligation for all authorities to promote, respect, protect and guarantee the human rights of all persons. That is to say, the State is undoubtedly obliged to the promotion, respect, protection and guarantee of human rights relative to all persons who are in the country or are under its jurisdiction, whether those recognized by domestic or international law.

However, the article itself refers expressly to the international treaties on Human Rights of which Mexico is a party, among which, and principally, is the American Convention on Human Rights (hereinafter the Convention), known as Pact of San José. Remission, incidentally, somewhat superfluous, because according to the Law of Treaties, all States Parties to an international treaty are constrained to comply and comply, regardless of national legal provisions.

These coincidences do not arise from chance, but are possible thanks to the Control of Conventionality that, as will be seen in the next section, introduces the criteria of the court to the States, thereby generating a monopoly on the criteria to be followed not only in the resolution of disputes, but in all state action, which is considered a displacement of the criteria and traditions that previously governed public decisions, at least in the jurisprudential lines, which as an example have been pointed out.

3. The "Control de Convencionalidad" doctrine.

In principle, it is necessary to establish that the "Control de Convencionalidad" doctrine, or conventionality control was named by the IACHR in the ruling that solved the case *Almonacid Arellano vs. Chile*. Previously, Judge Sergio García

Ramírez, in his votes of the cases *Myrna Mack* and *Tibi*, had made a conceptual approach to the control of conventionality that is carried out in the inter-American headquarters and in the internal sphere of the States (IACHR, 2012).

It is an effective tool to apply the International Law of Human Rights to the internal scope of the countries. This application promotes an interactive dynamic and a constant dialogue between the local courts and the IACHR, in this way, the conventionality control is linked to the establishment of general hermeneutical standards issued by the Court that must be observed by the courts and other State authorities with three fundamental purposes (Bazán, 2012):

1. Abide the international commitments assumed by the States;
2. Prevent the State from incurring on international responsibility;
3. Preserve the Inter-American system of protection of DH.

The evolution of jurisprudence has identified five elements (IACHR, 2012) of conventionality control as a hermeneutic tool:

- a) Consists in verifying the compatibility of the norms and other internal practices with the ACHR, the jurisprudence of the Inter-American Court and the other inter-American treaties of which the State is a party;
- b) It is an obligation that corresponds to every public authority within the scope of its competences;
- c) For purposes of determining compatibility with the ACHR, not only the treaty must be taken into consideration, but also the jurisprudence of the Inter-American Court and the other inter-American treaties of which the State is a party;

d) It is a control that must be carried out *ex officio* by all public authorities;

e) Its execution may involve the suppression of norms contrary to the ACHR or its interpretation according to the ACHR, depending on the powers of each public authority.

However, in the case of Mexico, as was anticipated, conventionality control is foreseen in the Constitution itself, Article 1. Constitutional refers that:

In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.

The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times.

All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee Human Rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a consequence, the State must prevent, investigate, penalize and rectify violations to Human Rights, according to the law.

Slavery shall be forbidden in Mexico. Every individual who is considered as a slave at a foreign country shall be freed and protected under the law by just entering the country.

Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited (1).

Now, in correlation with Article 1, Article 133 establishes:

This Constitution, the laws derived from and enacted by the Congress of the Union, and all the treaties made and execute by the President of the Republic, with the approval of the Senate, shall be the supreme law of the country. The judges of each state shall observe the Constitution, the laws derived from it and the treaties, despite any contradictory provision that may appear in the constitutions or laws of the states.

There is consensus in considering that the transcribed text of article 1, along with other provisions reformed in June 2011, meant the introduction of a new constitutional paradigm in Mexico that imposes on all legal operators and specifically on the National Supreme Court of Justice (SCJN) to determine the scope and aims that the said reform had.

One of the main contributions of the 2011 reform was the creation of a set of rules that may emanate from the constitution or international treaties and that make up what was called the *regularity or validity control parameter of Mexican legal regulations*.

This parameter is not constituted only with the constitutional, conventional or legal provisions; but also with the provisions contained in the jurisprudence issued by the SCJN which is mandatory and the jurisprudence of the IACHR, which undoubtedly is binding when Mexico is part of the matter resolved without the need to be reiterated (2).

Furthermore, it has been accepted that the jurisprudence of the IACHR is an extension of the American Convention on Human Rights, since it is considered that the Convention establishes provisions in the matter, understanding by disposition to the text of a specific order; while inter-American jurisprudence establishes norms, which are understood as the meaning attributed to the provisions (Cossío et al., 2015). What added to the idea of the constitutional regularity parameter

conformed by the catalog of rights recognized in the constitution and international treaties, the criteria emanating from all the jurisprudence issued by the IACHR are binding for the judges of the country

In this case, national judges are obliged to analyze whether the precedent (jurisprudence/sentence) of the IACHR is applicable to the Mexican legal system; that is, as a preliminary study it should be noted that the conditions that served as the basis for the resolution are analogous to the national reality and not that Mexico is obliged to carry out the actions ordered by the Court, as is the country that was party in the litigation (Cossío et al., 2015).

This complex mechanism gives rise to a growing influence that can be perceived even as the construction of a common normativity in the whole region from which public policy is also created within the States, so that in this incorporation of criteria to national legal systems, from the international sphere, we can identify a priori the elements that are currently forming the strategic toolkit of law and policy makers.

It is important to express clearly that the control of conventionality can be enhanced in international venue, which is properly the IACHR, since is attributed to it the quality of natural interpreter of the Convention and in national venue, that is, each judicial system of the different states is forced to verify the conformity of public acts of any nature with the Convention.

Now, in general, the control in national headquarters can be concentrated or diffuse. The concentrated control “contrary to the method of diffuse control, is characterized by the fact that the constitutional order expressly confers to a single state body, the power to annul laws sanctioned by the Parliament that are considered unconstitutional”

(Brewer, 2014). While *a contrario sensu*, diffuse control can be performed by any court but does not necessarily imply the expulsion of the rules, but its non-application. In the next section will be presented specific IACHR decisions addressed to Mexico; and Mexican Supreme Court decisions that illustrate the indicated influence.

4. Constitutional decisions and their impact over the policy modelling and Law Making activities.

In the previous section, legal support was established for the influence that inter-American jurisprudence has on the Mexican legal system and which is part of it since its introduction by constitutional means (Article 1).

The treaties and other binding international regulations for Mexico on Human Rights, formulated and promoted by the UN and the OAS, whose provisions are subject to control by the IACHR amount to more than two hundred (2) and they are related to human rights in general, asylum, international humanitarian law, enforced disappearance, persons with disabilities, racial discrimination, education and culture, slavery, extradition, genocide, environment, childhood, migration and nationality, minorities and indigenous peoples, women, intellectual property, refugees, health, torture and work.

That is to say, the matters to which they are addressed, imply an important accumulation of provisions that necessarily impact the state's work towards the interior and that, being the foundations of the IACHR resolutions, are mandatory for all authorities.

This regional tendency is somewhat novel, because although it is true that States were always bound by

the international treaties to which they belong, this obligation was perceived as an obligation of the State *per se*, as a subject of International Law but not necessarily of direct and obligatory application for all its authorities at all levels of government.

Traditionally on many occasions, international regulations to be effective inside the State, they had to be received through legislation, which safeguarded the classic activity of the legislator who executed his mandate based on the regulatory needs he autonomously perceived.

The dialogue between the IACHR and the national courts has imposed a different dynamic: sentences affect (if not oblige) the legislator and those responsible for public policy to perform certain acts. This necessarily implies a different systemic composition, since the toolkit used has been added with the resolution issued by the courts, which, incidentally, may even be indicated as contrary to the principle of separation of powers.

In that sense, there are two types of resolutions that can have these effects:

1. Those properly dictated by the IACHR where the Mexican State was a defendant and was found responsible, and
2. Those issued by the SCJN in the exercise of the conventionality control that in national headquarters is authorized to perform.

As for the first type, the IACHR had issued condemnatory decisions against Mexico in seven cases until now. In the following chart are presented some penalties imposed to the State, that refers to the legislators and policy makers, which by its nature transcends the victims (4).

Case	Penalties and/or safeguards of non-repetition
Cotton field (5)	<p>A. The State continues the standardization of all its protocols, manuals, ministerial criteria for investigation, expert services and the administration of justice used to investigate all crimes related to disappearances, sexual violence and homicides of women. Specifically, State should stick to:</p> <ul style="list-style-type: none"> I. Protocol of Istanbul II. Manual on the prevention and effective investigation of extrajudicial, arbitrary and summary executions of the United Nations III. International standards for the search for missing persons, based on a gender perspective, and report on the measures adopted <p>B. It must make adjustments to the “Alba Protocol” (urgent search mechanism designed by Mexico):</p> <ul style="list-style-type: none"> I. Searches of trade II. Coordinated work III. Eliminate obstacles that are effective IV. Assign human, economic, logistic, scientific resources V. Confront report and database VI. Prioritize searches <p>C. Mexico must create a database that contains:</p> <ul style="list-style-type: none"> I. Personal information on missing girls and women II. Genetic personal information and family cell samples to locate and identify III. Genetic information and cell samples from the bodies of girls or women <p>D. Permanent education and training programs and courses</p> <p>E. Generate and impart an education program aimed at the population of Chihuahua to overcome the situation</p>
Rosendo Radilla’s Case (6)	<p>A. That the federal judges adopt the criteria of the IACHR regarding the jurisdiction of military courts, and</p> <p>B. That the SCJN concentrate jurisdictional conflicts between military and civilian judges pending sentencing in collegiate courts of the country.</p>
Inés Fernández’s case (7)	<p>A. The State must carry out legislative reforms with international standards on Human Rights</p> <p>B. Resources for the <i>me’phaa</i> community of <i>Barranca Tecoani</i> (the indigenous village where the rape took place)</p> <p>C. Establish a community center. Center of the woman</p> <p>D. Ensure the permanence of girls enrolled in secondary school in Ayutla (the county where <i>Barranca Tecoani</i> is)</p> <p>E. Count on services for women victims of violence, provided by the institutions</p>
Valentina Rosendo’s case	<p>A. The State must carry out legislative reforms with international standards on Human Rights</p> <p>B. Limit the jurisdiction of the military jurisdiction to crimes that have a strict connection with the military discipline or with legal rights specific to that area and allow the persons affected by the intervention of that jurisdiction to have an effective remedy to challenge the performance of this jurisdiction</p> <p>C. Awareness and sensitivity campaigns on discrimination and violence against women</p>
Cabrera García y Montiel Flores case (8)	The State must carry out legislative reforms with international standards on Human Rights

The resolutions transcend the victims; that is, they do not only deal with compensation or individual reparation measures applicable to specific cases, but they also establish authentic lines of action for legislators, since we observe the reiteration of “making legislative reforms with international standards on Human Rights” and the order of “Limit the jurisdiction of the military jurisdiction to crimes that have a strict connection with the military discipline or with legal rights of that area and allow the persons affected by the intervention of that jurisdiction to have an effective remedy to challenge the action of the latter”. Obviously, it can only be corrected through legislation.

In the case of policy making, the variety is broader, as it refers to the standardization of protocols, manuals, criteria, research methods that can be included under the guidelines of the prosecutors' offices, which in a very specific way must adhere to international methodologies such as those contained in the Istanbul Protocol or in UN manuals.

In the same way, the IACHR ordered the reform of the “Alba Protocol”, which is a mechanism that allows the coordination of efforts of the three levels of government committed to the promotion and execution of activities leading to the location of women with a report of loss and that, in fact, it was modified in 2016 in behalf of Campo Algodonero's ruling in order to include the need to conduct official searches, in a coordinated manner at the three levels of government, carry out coordinated work by the authorities, eliminate obstacles that remain ineffective, which implied reform the Penal Code, assign human, economic, logistic and scientific resources as well as confront the reports received with the databases that exist. In this same sentence, Mexico was forced to create a reliable database on women and girls reported missing,

genetic personal information and cell samples of relatives to locate and identify missing women.

On the allocation of economic resources, which traditionally belongs to the legislative branch and the executive responsible for public budgets. There are also specific executive measures such as the establishment of community centers, ensuring the school stay of girls in secondary education in the municipality where the affectations were made, the development of awareness programs on violence against women, as well as generating attention services to women victims of violence.

Regarding the second type of decisions, those issued since the judicial activity carried out within the States under the control of conventionality and constitutionality, we refer specifically to a kind of sentences that illustrate more clearly the introduction of the elements that are currently shaping the execution Law Making and Policy Modelling toolkit in Mexico.

These sentences are called *structural* or *normative* because they are concerned with identifying structural state conditions that impede or hinder the exercise of rights. More concretely, they have been defined as judicial decisions that, in order to ensure the effective protection of the rights of large groups of people, order the design and implementation of public policies by the State (Gutiérrez, 2016).

For its part, Néstor Osuna identifies them as sentences through which the judges make an important effort to give effect to the constitutional statements, when they verify the existence of generalized, recurrent and serious ignorance of human rights (Osuna, 2016).

To formulate the transcribed definition, the author appeals to the experience of judges in the exercise of their functions, through which they perceive causes that systematically produce this deficit of

human rights, and that the cases that arrive at their offices, if they are resolved only as individual remedies, they cannot solve the general problem whose record is found in the files (Osuna, 2016).

The current relevance of these judgments derives from the possibility that the state conditions that prevent the effective protection of rights derive from the legislative omission or legislation contrary to the constitution or away from conventionality. What definitely involves introducing various and different elements to the toolkit.

This type of sentence is in wide development in countries such as Chile, Colombia and Argentina, both in jurisprudence and in doctrine. While in Mexico we are witnessing an incipient stage of their formulation but that have been glimpsed since the resolutions of the Federal Judicial Branch. Specifically, the Supreme Court of Justice of the Nation (hereinafter SCJN) in Mexico is the judicial instance that has pronounced sentences of a structural nature

The issuance of structural judgments by the Supreme Court of Justice of the Nation when resolving the *Amparo* Trial (2), expands the powers and faculties traditionally reserved to the judges, that at the most, were considered negative legislators in the sense of invalidating norms, but never of issue new ones.

This type of sentence encourages the exercise of an integral control of constitutionality and conventionality. For a better understanding, the following are concrete examples issued by the Federal Judicial Power and specifically by the SCJN, with the purpose of determining the position that the Mexican constitutional court has in this regard.

5. *Amparo* in Review 310/2013.

This trial was about the guardianship of two children procreated during the validity of the marriage of their parents, which was granted in the first instance to the mother, under the normative provision contained in the Civil Code for the Federal District where it was stated plainly that prefer to the mother to perform this work.

The sentence that resolves this *Amparo* in Review that was heard by the First Chamber of the SCJN is dated December 4, 2013 and in it the following fundamental issues were determined:

- Measures regarding the care and education of children must be adopted taking into account their interest, not that of the parents, since it is not the psychological or affective conditions of the parents that determine the measures to be adopted, but exclusively the good of the children. This criterion binds both the courts and the rest of the public authorities, including parents and citizens, so that measures must be adopted that are more appropriate to the age of minors, to progressively build control about their personal situation and future projection, avoiding always that the minor can be manipulated, looking, on the contrary, for their integral formation and their family and social integration.
- The effects and scope of the sentences issued by a Constitutional Court vary according to the process in which they are issued, and according to the constitutional violation that is noticed in the specific case.
- The claims of the claimants, the nature and purpose of the process set the pattern of the consequences of the sentence issued, either the declaration of an unconstitutionality, the

recognition of the injury to a fundamental right, and the restoration of the same.

- Not every violation of fundamental rights is the same, so the effect of a writ of *Amparo* must be characterized by a ductility that allows for the most effective protection of the rights of individuals.

This resolution establishes a clear position of the First Chamber of the SCJN in the sense that the effects and scope of the constitutional judgments will always depend on the nature of the matter to be resolved, the determining variable being the fundamental right that was violated; It also establishes that thinking differently would condemn the *Amparo* Trial to ineffectiveness in its role as guarantor of fundamental rights.

This case generated the Isolated Thesis with registration number 2005463, published in the Gazette of the Judicial Weekly of the Federation, in February 2014, under the heading “Sentences of Amparo. The effects are determined by the violation of the fundamental right of each specific case.”

Following this logic, a couple of resolutions have been issued:

- Federal Court in Criminal and Administrative Matters of the Twenty-Second Circuit. Isolated thesis with registration number 2012583, published in September 2016, under the heading: “Constitutional judgments, to determine what their effects are, it is necessary to take into account, casuistically, what type of act is claimed and what are the normative circumstances that surround it, since depending on the consequences that each act implies, the scope of those will have to vary in each concrete case”.
- Essential criterion. In this precedent specifically the Collegiate Court states that in many cases the sentences may go beyond the defendant, by constituting the only way to achieve a full reparation or restitution of the right violated.
- Precedent with registration number 2012584. Published in September 2016, under the heading “Constitutional judgments. Its typology is compatible with the purposes of the current *Amparo* trial”,
 - Essential criteria: Protective judgments are not necessarily limited to a binding effect with respect to the responsible authority, but sometimes include other equally binding effects that must be complied with by the organs of the State, in order to make an integral reparation for the violation committed.
 - The typology of the sentences has a logical and compatible relationship with the claim that there is a full reparation or restitution of the violated right, since the resolution must transcend the parties involved to eliminate all the direct legal consequences of the act claimed, since its origin is to restrict both the act itself, and its pre-established consequences, so the nature, types, scope and limits of the effects of the protective decision are not limited exclusively to what is determined in the *Amparo* judgment, but also the responsible authorities must understand immersed in them the

direct legal consequences they have on other organs, laws and institutions.

Thus, from a systemic approach, it can be said that legislators and policy makers of the interamerican system member states are actually being influenced more by external criteria and values than internal ones. That's because of the activity of the international courts, like the IACHR, who has become an almost lonely actor in the policy modelling in the region.

Something very interesting is that this shift has come through the judicial branch, it implies that the legislative, the administrative and the judicial authorities are linked by decisions that are consistent with the human rights legal corpuses.

Finally, local values are displaced to the environment, and the system is getting plenty of values that are considered as universal ones. The main characteristic of these values is that are considered intrinsically good and valid to all persons, shaping the global citizen.

6. Conclusions.

Under the influence of the global and regional normativism on Human Rights, national States as Mexico have incorporated elements and pieces to the systemic toolkit for policy modelling and law making activities, that have origin outside their borders.

It implies that the own and original criteria are not more taken into account to settle the principal lines of public policies and legislative issues.

It has been demonstrated how the contained provision in the human rights treaties are incorporated to national legal systems at the highest levels, which are the Constitution and its interpretation by the Supreme Court.

This pattern refer to a trend that involve a shift in the reasoning schemes that are reflected in the currently ruling schemes. Authorities and citizens feel satisfied if international criteria is used to solve internal issues, that can be trials, legislative gaps or public policy.

This process is carried out by two principle means: the enforcement of the sentences dictated by the IACHR and all the standards it issues, and the "control de convencionalidad" performed by Mexican courts.

This way, the system is steadily ejecting elements to the environment and through that expulsion is creating a differentiated configuration of itself.

Notes.

- (1). Translation made by the Law Research Institute of the National University, available at <https://www2.juridicas.unam.mx/constitucion-reordenada-consolidada/en/vigente>
- (2). "Sentencias emitidas por la Corte Interamericana de Derechos Humanos en asuntos donde el Estado mexicano fue parte. Para que sus criterios tengan carácter vinculante no requieren ser reiterados" Décima Época, Registro: 2003156, Pleno, Semanario Judicial de la Federación y su Gaceta, 2013, Tesis: P.III/2013, p. 368.
- (3). According to the web site of the National Supreme Court of Justice, available at <http://www2.scjn.gob.mx/red/constitucion/TI.html>
- (4). It has to be said that these penalties were imposed among a lot others in each judgement, that were addressed specifically to the victims and the specific investigation procedures.
- (5). This case is known as "cotton field" or *campo algodonero*, because the bodies of three women were found in a cotton field in Ciudad Juárez, Chihuahua. It is about Mexican state international responsibility because of a clear pattern of systematic aggressions and violence against women, situation widely documented and known as *las muertas de Juárez*.
- (6). This case is about the forced disappearance of this person who was victim of an illegal detention at a military check point.
- (7). This and Valentina Rosendo cases, are about indigenous women raped by soldiers. The women were part of highly marginalized indigenous communities at Guerrero State, where military forces were stationed.
- (8). The case refers to the international responsibility of the State for the arbitrary detention and cruel and degrading treatment to which Teodoro Cabrera García

and Rodolfo Montiel Flores were subjected, as well as for the lack of investigation and punishment of those responsible.

(9). Amparo is the name of the Constitutional Judgment which purpose is to protect constitutional human rights.

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Le Costituzioni orizzontali

Les Constitutions horizontales

The Horizontal Constitutions

*Tyler Adams, Nicoletta Bersier Ladavac, Andrea Pitasi, Ellen Taricani**

Riassunto

Lo scopo del presente lavoro è quello di descrivere l'“orizzontalizzazione” della costituzione dello stato/nazione in uno scenario di globalizzazione del diritto, in cui l'Elaborazione della Politica Legislativa di un Ordine Mondiale Sovranazionale (*Supranational World Order Legislative Policy Modelling* - WOLPM) sta riprogettando drasticamente la gerarchia tradizionale delle fonti normative, la cui sommità era rappresentata dalle costituzioni nazionali. Lo scenario attuale è molto differente e le costituzioni dello stato/nazione non rappresentano più l'unica cornice per la legiferazione; al contrario le costituzioni fanno parte di una cornice più ampia fino ad essere inquadrare altrove. Tale nuova cornice è più corta in senso verticale e orizzontalmente più lunga e, a causa dello slittamento dei trattati transnazionali e sovranazionali, la sovranità sta diventando sempre più sovranazionale e globale; conseguentemente, sta emergendo una condizione di interdipendenza che delinea una rete non reversibile di reti. Tale processo di orizzontalizzazione evolve nell'innovativo potere della funzione legislativa nel sistema legislativo globale; tale sistema è l'unico che può proattivamente supportare una politica di innovazione praticabile per le sfide chiave dei nostri tempi. Inoltre, tale variazione di potere sfrutta e aumenta la qualità della democrazia: tramite una drastica riduzione dei costi meso e micro organizzativi di Williamson - i quali possono anche facilitare un collegamento diretto tra i livelli macro e psico-sociali – dove sembra emergere un'evoluzione da più persone a una singola persona (es.: dalle singole persone degli stati membri dell'UE al popolo dell'UE). Per meglio comprendere tale evoluzione è possibile basarsi su due basi teoriche. Da una parte i lavori di Lawrence Friedman sulla globalizzazione e sulla cultura della tecnologia, la quale unisce anche le tradizioni sociali, politiche e religiose nel processo di legiferazione globalizzato. Dall'altra la visione di Luhman-Teubner basata sul concetto di Sistema Legislativo (solo uno e globale in tutto il pianeta). In questo caso, un Sistema Legislativo Globale implica due direzioni evolutive: una direzione verticale, la quale significa un aumento nella produzione di leggi in cima a tale Sistema e una direzione orizzontale, la quale consiste di abbinamenti strutturali con i sistemi sociali giuridici locali. Tali abbinamenti possono presentare anche caratteristiche conflittuali. Pertanto, così come delinea Teubner, si assiste a una crisi del costituzionalismo tradizionale, causato da un transnazionalismo. Di conseguenza il costituzionalismo tradizionale si basa sul concetto di nazione-stato e può difficilmente accettare la sovranità sovranazionale. Inoltre, c'è la forte tendenza tra i sistemi sociali ad allontanarsi dallo stato generando un'autonomia individuale o istituzionale. Per prevedere il possibile risultato di tale tendenza, il miglior strumento teorico è la distinzione sistema/ambiente. Tali nozioni operano una netta distinzione tra un ordine mondiale globale sempre più formalizzato e unificato (tramite i trattati sovranazionali come menzionato sopra) e un ambiente sempre più turbolento e rumoroso, costituito da forti proteste. In base alla teoria sistemica, l'irritazione e la risonanza possono far vacillare il sistema legislativo, tuttavia l'ambiente rumoroso non ha funzioni costruttive.

Résumé

Le but de ce document est de décrire l'« horizontalisation » des constitutions d'état/nation dans un contexte de globalisation de la loi, où le Modelage de Politiques Législatives Supranationales d'Ordre Mondial (*Supranational World Order Legislative Policy Modelling* - WOLPM) est en train de révolutionner la hiérarchie traditionnelle des sources juridiques, dont les plus hautes étaient les constitutions d'état-nation. Le scénario actuel est radicalement différent et les constitutions d'état/nations ne représentent plus le cadre de légifération; elles sont plutôt un élément d'un cadre plus vaste, lui-même scindé en différents systèmes. Cette nouvelle structure est plus courte verticalement et plus développée horizontalement, car les traités transnationaux et supranationaux déplacent la souveraineté à un niveau de plus en plus supranational et global. Par conséquent, une condition d'interdépendance est en train d'émerger, définissant un réseau de réseaux irréversible. Ce processus d'horizontalisation établit le pouvoir innovant de la fonction législative dans le système de loi global; ce système est le seul qui puisse supporter proactivement une politique innovante soutenable face aux défis majeurs de notre époque.

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En outre, ce pouvoir fait figure de levier et améliore la qualité de la démocratie: à travers une restructuration drastique des coûts Williamson au niveau méso et macro de l'organisation – qui peut également favoriser un lien direct entre les niveaux macro et psycho-sociaux – une évolution semble émerger, de différentes populations à une population (par ex. : des États membres de l'UE à la population de l'UE). Une meilleure compréhension de cette évolution se base sur deux fondements théoriques. D'une part, les travaux de Lawrence Friedman sur la globalisation de la culture et de la technologie, qui entraîne également la recombinaison des traditions sociales, politiques et religieuses au sein du processus globalisé de légifération ; d'autre part, la vision de Luhmann-Teubner basée sur le concept de Système de Loi (un système unique et global pour toute la planète). Dans cette optique, un Système de Loi Global implique deux directions évolutives: une direction verticale, ce qui signifie accroître la production de loi au sommet du système, et une direction horizontale, consistant en un couplage structurel avec les systèmes sociaux juridiques locaux. Ces couplages peuvent également présenter des caractéristiques conflictuelles. En effet, comme le souligne Teubner, le constitutionalisme traditionnel traverse une crise provoquée par la transnationalisation, car le constitutionalisme traditionnel est basé sur l'état-nation, et peut difficilement accepter des souverainetés supranationales. Par ailleurs, de fortes inclinations au sein des systèmes sociaux tendent à les rejeter hors des états et à préférer une autonomie individuelle ou institutionnelle. Afin de prévenir l'éventuelle émergence de cette tendance, le meilleur outil théorique est la distinction système/milieu. Cette notion établit une nette distinction entre un ordre mondial globalement unifié et formalisé (à travers des traités supranationaux comme évoqué plus haut) et un milieu de plus en plus agité et revendicatif caractérisé par de fortes protestations. Selon cette théorie systémique, l'irritation associée à celles-ci pourraient faire osciller le système législatif, tandis qu'un milieu tumultueux n'a pas de fonctions constructives.

Abstract

The goal of this paper is to describe the “horizontalization” of state/national constitutions in a scenario of globalizing law, where the Supranational World Order Legislative Policy Modelling (WOLPM) is dramatically redesigning the traditional hierarchy of legal sources, whose top were with state–national constitutions. The current scenario is radically different and state/national constitutions are no longer frameworks for law-making; rather they are part of a larger frame, but rather framed in a different framework. This new framework is vertically shorter and horizontally much longer, as transnational and supranational treaties are shifting the sovereignty is going more and more supranational and global; as a consequence, a condition of interdependence is emerging, which shapes a non-reversible network of networks. This horizontalization process evolves the innovative power of the legislative function in the global law system; this system is the one which can proactively support an innovation policy viable to the key challenges of our times. Furthermore, this power shift leverages and increases the quality of democracy: by a dramatical downsizing of the meso and the micro organizational Williamson's costs -which can also facilitate a direct link between the macro and the psycho-social levels- an evolution seems to be emerging from different peoples to one People (eg: from the EU member states peoples to the EU people). A better comprehension of this evolution is based upon two theoretical grounds. On one side, Lawrence Friedman's works about the globalization of culture and technology, which is also recombining social, political and religious traditions in the globalized law making process. On the other side the Luhmann-Teubner's vision based on the concept of Law System (just one and global all over the planet); in this case, a Global Law System is implies two evolutive directions: a vertical direction, which means increasing law production at the top of this System; and a horizontal direction, consisting of structural couplings with local juridical social systems. These couplings can also show conflictual features. As a matter of fact, as Teubner points out, there is a crisis in traditional constitutionalism, that is caused by transnationalization. As a matter of fact, traditional constitutionalism is Nation-state based and hardly can it accept supranational sovereignties. Furthermore, tendencies are strong among social systems, to put themselves outside the state and to engender individual or institutional autonomy. In order to foresee the possible outcome of this trend, the best theoretical tool is the system/environment distinction. This notions draws a neat distinction between a more and more formalized and unified global world order (through supranational treaties as mentioned above) and a more and more turbulent and noisy environment, consisting of strong protests. According to systemic theory, irritation and resonance might make the law system oscillate, nevertheless the noisy environment has no construction function.

Key words: horizontalization; Constitutions; WOLPM; Global Law System.

1. Prologue: the globalization of law and the evolution of law sources hierarchy.

The goal of this paper is to describe the “horizontalization” of state/national constitutions in a scenario of globalizing law, where the Supranational World Order Legislative Policy Modelling (WOLPM) is dramatically redesigning the traditional hierarchy of legal sources, whose top

were with state–national constitutions. The current scenario is radically different and state/national constitutions are no longer frameworks for law-making; rather they are part of a larger frame, but rather framed in a different framework. This new

framework is vertically shorter and *horizontally* much longer, as transnational and supranational treaties are shifting the sovereignty is going more and more supranational and global; as a consequence, a condition of interdependence is emerging, which shapes a non-reversible network of networks. This horizontalization process evolves the innovative power of the legislative function in the global law system; this system is the one which can proactively support an innovation policy viable to the key challenges of our times.

Furthermore, this power shift leverages and increases the quality of democracy: by a dramatical downsizing of the meso and the micro organizational Williamson's costs -which can also facilitate a direct link between the macro and the psycho-social levels- an evolution seems to be emerging from different peoples to one People (eg: from the EU member states peoples to the EU people).

A better comprehension of this evolution is based upon two theoretical grounds.

On one side, Lawrence Friedman's works about the globalization of culture and technology, which is also recombining social, political and religious traditions in the globalized law making process.

On the other side the Luhmann (1995, 1997)-Teubner's (1996, 2012) vision based on the concept of Law System (just one and global all over the planet); in this case, a Global Law System implies two evolutive directions: a vertical direction, which means increasing law production at the top of this System; and a horizontal direction, consisting of structural couplings (quot) with local juridical social systems. These couplings can also show conflictual features. As a matter of fact, as Teubner points out, there is a crisis in traditional constitutionalism, that is caused by transnationalisation. As a matter of

fact, traditional constitutionalism is Nation-state based and hardly can it accept supranational sovereignties. Furthermore, tendencies are strong among social systems, to put themselves outside the state and to engender individual or institutional autonomy. In order to foresee the possible outcome of this trend, the best theretical tool is the system/environment distinction (Luhmann, 1995). This notions draws a neat distinction between a more and more formalized and unified global world order (through supranational treaties as mentioned above) and a more and more turbulent and noisy environment, consisting of rageous protests. According to systemic theory, irritation and resonance might make the law system oscillate, nevertheless the noisy environment has no costruction function.

2. Policy Models in Five.

This distinction system/environment requires further considerations.

According to Luhmann, all systems consist of communication acts, and while law systems consist of epistemological communications (i.e. communication which are supposed to comprehend the possible evolution trends of a number of other systems), also in their environments there can be complex systems, whose basic communications acts essentially base upon doxa (Berger-Luckmann, 1991), i.e media redundancy of emotional elicitations. It is important to highlight the centrality of doxa in contemporary policy-making, which essentially base upon quick decisions aiming at keeping and increasing public opinions' consensus. Furthermore, the distinction environment/system is not absolute, for systems can be environment for other systems and viceversa.

In this specific case, policy systems can be the environment for law systems and law systems for opinion systems; this means they are reciprocally disordered and noisy.

In order to have these two categories of systems communicate, it is necessary to redesign their relationships: a structural coupling should emerge.

Within this framework, law systems will play a major role, because, as above shown, they are epistemologically more complex and innovative. In other words, as the American political scientist T.J. Lowy (1999 and 2009) stated, “policy determines politics”: the legislator is supposed to lead social changes and to have politics drive society towards the new global order.

With this aim, the key basic Legislator’s toolkit is composed of five tools:

a) Institutional tool.

It is the most traditional legislative tool since the Peace of Vestfalien (1648), through the Congress of Vienna (1815) up to the world new order after the Great War.

The national State is the historical key player of this tool.

b) Intergovernmental tool.

This is a key tool adopted to shape the world order since the WWII; the Marshall Plan, UN treaties and agreements, the original core of what is now called European Union, WTO, WIPO and WHO are outcomes of this tool.

c) Federal tool.

It is a very important and nevertheless tricky tool. Most of what the doxa/public opinion would call “nation states” are federal ones: Mexico, USA, Canada, Switzerland, Brazil, Argentina and more.

Moreover, some evolving organizations such as the European Union are considering to redesign according to a federal shape (The option still needs

to be defined whether high centralization federalism - like Brazil - or higher decentralization federalism - Switzerland).

d) Supranational tool.

This tool rapidly spread in the early 1990s, just after the fall of the Berlin Wall. Its basic step is transnationalism as a standard to assess the high speed increase of the global interdependency level in law, finance, politics, technology etc. The basic principle of this tool is that any decision made at a supranational level is automatic valid for all the involved states, that have no power to change or reject them. Since the Treaties of Maastricht (1992) and Lisbon (2009). The European Union in practice moved towards this direction, in spite of the debate about federalism mentioned above; WHO and WIPO are still showing intergovernmental structures, but they are getting more and more aware that they have to redesign themselves transnationally if not yet supranational. The EU-Canada Treaty and the EU-Japan Treaties, both signed in 2017, are clear examples of transnational and supranational decisions.

e) Systemic-functional neo-constructivist tool.

Jean Piaget (2000), Heinz von Foerster, Ernst von Glasersfeld, Niklas Luhmann, Peter Berger and Thomas Luckmann were the masters of this approach applied to several different areas of the social, political and legal sciences. Piaget taught that viable knowledge is scientifically constructed, experimental (which means much more applied testing than empirical research), self reflexive/second order, genetic/generative and historical (as a continuous working out eventually with Simmel and Nachfuehlung), Berger and Luckmann taught how to investigate the common sense “taken for granted worlds” from which no generative-innovative-scientific process can start up;

von Foerster and even more von Glasersfeld taught us that in the “taken for granted world” behaviourism is king and social dynamics are rather mechanics by elicitation feedback or maybe elicitation-adaption-feedback. Nevertheless the taken for granted world’s constructive and generative power is practically meaningless and irrelevant; no common sense based ‘taken for granted’ epistemology is possible: it only generates doxa. Generative, genetic, experimental knowledge comes from constructivist epistemology. Among these pillar authors, Luhmann was the one who devoted many, many pages to power, law and politics (Luhmann 1983, 1989, 1990a, 1990b, 1990c, 1990d, 1993, 1995a, 1995b, 1997, 2000, 2006).

Global Interdependency is a key outcome of the systemic- functional neo-constructivist tool, ofr it can shape technological, IPR, Taxation, Educational ecc. standards which are no doubt *sachlich* but not ontological *wirklich*.

The horizontalization process mirrors the transnational- supranational trend above described and and mainly affects state-national constitutions. As a matter of fact, these constitutions no longer represent the top of the law source hierarchy and they are no longer so strategic to master and command lower level sources. Horizontal constitutions are rather focused on symmetric and mutual alignment within higher traties (just like the EU, for example) and world class agreements (just like the CETA, for example). In short, horizontalization means that while, in the national states, the hierarchy of the legal sources was vertical and multilevel, nowadays the hierarchy has become shorter and the diagram of the sources much flatter, just like in the redesigning EU.

3. From international comparative law to supranational law.

As a matter of fact, EU perspective is a perfect exampl for the problem setting about horizontalization; namely, the focus of this chapter will be the Treaty of Maastricht (1992-93 <https://portal.cor.europa.eu/subsidiarity/whatis/Pages/SubsidiarityfromMaastrichttoLisbon.aspx>) the first big EU Treaty after the Fall of the Berlin Wall. In the 1990s, the challenge was to balance exclusivity and subsidiarity between the EU and its member states; however, the high speed globalization process between the early 90s and the Zero years led to a paradigm shift: in order to keep the decision process as closer as possible to the citizen, it became necessary to downsize intermediate levels of governance and, principally, their Williamson costs. The original conception of international law as the most general, positive, artificial, abstract, formalized and thus valid kind of law source as theorized in kelsenian terms is still valid and paradoxically no longer valid at the same time; as a matter of fact, what Kelsen stated about international law remained valid albeit shifted to the trans-supranational level. Furthermore, transnational and supranational treaties were formally reversible but in practice irreversible while the traditional international treaties, connecting two or more entities without mixing them, allowed a reversibility way which is obsolete and tendentially impossible in a globalized law system.

Since December 1st 2009 the EU Treaty of Lisbon have reinforced the transnational/supranational trend.

This happened in the framework of a more and more leveraged world order whose transnational treaties become shaped on a bigger and bigger scale.

In February 2017, the UE for example, signed the free trade agreements with Canada (<http://ec.europa.eu/trade/policy/in-focus/ceta/>), Japan (<http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/>) and Mexico (http://trade.ec.europa.eu/doclib/docs/2017/may/tradoc_155524.pdf), in December 2017. The negotiations for a free Trade Agreement between EU and MERCOSUR began through the mediation of Mexico while USA, Australia and Japan began negotiations for a new Transpacific free trade agreement (<https://www.japantimes.co.jp/tag/trans-pacific-partnership>).

In Spring 2018, 44 of the 55 African State created the African Free Market (<https://edition.cnn.com/2018/03/22/africa/africa-n-trade-agreement-world/index.html>) and most of the missing 11 states are going to join while the only opponent country is Nigeria which is worried that this free market area might downsize Nigeria's power as the African strongest economy. Nevertheless, an African Free Market area would become a transnational and supranational global player able to cooperate/compete with the other Global Players such as USA, Canada, EU, Mercosur etc none of them a national state.

4. The Five Policy and Law Models and the Horizontal Constitutions.

The five tools above described form the strategic toolkit of a more and more supranational legislator, as the EU redesigning process clearly witnesses.

It is important to highlight that the "horizontalization process" emerges from a planned policy modeling and lawmaking, rather than from a

spontaneous expression of the Umwelt or Lebenswelt.

The first step of the EU making was essentially technical, as it focused on free trade agreements, markets, finance, centralized banking and so on. This step is still in progress but since 2007-2009 it has structurally coupled with the unified EU social policy.

As a matter of fact, the free trade agreement is mirrored with the Charter of Nice (2007) which turned into a Treaty in 2009 by the reinforcement of the Treaty of Lisbon signed in 2007 and starting its legal validity from December 1st 2009.

Freedom of trade structurally couples in the EU with the respect of fundamental rights granted by the Treaty of Nice and reinforced by the Treaty of Lisbon. It is not (yet?) one step further towards a new EU constitution attempt, rather a horizontalization process, which matches transnational and supranational standards for free trade and fundamental rights together (Walkila, 2016). It implies a radical revolution and redesign of the EU institutions (Hodson-Peterson, 2017), especially subsidiarity/exclusivity dilemma as shaped by the Treaty of Maastricht in 1992-93 (Garben-Govaere, 2017). As a matter of fact, it is necessary to recognize that the EU decisional sphere grows up as far as the single member states are not able to keep their autonomy due to interdependence standards.

This structural coupling implies that the "living law" does not root from the "blood and tears" of social and political action, as if politics were the embedment of law (just like for example in Ehrlich's traditional perspective); on the contrary, "living law" refers to autopoiesis of the law system, according to the Luhmann (2012-13) Teubner's (Rufino-Teubner, 2005) vision.

5. The system /environment paradigm is a law globalization/ nationalist populism paradigm for Unifying without Integrating.

Thus, the living law refers to the autopoiesis of the law system, rather than social and political actions in the “environment/Umwelt”. This is a key concept for the enlightened and enlightening law making, especially when the legislator is supposed to cope with complex issue, like increasing demand of democracy in the EU.

As a matter of fact, it is necessary to define ‘democracy’ conceptually (as a Grudbegriff) and embed this notion in the EU policy modelling framework.

First of all, democracy belongs to systemic Burgerrecht/citizenship rather than “Umwelts” Volksgeist. This is a basic prerequisite for democracy’s effectiveness, as required for example to have legally valid elections.

Second, democracy implies also freedom of thought /speech as defined by legitimate laws, rather than social sentiments.

Third, democracy implies citizens’ proactive participation within the self-referential procedural settings of the law system, as well as viable and functional levels of competence for managing all the possible options of any decision process.

As Luhmann points out “the increase in diversity within the boundaries of the global systems and the increase in possibilities set free by functional differentiation ... leads to a response at the semantic level of societal-descriptions. Relativism generates the quest for legitimation. Within the frame of the possible, society needs a narrower frame of the permissible. It produces a variety of devices to enclose what can then be regarded as meaningful expectations: a frame within the frame of the possible. This internal frame may be described in

terms of institutions” (Niklas Luhmann, 1997a). The structural coupling/interpenetration between the law system and the (shaped as citizen) psychic system, in the decision making process, is a mirroring double process; on one side, there is the law system’s self-referential selection about the allreferential topics provided by the (political) environment. On the other side, psychic systems manage to code their communication according to law system’s meanings and express their self-representations accordingly. If this structural coupling fails, citizenship implodes into Umwelts Volksgeist. Luhmann described this process in the chapter 16th of his well known book about Ecological Communication (Luhmann, 1989): no social movements had never been able to set the agenda of any system. In spite of the most violent streetfights, no G7, G8 or G20 ever changed their agendas or plans.

With all this in mind, let us try now to answer the following question: “What does democracy mean in the EU?”.

It means:

- 1 Direct participation of the EU people to the EU elections regardless their national appartenance.
- 2 A competent and skilled, well educated, building intensive citizenship labeled as hypercitizenship.
- 3 A procedural-deliberative lawmaking and policy modeling process, which can filter meaningful communication/meaningless noise and to filter macro impact shocks/ micro emotional contingent shifts.
- 4 Within a scenario made of global players, nation-states (at least in Europe) are not able any longer to choose the option of isolation: they will

forcely be under the influence of larger and more powerful entities.

5 Unifying the free trade sets (step 1), unifying the fundamental rights (step 2), is not yet full integration. Step 3 is to facilitate the EU people to cope with the complexity of our times and scenarios.

6. Horizontalization in a Nutshell.

Horizontalization is also a strategic escape from the false problem and meaningless dilemma between a technocratic top-down EU and a radical participative bottom-up EU. Horizontalization essentially means alignment and cutting off obsolete intermediate levels, which merely increase Williamson's transactional costs with no added value for EU procedural-deliberative and organizational process. From this point of view, interesting is Piattoni and Schoenlau (2015)'s contribution: they drew a valid bottom-up EU policy-modelling focused on the EU CoR (Committee of Regions), which highlights a key policy problem: The CoR is pivotal in the EU bottom up multilevel process as far as the Regions are considered key units; nevertheless, EU has also many metropolitan areas (Paris, Madrid, Barcelona, Rome, Bruxelles, Milan, Amsterdam, Lisbon and many more), which could become a strategic cluster, if their interconnerctions were horizontally empowered, passing by "higher" levels. Are both Metropolitan Areas and Regions necessary to a well-designed EU? In case of either/or selection, which should be empowered and which cut off? In which way the selection should take shape and place?

The answer of the supranational legislator is: the best solution is the most horizontal. This most likely means choosing the option Metropolitan Areas,

as many Regions are much more bureaucratic and less wealth generators than Metropolitan Areas, and many times Regions are even smaller than Metropolitan Areas (in Italy for example the two regions Valle D'Aosta and Molise together are much smaller than Rome).

alignment might allow a convergence of tangible and intangible assets in a EU evolutionary cycle of Demography- Food - Technology - Law&Policy Modelling, and would contribute to make of EU a more and more strategic, competitive/collaborative Global Player among other Global Players.

7. Epilogue.

Horizontalization is a three step process of the new EU lawmaking and policy modeling through free trade-fundamental rights and cosmopolitanism which might also shape a Leydesdorff's triple helix (<https://www.leydesdorff.net/lists/th.htm>).

Horizontalization means that Buergerrecht takes shape more and more away from its nation-state roots (Staatasangehoerigkeit) and turns into supranational status of hypercitizenship. This allows a reduction of the multilevel bureacracy of the EU and a faster and more effective alignment between the EU and the other Global Players that characterize the turbulent, complex and global scenarios of our times.

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Osservando l'ordine mondiale sistemico e sovranazionale

Observant l'ordre mondial systémique et supranational

Observing the Supranational Systemic World Order

*Reza Eftekhari**

Riassunto

L'approccio penale nella legge transnazionale si è principalmente basato sulle norme sostanziali affrontando serie sfide tra le quali spiccano ingannevoli teorici ordini del giorno, variazioni veloci e repentine nei modelli comportamentali del reato e controversie sui meccanismi globali della descrizione normativa. Il presente articolo suggerisce che i meccanismi criminali esistenti sono principalmente incrementati dalle politiche procedurali senza ulteriori riferimenti alla confusa diversità di nuovi modelli criminali. Il suo tema centrale è disegnare una cornice teorica affidabile di una rete sovranazionale che agisce su norme procedurali relative ai reati. La flessibilità e la contabilità nelle politiche amministrative e negli standard procedurali dovrebbero essere sviluppati pazientemente per quanto riguarda i risultati penali attuali. L'autore sostiene che l'implicazione e l'istituzionalizzazione delle norme sostanziali nel progetto sovranazionale sono due obiettivi facilmente raggiungibili grazie ad un'assistenza capillare. In altre parole, il teorema o i discorsi mancanti in grado di rivolgersi alle norme sostanziali, o che possono essere volte alla creazione di un dibattito fecondo che produca standard normativi penali per i reati globali, devono essere elaborati in una rete di cooperazione sistemica. C'è chi ribatterà citando il bisogno di una esplorazione tematica delle norme sostanziali le quali costituiranno la rete sovranazionale come approccio teorico con priorità sui meccanismi procedurali.

Résumé

Les approches pénales dans le cadre législatif transnational se sont focalisées sur les lois essentielles et ont été confrontées à d'importants problèmes tels que de programmes conceptuels fallacieux, de changements brusques et violents des modèles culturels et comportementaux de la criminalité, et de nombreuses controverses dérivant des mécanismes mondiaux de description normative ont surgi. Cette étude suggère que les mécanismes criminels existants sont favorisés à la base par des politiques procédurales démunies face à la confuse diversité de la nouvelle criminalité. Il est indispensable de définir un cadre théorique fiable avec un réseau supranational permettant d'agir sur les règles des procédures pénales. Flexibilité et responsabilité dans le cadre des politiques administratives et des normes procédurales devraient être les maîtres mots dans les décisions pénales actuelles. L'auteur pense que la réussite de l'implication et de l'institutionnalisation des normes substantielles dans le projet supranational est possible à l'aide d'un réseau de soutien. En d'autres mots, le manque de principes ou de discussions pouvant orienter les règles de fond ou aider à créer un débat fructueux aboutissant à un ensemble de normes pénales pour affronter la criminalité globale doit être affronté à travers un réseau de coopération systémique. Il faut également prendre en considération le besoin d'une exploration thématique des règles de fond qui pourraient former le réseau supranational d'approches conceptuelles donnant la priorité aux mécanismes procéduraux.

Abstract

Penal approaches in transnational law have basically focused on substantial rules and faced serious challenges of which the misleading conceptual agendas, fast and furious shifts in cultural and behavioral patterns of crime, and controversies about global mechanisms of normative description are remarkable. My paper suggests that the existing criminal mechanisms are, basically fostered by procedural policies without further references to the confusingly diversity of new crime patterns. Its central theme is to draw a reliable theoretical framework of a supranational network that acts upon procedural criminal rules. Flexibility and accountability in administrative policies and procedural standards should be patiently developed in relevant with the current penal findings. I argue that the successful implication and institutionalization of substantial norms in the supranational project is positively achievable through network assistance. In other words, the missing theorem or discourses that might address the substantial rules or be directed toward creating a fruitful debate that ends in normative penal standards for dealing global crimes must be reflected in a network of systemic cooperation. There will be also an argumentation regarding the need for a thematic exploration of substantial rules that would form the supranational network as conceptual approaches with priority over procedural mechanisms.

Key words: transnational law; penal approaches; supranational network; global crimes.

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1. Introduction.

International law represents a long history of collaborative thoughtfulness in Twenties to generate normative systems through frustrating meetings and communications. States' penal policies normally take divergent approaches and may argue convincingly that their independent norms do not allow an international legal treaty compromising their jurisdiction and sovereignty. Penal Law is substantially the law of boundaries and sovereign disciplines.

Legal systems respectively depend on the local mechanisms and jurisdiction, and states assume themselves constitutionally bound to revise and improve legal policies and procedures systematically. Approaches dealing with crime ranges in transnational level have basically focused on substantial rules and faced serious challenges of which the misleading conceptual agendas, fast and furious shifts in cultural and behavioral patterns of crime, and controversies about global mechanisms of normative description are remarkable. Generally two sets of legal thought have been advised for addressing crimes that are beyond the borderlines, International Criminal Law (ICL) and Transnational Criminal Law (TCL). States overwhelmingly articulate their increasing concerns about paradigm shifts in crime patterns both within and abroad their territories; concerns that are considered legitimate by legal thinkers and represent positivistic thoughts in criminology and objectivistic penal policy. The attempts to outline a theoretical frame for penal policy-modeling are deemed to focus on 'widespread use on generic concepts covering a multiplicity of different kinds of criminal activity'. Approaches dealing with these problems and focus intellectually on substantial rules have faced serious challenges of which we may refer to misleading

conceptual agendas, fast and furious shifts in cultural and behavioral patterns of crime, and controversies about global mechanisms of normative description.

A comprehensive dialogue to resolve the practical deficiencies arising from the dichotomy of procedural rules and substantial law in international level is proposed. Revising and redefining patterns that govern international criminal system as well as those related to civil justice is the prerequisite for every supranational mechanism of policy modelling in penal procedures. Existing patterns of network cooperation suggest a critical-analytical pathway to theorizing this intellectual discourse. Penal policies need to address the challenges that relentlessly confront the process of setting up normative penal instruments. The instrumental package may include the proper transnational responses to threats against legitimacy measures and enforcement mechanisms. There are argumentations regarding the thematic exploration of substantial rules that have formed the international treaties as conceptual approaches with priority over procedural mechanisms. The discourse is primarily supposed to be redirected toward comparative studies specially, discussing the prevailing patterns. Importantly, criminological studies with a diagnostic trend should examine the nature and effects of the so-called widespread crime patterns in international arena.

2. The Backgrounds of Supranational Penal Regime.

Basically the indispensable domination of empiricism and objectivism in policy-making approaches related to the criminal issues dictates practical challenges both locally and internationally. Besides, framing theoretical findings to prepare regional or international settings lead us to a

comprehensive study of criminological phenomena such as behavior patterns, social norms and institutional standards. That is the case with substantive rules which are significantly related to legal rights and are ends in themselves. The other aspect direct our attention toward procedural rules and doctrines that represent instrumental approaches (Mac Mahon, 2013).

Social changes in different arenas, globalization and the virtual environment that encompasses our real world have caused new crime pattern to rise with mostly a global nature. Actually, from a criminological perspective we, in our multicultural milieus, are continuously moving toward experiencing akin and common patterns of crimes. Paradigm shifts in times of relentless efforts for developing international systems of cooperation have created coexisting systems in the form of international treaties, international criminal justice systems and corresponding tribunals that exclusively rely on analogy for their justification, and at the same time, have created legal territories with their own laws and policies 'rather than being a mere substitute or complementary part of a national system (Tallgren, 2002). The singularity of criminal behavior as a matter of domestic law and jurisdiction has faded in modern social studies and found a comparative nature. Similar patterns, specially, those related to terrorist attacks and cyber-crimes are found everywhere, inspiring potential offenders and dormant mentalities. They simply pass over the boundaries and are beyond the state's predictive philosophy in laying down substantial codes of law.

The other part of the debate is domestic system normally interwoven with restrictive policies. They tend to deal with the crimes based on local policies. They administer the processes and resort

respectively to different and self-made methods. States enthusiastically legitimize their approaches like resort to violence and to means associated with extra-legal acts, targeting and killing suspects of terrorism (Cassese, 2001). The elimination or revision of such approaches is inevitably the prerequisite for setting up every supranational or international toolkit. In a nutshell, supranational agreements as a ground for some kind of international cooperation are considered among useful approaches for combating the uprising evil crimes that have brought about crisis in national security and global peace. International criminality is characterized by state involvement which may require to be addressed by the state itself and precisely the exceptional measure of international law superseding national law (Boister, 2003).

2.1. The Conceptual Framework.

Criminal law as an instrument or in the form of administrative toolkit that internationally directed toward attempts to shape supranational systemic order may face considerable challenges. One important challenge stems from the fact that the criminal law and global penal procedures are supposed to be positivistic disciplines of law "based on the fundamental importance of legality, the principle of *nullum crimen sine lege, nulla poena sine lege*" (Tallgren, 2002).

Basically procedural issues should be discussed in early stages of establishing any legal system (Mac Mahon, 2013). States and individuals concerned with the rules and regulations governing international legal institutions normally rely on substantial law as the philosophy and then deal with the mechanisms of administration. Therefore, the first steps toward forming or reframing structures for co-operation or anti-crime activities will lead us to the necessity of a conceptual framework of

prospective penal policies. The conceptual analysis referring to the substantial law is the idea of Transnational Criminal Law as a system of inter-state observations that is supposed to advise national penal laws (Boister, 2003). However, any supranational system for addressing criminal issues in that level should be necessarily a system of procedural law subsidiary to the national jurisdiction.

Apparently there are conflicting trends between sovereign states about how to deal with the different types of crimes that trespass general interest of involving ones. They also think and act distinctively in response to the transnational criminal acts. On the other side, they may find themselves legally bound to reform and administrative revision. States need to reorganize their institutions and policies to take effective steps for helping global society in combatting against terrorism. Penal policies that will provide the context for legal cooperation are accordingly a proper ground for creating a systemic network of procedural and administrative rules related to varying sets of transnational crimes. Among areas in which supranational agenda may suggest coordinative policies are the followings.

1. Prevention approaches are thought to include socio-legal observations that can encompass the common interests of involving states. Crime prevention programs and actions are apparently a matter of scientific and social concerns. Scholars and policy-makers that belong to different domestic systems can participate and exchange knowledge and experience through these inter-state programs. Unfortunately we cannot ascertain scientifically how much international institutions like UN Security Council or International Criminal Court have been successful in preventing transnational or

international crimes. Plus, it is not easy to predict or estimate realistically the prevention effects of these bodies (Tallgren, 2002).

2. Prosecution as a procedural practice will be administered in accordance with conventional policies and aligned with the rules outlined in bilateral agreements. States should be able to politically declare whether they are prefer to be a part of an international jurisdiction. Apparently regarding one of the most threatening crimes to local and global security, terrorism, sovereign states have shown their reluctance to defer to international jurisdiction dealing every act of terrorism (Megret, 2003). Hopefully such a willingness to agreed system of jurisdiction via supranational order seems likely to be achieved.

3. States involved in the program will adopt constructive policies toward supranational agreements. They would presumably attend gatherings and assemblies to foster inter-state cooperation. However, national sovereignty in some degrees has to be surrendered voluntarily when participating in a supranational order (Ouwerkerk, 2015).

2.2. Examined International Approaches.

International legal institutions have a comprehensive history of criminal law and procedures with a variety of penal issues. They resorted to the systemic legal measures in multiple situations to serve the justice and to be representative of the nations' willingness to execute transnational rules and obligations. In the second half of 20th century in particular, the world observed periods of development and expansion in the grounds of international cooperation between states regarding criminal matters (Tallgren, 2002) as a result of remarkable international tribunals. The preliminary movements has started in the 19th

century when international society tried to decisively respond to the major criminal acts and harmful behaviors in the form of obligatory conventions and this approach found a very strong and significant support from the involved states (Boister, 2003).

Considerable development and improvement were attained in the closing decades of 20th century including the complementary revision in the conceptual frameworks. Procedural rule like those related to fact-finding were clearly and positively reappraised (Peters, 2003). Additionally, the establishment of commissions for mutual cooperation in penal subjects and reconciliation of conflicting trends in procedural policies are very important though, as observed by scholarly works, financing of such bodies remain a serious issue (Peters, 2003). International institutions have been primarily engaged with the highly evaluated mission of creating normative standards for activities directed toward justice. Their laws tended to be the obligatory rules and as a basis for human rights and civil and criminal justice. Their procedures were supposed to be aligned with the global administrative approaches and with local jurisdictions. The effectiveness of criminal trials to serve as a historical and memorial foundation has inevitably been a cornerstone in contention of international criminal justice since its first experiments (Stahn, 2012).

3. Rethinking the Fragments of Supranational System.

Supranational order is a system based on procedures primarily. Substantial rules will be applied when we are in need of theoretical discourses to address the basic definitions. Criminal activities in international arena are confusingly diverse in nature. Supranational order engage

thematically with the concept of transnational crime. The remarkable advances in information and communication technologies have made states confronting and treating many kinds of criminal acts that substantially involve cross-border policies (Ouwerkerk, 2015).

According to Mueller, “transnational crime” is a criminological rather than a juridical term, articulated by the UN Crime Prevention and Criminal Justice branch (Boister, 2003). From a criminal legal point of view, it has been invented ‘in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country’ (Mueller, 2001). Generally, this branch of international law includes approaches that help us find the concepts which are agreed upon. That may be one step forward in creating a system that rely mostly on procedures.

Revising and redefining patterns that govern international criminal system, as well as those of the civil justice, is the prerequisite for every supranational mechanism. This paper suggests a critical-analytical pathway to theorizing this intellectual discourse. It will review the challenges that relentlessly confronts the process of setting up normative penal instruments. In a supranational level states basically search for new and effective policymaking models that would enjoy a cooperative theme while being able to address the needs for combating transnational crimes. The proposed system is very flexible and is plausibly able to make substitutions between national and supranational procedure patterns. The ideal proposition of supranational system has been once stated scholarly as “the establishment of a supranational institution in the area of penal law, ICC, which suggests that the traditional rejection of

supranational authority has been modified fundamentally and we are moving toward a society to which all individuals belong and through which all interests are expressed" (Mueller, 2001). The normative framework for penal law and policy provided by international institutions has showed periodical divergence from socio-legal standards that are constitutionally preferred by involving states. The proponents of efficacy of supranational system have to be advised about this challenge.

3.1. Civil Justice, Penal Procedures and Constitutional Concerns.

Should supranational penal system normatively adoptable with national substantial law and be subsidiary to rules of sovereignty? Can the involved states rely primarily on their rules of law and policy models to be a part of an inter-state legal entity? Since the supranational penal system executes the goals centrally defined as the way to international criminal justice it will work upon legal standards that are intrinsically unnegotiable in the sense of an agreement. First, the normative basics of human rights law, civil justice and constitutional maxims should be regarded in conformance with the procedural rules in any inter-state arrangement. In this new order states involved in this new order must, as it is expected politically, represent the rights and interests of their citizens (Megret, 2003) as well as other states. Secondly, sovereign states while confirming their status as parties in an agreement regarding penal system should have in advance gain a common understanding of what I refer to as the normative description of action policies which were principally theorized prior to any international engagement. And third, there is a significant difference between agreements concluded in penal justice or human rights law or any other international legal domain and contracts

related to political, military or economic subjects. Basically, in the former, state party needs to have the legitimate status and minimum standards of justice and right-protecting policies in its history affirmed prior to joining the convention. It has been wisely argued that a democratic society would lose the war against these enemies when it abandons its fundamental and constitutional principles (Gross, 2003).

Furthermore, corrective and restorative policies that have been practiced successfully in the local communities can provide a very useful and applicable agenda for the states that tend to participate in a supranational program. Currently, restorative, welfare-oriented and retributive approaches in criminology areas coexist and act in the United Kingdom, Australia and the United States (Barker, 2007). International and supranational agreements that have formed around substantial penal law can equally be rearranged based on those approaches. Restorative practices are dynamic circles in national penal law that can produce an interactive frame for dialogue and cooperation in supranational systems. These frameworks set external boundaries in healthy communities while fostering inner control and social discipline (Bailie, 2009). As a matter of fact, through these states may come into an arrangement for exchanging penal policies and achievements through these local experiences.

There also serious concerns about observing civil and constitutional rights that stem in the extra-legal measures and practices in dealing with international criminal threats. Terrorist attacks of September 11 and the afterward move toward war against terrorism raised the issues previously were at the edge of legal universe such as how a constitutional regime should respond to violent challenges (Gross,

2003), a question that has found a sharp reference to civil justice and human rights law.

3.2. Theoretical Response to the Queries about Efficacy.

The supranational system can perform its complementary task in cross-border penal issues and do the investigation and prosecution activities within a normative set of regulations. This is also the case with international criminal law whose norms lies in a space between traditional areas of international law and domestic jurisdiction (Stahn, 2012). However, the International Criminal system would not have responded to all of the expectations.

Some area of international criminal system concerned with institutional architecture are in need of a procedural reform. “They include, inter alia, the relationship between pre-trial and trial, the scope and use of live testimony, the timing of disclosure, use of interlocutory appeals, judicial management and interpretation/translation” (Stahn, 2012). The supranational system is not only supposed to lack these weaknesses but also enjoys the following features.

1. There are concerns about national policies that may be influenced procedurally by transnational codes. As an example, the fear to lose control over practices of criminal justice urged United Kingdom to decide to partially withdraw from EU programs for cooperation in criminal affairs (Ouwerkerk, 2015). In contrary, a prospect supranational order outline in the form an agreement for inter-state penal and procedural rules enjoy more efficacy and legitimacy among its actors. Supranational agreements can create an atmosphere of trust and reliability in which, like ell-operated EU conventions ‘based on the assumption of high level of mutual trust in each other’s criminal justice

system, judicial decisions that are handed down in other EU member state have to be recognized and enforced as if they would have been handed down in the domestic legal order’ (Ouwerkerk, 2015).

2. Institutions which are created to act as the powerful mediums related to a supranational penal order are precisely open to systemic interpretation, partly because there is no conflict between themes and objectives they are supposed to serve them (Robinson, 2003). Additionally, it can be very helpful in keeping global peace. Supranational system will limit the trends to use military power and particularly obligate the involved states to refrain from resorting to violent reactions against targeted criminals. It is said that states politically incorporate restrictions on their policies in use of force against prospect criminals within normal military operations (Goodman, 2013). This restrictions, if fostered by supranational penal system, would increase the possibility of keeping peace in conflict areas.

3. Developing some appropriate standards in the form of supranational system to serve the interests of justice and criminal prosecution may be a very frustrating affair. In this regard, there are similar arguments that international institutions like International Criminal Court have faced serious challenges both politically and philosophically in developing such standards for institutional justice mechanisms (Goodman, 2013).

4. Prosecution and the process of trial in International Criminal Law has been traditionally a matter of procedural law among divergent systems and predictably very slow and costly. The United Nations, the Assembly of State Parties and even judges and individual scholars have criticized the turtle-like speed of their procedures specially, the significant delay in bringing suspects to trial (Stahn,

2012). Supranational systems that are affiliated to the common legal institutions created by states or unions can act for prosecutions and related procedural activities more speedily and effectively because of their realistic nature.

4. Conclusion.

Addressing divers-range crimes that cover cross-border activities is constantly appealing for new approaches in transnational level. In this regard, scholars have many critical points to discuss; the misleading conceptual agendas, fast and furious shifts in cultural and behavioral patterns of crime, and controversies about global mechanisms of normative description. Here I suggest that the supranational paradigm in forming penal system has proved more helpful than the two sets of institutions advised for addressing crimes that are beyond the borderlines, International Criminal Law (ICL) and Transnational Criminal Law (TCL).

Furthermore, states present their increasing concerns about paradigm shifts in crime patterns both within and abroad their territories and the need for supranational agreements. Approaches dealing with these problems and focus intellectually on substantial rules have faced serious challenges of which we may refer to misleading conceptual agendas, fast and furious shifts in cultural and behavioral patterns of crime, and controversies about global mechanisms of normative description. Revising and redefining patterns that govern international criminal system as well as those related to civil justice is the prerequisite for every supranational mechanism of policy modelling in penal procedures. Existing patterns of network cooperation suggest a critical-analytical pathway to theorizing this intellectual discourse. In this paper, I try to portray theoretically a framework for penal

cooperation. International Criminal System and Transnational Criminal law have their own deficits both in theory and practice. Generally speaking, a supranational system may be activated based on bilateral or multilateral agreements. The supranational system can perform its complementary task in cross-border penal issues and do the investigation and prosecution activities within a normative set of regulations. It is characterized as having efficacy in enforcement mechanism, legitimacy doctrine, a handful of agreed upon agendas for interpretation and translation, and finally, a set of procedural rules.

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Crimine e vittimizzazione nell'ordine mondiale globalizzato

Crime et victimisation dans un monde globalisé

Crime and Victimhood in a Globalized World Order

*Emanuela Del Re, Seema Shekhawat**

Riassunto

La globalizzazione ha imposto una ridefinizione del reato, dalla schiavitù alla corruzione, al terrorismo e altro. È possibile elaborare un approccio trasversale e convenzionalmente condiviso nella società globalizzata che permetta a tutti gli attori implicati di interpretare correttamente il comportamento criminale contemporaneo e agire conformemente, in particolare in relazione alla nuova idea di vittima? Gli autori cercano di rispondere a questa domanda cruciale sollevando problematiche quali il ruolo dei singoli paesi così come delle organizzazioni internazionali nella definizione di cornici legislative globali e valori condivisi. Una forte ondata anti globalizzazione, emersa come reazione agli eventi recenti quali migrazione, conflitti asimmetrici e altro, sta imponendo una seria riconsiderazione delle strutture esistenti, delle procedure e delle strategie. Le attuali strategie, gli strumenti, gli approcci del legislatore sono in grado di fornire le risposte necessarie alle pressanti richieste crescenti e al riconoscimento delle comunità locali, ma allo stesso tempo al bisogno di mantenere un equilibrio a livello globale? Tramite riferimenti a case studies come l'attraversamento delle frontiere dei migranti e dei rifugiati, esaminati da prospettive sia globali che locali, gli autori vogliono fornire degli spunti per un approccio innovativo volto ad una riformulazione del fenomeno in un ordine globale in mutamento.

Résumé

La globalisation a imposé une redéfinition du crime – de l'esclavage à la corruption, en passant par le terrorisme et autre. Est-il possible d'élaborer une approche transversale conventionnellement partagée de la société globalisée permettant à tous les acteurs de premier plan d'interpréter correctement le comportement criminel contemporain et d'agir en conséquence, spécialement en ce qui concerne la nouvelle conceptualisation de victime ? Les auteurs essaient de donner une réponse à ce problème crucial, c'est à dire la question du rôle de chaque pays ainsi que des organisations internationales dans la redéfinition d'un cadre législatif global et de valeurs partagées. Une forte vague anti-globalisation, émergée en réaction à des phénomènes récents tels que migrations, conflits asymétriques et autres, impose une reconsidération sérieuse des structures, procédures et stratégies existantes. Les stratégies actuelles, outils de travail et approches de législateurs sont-ils aptes à fournir les réponses nécessaires aux pressantes demandes croissantes de reconnaissance de communautés locales et, en même temps, à l'exigence de maintenir un équilibre au niveau global? En se basant sur des cas d'étude tels que migrants et réfugiés, les auteurs entendent fournir des éléments en faveur d'une approche innovante pour recadrer ce phénomène dans un contexte global en évolution.

Abstract

Globalization has imposed a re-definition of crime – from slavery to corruption, to terrorism and other. Is it possible to elaborate a transversal and conventionally shared approach in the globalized society that allows all relevant actors to interpret contemporary criminal behavior correctly and act accordingly especially in relation to new conceptualization of victim? The Authors try to answer this crucial question raising issues such as the role of single countries as well as international organizations in defining global legislative frameworks and shared values. A strong anti-globalization wave that has emerged as a reaction to recent events such as migrations, asymmetric conflicts and other, is imposing a serious re-consideration of the existing structures, procedures and strategies. Are the current strategies, toolkits, approaches of legislators able to provide the necessary responses to the raising and pressing demands of recognition of local communities and at the same time to the need to maintain an equilibrium at global level? Through references to case studies such as migrants and refugees border crossing, examined from both global and local perspectives, the Authors intend to provide inputs for an innovative approach to reframing this phenomenon in a changing global order.

Key words: crime; victims; globalization; migrants; refugees.

"Would you believe it, Ariadne?" said Theseus "The Minotaur scarcely defended himself"

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1. Globalized crime.

The correct conceptual framework to define legal, deviant and criminal behaviors in a globalized world order is a challenge. The current debate on globalization has an effect on economic and political processes and also on victimhood and crime, but globalization remains an ambiguous concept, to use Hay and Marsh words, and needs to be demystified (Hay, Marsh, 2016).

There is no conventional approach amongst theorists in different areas of social sciences on the definition of globalization (Ning, 2016). Milanovic offers an interesting synthesis of the issue: “Faced with such a complex constellation of theoretical and semantic propositions, one must emphasize that globalization is not merely an idea, but first and foremost a fact” (Milanovic, 2016). The emphasis on the concrete dimension of globalization is crucial, yet the complexity of the phenomenon demands conceptual clarification especially when attempting to explore its relation to deviant, criminal and (il)legal behavior.

Amongst the consequences of globalization – positive and negative – there is the fact that it occurs unequally in the world, creating a process of differentiation and polarization. A phenomenon reflected in Roland Robertson's known neologism *glocalization* (Robertson, 1995), and in the distinction of countries into core, semi-periphery and periphery (Van Derr Mer, 2017) with social-political-economic consequences.

Globalization implies a process of “inclusion/exclusion”: an on-going process of division of countries, social groups and people into the excluded and the included that is sustained by many. Bauman avoids using the definition

“included/excluded”, preferring the terms “tourists” for the included, and “tramps” for the excluded, in this way emphasizing that these two groups represent two worlds, two perceptions of the world and two strategies (Bauman, 2013). Luhmann had imagined already in the 1990s a worst possible globalization scenario based on a meta-code of inclusion/exclusion, that would have had as a consequence that some people would be included into the functioning system and others would simply try to survive. The excluded (countries, social groups, persons) would constitute a humus for crime and deviance (Luhmann, 1998). The causal process exclusion-crime is possible, given that the emergence of crime - structure, scale and dynamics – depends on social, economic, political demographic and other factors.

Human interaction has definitely undergone a process of acceleration, and has created new and favorable contexts for deviant and criminal behaviors. Viano sustains that the global circulation of capital and the promulgation of neo-liberal economic policies is generating an ever-growing gap between the wealthy and the poor, enhancing the attraction of deviant and criminal choices (Viano, 2010, pp. 64-65). A vivid portrait of the context is offered by Rotman who sustains that criminal and deviant activities have proliferated, and the threat of violence has increased in intensity and scope as a result of globalization: “the advances in communications and transportation technology, the openness of borders and the computer networks that make these borders irrelevant, reduced state authority, cyber-finance, and offshore banking have enabled organized crime to create flexible, global networks and thus evade state regulations and cumbersome international law enforcement”

(Laverick, 2016, p. 23). Rotman argues that the transnational expansion of criminal organizations has increased the level of violence: "Organized crime has created a market in violence, subcontracted to and perpetrated by local criminals" (Rotman, 2000, p. 3). Laverick argues that crimes and deviant behaviors are consequences of globalization (Laverick, 2016, p. 5) and identifies those types of behavior that can be included under the term "international crimes". Referring to slavery and piracy in particular, Laverick highlights the association modern society has made "between weak states, international and transnational crimes and terrorism leading towards the development of an international security consensus" (Laverick, 2016, p. 23). This, in turn, helps to provide a strong motivation to understand why criminal behavior occurs in order to elaborate international strategies to prevent them.

The geographical dimension is also an important factor in the definition of crime defined as global. Karofi and Mwanza sustain that a crime is a global issue if it meets at least one of specific criteria: a) a particular crime presents an accentuating character in most nations on the globe, not necessarily involving actors who perpetrate the crime across borders; b) the crime is trans-border and the actors cross frontiers (Karofi, Mwanza, 2006). Frontiers have become virtual due to technology and easy mobility, Findlay sustains (Findlay, 2013; Findlay, 2000).

Globalization has a double effect: on one hand globalization processes give an impulse to crime and criminal behavior; on the other, criminal behavior at a global level provokes an effect on globalization. This is what the Human Development Report 2016 points out sustaining that they constitute a real threat (UNDP, 2016). This is demonstrated by the

growing influence of organized crime: estimated to gross 1.5 trillion US dollars a year: it competes with multinational corporations as a true economic power. Moreover, the threat derives from the fact that global crime groups are able to intrude politics, economics and the forces engaged in contrasting crime. Their networks expand easily in globalization and prosper.

Fundamental elements of crime are the relationships that develop in particular contexts with specific dynamics. These relationships are motivated by economic profit that justifies recurrence to crime (Walters, 2015). There are contradictions inner to globalization as an economic process that can affect the individual's sense of being: the consequence would be that the individual would resort to criminal behavior as a choice (Kinnvall, Jonsson, 2014). Findlay argues that the globalization of capital from money to the electronic transfers of credit, of transactions of wealth to the exchange of property, information technology and the seemingly limitless expanse of immediate and instantaneous global markets have enabled the transformation of crime beyond people, places and even beyond victims: "crime is now as much a feature of the emergent globalized culture as is the feature of every other aspect of consumerism" (Findlay, 2013).

Globalization has fed new forms of crime, especially in areas that were not in contact with the world before. An example is given by Albania, that after the fall of the regimes in 1991 and the consequent opening of the country to the world, also imported forms of crime such as human trafficking and cultivation of hashish, with the creation of organized crime in cooperation with transnational criminal groups. Another example is the war in Kosovo, where new forms of criminal activities

were created such as brothels to host women trafficked from Moldova and Ukraine for the use of the international armies (Del Re, 2003).

The development of different types of deviance as a consequence of globalization, implies also the development of different types of social control.

The changes prompted in crime by globalization, have occurred also in criminal justice. Given that crime is undergoing a process of internationalization, also domestic criminal systems must adjust to the new global demands. An interesting example is a law introduced in Italy in 2003 on illicit trafficking of human beings. The law was motivated by the fact that the increase in illegal migration to the country had inspired new forms of criminal exploitation of trafficked human being - even to the point of enslaving them - which were not diffused in the country before (Law 11 August 2003, n. 228, "Measures against the trafficking of Human Beings", *Gazzetta Ufficiale* n. 195, 23 August 2003, <http://www.camera.it/parlam/leggi/03228l.htm>).

There is a risk that in a globalized crime system, the lack of international coordinated actions and norms would allow the perpetrators to escape prosecution and the victims without legal recourse (Letschert, 2011). What is strongly needed, affirms Letschert, is the development of new national and international arrangements to protect and empower actual victims.

Types of crime such as organized crime, drug trafficking, terrorism and human trafficking, have taken advantage from globalization; this has required the elaboration of new strategies for social control to fight against the new forms of crime and deviant behavior. Globalized forms of control are those that imply multilateral agreements and participation. For example: the creation of Europol

in 1998; international laws and regulations to tackle organized crime, human trafficking, drug trafficking, terrorism, money-laundering and other; international agreements on issues regarding crime and criminals, including for instance the revision of UN resolutions according to the new global scenario, such as the condition of inmates in penitentiaries and penal colonies (revision of UN Resolution on the "Standard Minimum Rules for the Treatment of Prisoners"); the development of restorative justice and juvenile justice; the universal tendency of abolishment of capital punishment and other. The concept of punishment itself has undergone changes, as well as the role, rules of engagement and actions of police forces, with analysts observing an increase in repressive measures on the part of police and criminal justice in particular against the marginalized.

2. Victimhood in globalized societies.

Together with the changes that the concept of crime has undergone over the course of history, the concept of victimhood had also undergone a process of redefinition both in terms of the causes of such redefinition and of the meaning that the concept has acquired in relation to globalization (Loeber, Huizinga, 2001; Del Re, 2009).

According to victimologists (Dillenburg, 2007), the level of vulnerability of individuals or groups is determined by social-economic-political factors. For example, family factors - low socioeconomic status, parental crime, single-parent household, poor parental supervision - as well as individual factors - low education, involvement in gang or group fights, drug use, drug sales, being oppositional, hyperactive, or impulsive, and association with delinquent peers - are related to increased risk of victimization (Van Reemst, Fisher, Van Dongen,

2013). While the debate on the “victims of globalization” especially under the economic point of view is lively, the literature on the changes that the concept of victim has undergone because of globalization is scarce.

Globalization has produced new types of victimization, and as a consequence new forms of legal responses have been created. Wemmers and De Brouwer analyze in particular the creation of a new international criminal institution in The Hague (the Netherlands), in 2002: the International Criminal Court (ICC) (Wemmers, De Brouwer, 2011). The ICC began functioning when the Rome Statute came into force, establishing four core international crimes: genocide, crimes against humanity, war crimes, crime of aggression. The ICC can only investigate and prosecute the four core international crimes when States are “unable” or “unwilling” to proceed and the jurisdiction of the court is complimentary to the jurisdictions of domestic courts. Very important is to underline that the crimes listed are not subject to any statute of limitations. Hundred-twenty-three countries are part of the Rome Statute. The ICC is an interesting example because the concept of victimhood does not treat the victim as passive but recognizes the victim’s rights through victim participation and reparation. This has promoted a new approach to the concept of victim. Dignan points out that the common general association between the terms “victim” and “crime” is a recent phenomenon (Dignan, 2005). In the past “victim” was mainly associated with general misfortune. The term itself that derives from the Latin word for *victima*, that is the sacrificial animal, has perpetuated the image of “sacrificed ones” for those who have been the object of crime or abuse in all the Western languages (Van Dijk, 2009) as well as in modern

Hebrew and Arab (Fletcher, 2007). During the post-war period, when policymakers began discussing the concept of welfare state, the “victims of misfortune” for whom they intended to make provision were those oppressed by the so-called five “giant evils of society” that were want, disease, ignorance, squalor and idleness, except crime (Mawby, Gill, 1987). Victims of crime have remained virtually invisible until recent times when they have been recognized as a distinct social category in their own right, and the first coordinated responses have been formulated to address their demands.

It is true that the ICC deals with mass victimization such as genocide and that the issue of victims of conventional crime need to be addressed: this raises the issue of what convergences there are between victims of conventional crime and the victims of mass crimes. In any case, there is a continuous reference to international instruments such as the 1985 UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. However, the UN Declaration is largely based on the needs of victims of conventional crime. The concept of victim’s rights in criminal proceedings is still a new concept that needs to be operationalized properly in the new globalized context. Despite various examples since the II World War starting with the Nuremberg Trials, followed by special tribunals such as Rwanda, Former Yugoslavia, Sierra Leone – the victims have continued to be considered and used mainly as witnesses. A change has occurred with the Rome Statute and, Ferstman (Ferstman, 2017) points out, to a certain extent, with the regulations of the “Extraordinary Chambers in the Courts of Cambodia” (see: <https://www.eccc.gov.kh/en/node/39457>) and the “Special Tribunal for Lebanon” (see:

<https://www.stl-tsl.org/en/>. She says that until recent times studies were mainly focused on the victims' perceptions of international criminal proceedings, victim and witness protection, the ability of victims to participate in proceedings, and new possibilities for victims to claim reparations. The new globalized approaches have also had an impact on studies, because now that there have been several years of court proceedings before the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon, it is possible to analyze the impact of the new procedures and propose new measures (Bonacker, 2014).

Is an international overarching legal framework needed beside domestic law systems?

Letschert (2014) stresses upon the changes in the concept of victim brought about by the definition of Human Security delineated by the UNDP. The "Human Development Report" of 1994 has introduced the concept of Human Security that focuses on people (UNDP, 1994, p. 22; Gomez, Gasper, 2013). The new concept implies a concept of security that transcends the limits of the paradigm security-conflict-territory, promoting an holistic view of the concept of security related to human beings, implying a number of aspects including: "safety from chronic threats such as hunger, disease, and repression as well as protection from sudden and harmful disruptions in the patterns of daily life – whether in homes, jobs or communities" (UNDP, 1994, p. 23).

Part of this concept of human security is also the relation between individuals and legal frameworks and institutions, especially in presence of crime.

Letschert reports that according to the victims' movement - that over the past twenty years has had considerable impact on policy – "criminal justice

systems across the world should serve the interests of those directly harmed by crime besides or even before those of the state. From this perspective, key victim-centered functions of criminal justice are access to justice, information, recognition and reparation. Furthermore, victims are entitled to social support to be reinstored into their former life" (Letschert, 2014, p. 3).

An important step has been made with the elaboration of the "Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" that was adopted in 2005 by the UN Commission on Human Rights (available at: <https://www.un.org/ruleoflaw/blog/document/basic-principles-and-guidelines-on-the-right-to-a-remedy-and-reparation-for-victims-of-gross-violations-of-international-human-rights-law-and-serious-violations-of-international-humanitarian-law/>). Together with the abovementioned "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", according to Letschert the two documents have set the global standard for the treatment of victims in national and emerging international criminal law, operationalizing the concept of human security: "they could be seen as important operationalizing of the concept of human security in the domain of criminal justice. Improvements in procedural rights of crime victims are embedded in the legal traditions and structures of domestic criminal justice systems. Where domestic arrangements of criminal justice are replaced or supplemented by international criminal law, existing provisions for crime victims must be transferred to these new settings" (Letschert, 2014, p. 3).

3. Local versus global perspectives.

The strong centripetal attraction force that some countries and organization are exercising at global level as regards crime and victims, is challenged by domestic legislations reflecting cultures and identities.

In the world a dangerous trend is developing that confuses religion and related values with local practices. In reality Islam, for instance, as a religion, is distant in its values from some local practices and traditions that are in contrast with the universal concepts of Human Rights.

The harmonization of legislation is not easy given that some issues are approached on parallel tracks by different countries. For instance, The Arab Charter on Human Rights (ACHR) adopted by the Council of the League of Arab States on the 22nd of May 2004, affirms the principles contained in the Universal Declaration of Human Rights, the UN Charter, the Cairo Declaration on Human Rights in Islam, The International Covenant in Human Rights. The Charter came into force in 2008 (http://www.europarl.europa.eu/meetdocs/2009_2014/documents/darp/dv/darp20100504_06_/darp20100504_06_en.pdf). Despite the converging principles, in 2008 Louise Arbour (<https://news.un.org/en/story/2008/01/247292-arab-rights-charter-deviates-international-standards-says-un-official>) affirmed that the Arab Charter was incompatible with the UN definition of Human Rights especially as regards the rights of women, and of children as regards death penalty (Del Re, 2017, pp. 283-285).

The reason why this case is recalled here, is that one of the main issues in the globalized dimension of crime is the fact that the local perspective often finds it difficult to harmonize with the global

approach and vice-versa, considering that “global” is a definition that becomes in many cases controversial. A debated case is that of Russia, where the concept of Sovereign Democracy, as affirmed by Lettinga and Van Troost, admits the universality of human rights but “reserves the sovereign right to interpret and implement them without external oversight” (Lettinga, Van Troost, 2017). Lettinga and Van Troost talk about “multiple civilizations approaches” sustaining that this approach has a weak point because it prioritizes particularism over universalism.

These issues are delicate and imply rational reasoning as well as a number of ideological issues, generalizations, superficial prejudices and other cultural related distortions. However, it must be pointed out that finding common legal responses to the phenomenon of global crimes and to the protection of victims of global crime is difficult.

In a comparative approach, it emerges that despite the difference in the approach between the countries in the world to globalized crime, the legal systems in many of the so called developing countries do not necessarily diverge from the Western mainstream. Besides, many new legal systems in developing countries are designed on the basis of a comparative approach taking inspiration from existing juridical codes of other countries such as for instance the case of Albania in the 1990s taking inspiration from European Law systems drawing the new codes with the help of European experts. In other cases, the new legal system is the product of a process accompanied step by step by international institutions as in the case of Kosovo after the war: the European Union Rule of Law Mission in Kosovo (EULEX) launched by the EU Council in 2008 was started to “guarantee that all members of society benefit from the rule of law”

(<http://www.eulex-kosovo.eu/>). It has received a new mandate until 2020. Missions such as EULEX have a strong symbolic meaning on two levels: a) because they assure a status to the deliverer (in this case the EU) to be an important security actor in world politics (Dursun-Okzanca, 2009) and b) they offer a certification to the country that is developing the legal system when it aspires to a recognition by a specific circle of countries (in this case the Western countries).

This reflection raises the issue whether a global law is emerging from the multi-leveled acceleration of human interaction.

Le Goff wonders whether a global law is emerging in the global economy, that is the result of a harmonized scheme of converging national laws and practices, international custom and values (Le Goff, 2007). How to define “global law”? Does global mean that this law is multicultural, multinational, multidisciplinary? Is it well defined yet? There is no formalized structured legal system at global level except for institutions such as, amongst others, the above mentioned International Criminal Court. The problem is that even when there are UN Resolutions that are approved by many countries, rarely they are signed and implemented by all the countries.

Le Goff simply points out that there is no “global code” nor a “global Court of Justice” (Le Goff, 2007, p. 130). Yet the concept exists, but it constitutes a direction rather than an achievement for the moment. The International Criminal Tribunal for the former Yugoslavia (ICTY), constitutes a synthesis of this approach. Le Goff refers to the words in the ICTY text that lists its core achievements: “has expanded the boundaries of international humanitarian and international criminal law [...] It has created an *independent system*

of law, comprising elements from adversarial and inquisitory criminal procedure traditions” (<http://www.un.org/icty/cases-e/factsheets/achieve-e.htm>).

This would sustain the idea that a global law is possible, but despite the effort by state and non-state actors and international organizations, the concrete realization of an integrated global law system is far from becoming a concrete reality. The idea that law would transcend state boundaries is not new but is perceived as scary by many who oppose globalization. Michaels, amongst others, talks about ‘transnational law’ but although the form changes, the substance does not (Michaels, 2013).

Do we need a global law? The anti-globalization movement – with its many souls – is an important actor in this issue because it is the indicator of a minority approach that balances the global trend defined by the Bretton Woods institutions. The anti-globalization movement is the indicator of a social-political-economic awareness that the decision-making process is strongly influenced by these institutions also at legal level. Moreover, the anti-globalization movement has developed its own system of intervention in society “thus represents the formation of a trans-boundary polity organized around meta-state institutions, albeit in a critical role” (Garcia, 2005, p. 13).

The challenge of finding an equilibrium between local and global becomes even more serious when law enforcement is involved, considering that crime in the globalized world has revealed a huge number of nuances and interpretations. Globalization, however, especially in its digital dimension, is a powerful agent of change. One example is the concept of rape, that is changing in several legislations. An important example is the so called

“Amina Law” in Morocco, a controversial article that allowed rapists to avoid charges if they married their victims (see <https://www.aljazeera.com/news/africa/2014/01/morocco-repeals-rape-marriage-law-2014123254643455.html>). A multi-directional global campaign brought to the repeal of the law. The campaign was multi-directional because the fact that the Moroccan society had become more aware of the issue, was due to the fact that part of it had denounced the fact, and this had happened because it had been influenced by other legal interpretations of rape through global media. Finally, the global society had become aware of the situation in Morocco reacting to it, because the global media had been sensitized by the Moroccan civil society.

4. Global Crime and Vulnerable groups.

Migrants, refugees are vulnerable groups and vulnerable groups protection has become a global issue in a number of ways. From a geographical point of view: there is no region of the world not affected, whether as a producer or a receiver of refugees, or as a country of transit. As regard the causes of migration, we can refer to forced migration, due to persecution, conflict, environmental issues and violation of human rights; economic migration; voluntary migration; and, in several cases, people migrating for different reasons but following the same routes at the same time (Del Re, 2017). Taking into account the number of migrants and refugees, according to the latest data diffused by the UNHCR (2017), there are 65.6 million persons forcibly displaced due to conflict, persecution and human rights violations worldwide, of which 40.3 million are Internally Displaced Persons (IDPs), 22.5 million are refugees and 2.8 million are asylum seekers. Further, the total

number of people estimated to have been displaced globally is the highest on record.

The conditions of life marked by experiences of victimhood are relevant determinants for the decision to migrate. In literature they are referred to as push factors. The main areas of push factors nowadays conventionally referred to are: conflicts and security; economic factors – poverty; climate change. Threats such as wars and conflicts, killings of relatives or neighbors, displacement, political oppression, continuous ethnic or religious discrimination, natural or environmental disasters, the loss of basic life resources (economic, social, healthcare, etc.), pervasive corruption or chaotic economic or social life conditions are harmful. According to article 18 of the UN Basic Principles (1985), desperate life conditions can be considered as victimologically relevant.

An important aspect of migration is border crossing. Violence in the border areas is too often regarded as normal and thereby incidents of violence against female migrants, refugees, trafficked and border residents often remain underreported and unattended (Shekhawat, Mahapatra, Del Re, 2018). The vulnerable communities, and more specifically women, get exposed to state-centered rigid bordering practices, paving the way for their alienation as well as exploitation. When women cross the border, their vulnerability emerges critically: they lose their point of orientation; they lack knowhow; they can become the object of blackmailing to have access to resources; they are sexually harassed and abused (Del Re, 2018, pp. 25-26).

Vulnerability emerges in a number of ways. For instance in the case of women who are victim of human trafficking (UNODC, 2018), on one hand they are more protected than normal migrants by the

passeurs, because they are valuable goods to be put on the market. On the other hand, once they arrive at their destination, these victims are systematically exposed to continuous, systematic victimization. Besides their “core” victimization through sexual or labor exploitation, they suffer from intimidation, coercion, abduction, threats, use of force, deceit, fraud, etc. An additional component is the increased threat of indirect victimization in cases where family members or friends in the victims’ home country become the subject of intimidation or extortion (Shekhawat, 2018; Lee, 2014).

All groups of migrants are explicitly vulnerable and, at the same time, exposed to increased risks of victimization. It is not too speculative to assume that only a very small minority of migrants have never suffered from any victimization throughout their journey. On the contrary, many of their personal biographies would disclose horrible records of victimization and trauma experienced at home, during transit and even later in their place of destination. In addition to specific risks related to their status as migrants, they also face the same risk as any other citizens of becoming victims of conventional crimes.

The issue that must be raised here is in what way globalization plays a role in the process of victimization of vulnerable groups and individuals. Is international law able to protect them? An important example are the 2000 Palermo Protocol no. 1 to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (see <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>) on trafficking in human beings, and *Protocol no. 2 against the Smuggling of Migrants by Land, Sea and Air* (see

https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf), on the smuggling of migrants. Protocol no.1 is strongly centered on victim protection and victim support, Protocol no.2 is an instrument of criminalization, although it includes at least a few provisions addressing some victimological aspects, in particular in its article 5 on the fact that migrants shall not be liable to criminal prosecution for the fact of having been smuggled (United Nations, 2000).

Bar-Tal et alii (2009) argue that just as individuals experience a sense of victimhood because of personal experiences, communities such as ethnic groups may also experience this sense. It may result from events that harm the members of the collective because of their membership, even if not all the group members experience the harm directly. The sense of self-perceived collective victimhood is based on and reflected in the sharing of societal beliefs (Bar-Tal, 2000), attitudes and emotions. These provide one of the foundations for a societal system. Shared societal beliefs, such as beliefs about victimhood, serve as a basis for construction of a common reality, culture, identity, communication, unity, solidarity, goal-setting, coordinated activities, and so on (Merton, 1957; Parsons, 1951). Moreover, societies may choose to internalize past harms and to “transform them into powerful cultural narratives which become an integral part of the social identity” (Robben, Suarez-Orozco, 2000, p. 23). Finally, the collective sense of victimhood becomes a prism through which the society processes information and makes decisions.

This is where local and global can be best harmonized.

5. Preparing global society for 2030.

Although there is no conventional description for the concept of global crime, some converging elements can be identified. In general the concept to which international documents refer is transnational crime. CATOC, the United Nations Convention against Transnational Organized Crime entered into force in 2003, affirms that a crime is transnational when it is committed in more than one State; if it is committed in one State but part of its preparation, organization, planning or control takes place in another state; if it is committed in a State but involves an organized criminal group engaged in criminal activities in more than one state; if it is committed in one State but it substantially affects another State.

The debate on transnational crime implies a reflection on the relation between globalization and organized crime. Globalization has created opportunities for the organized crime in the world because it has allowed the expansion of criminal interests both territorially and in terms of domain.

The more expansion, the more need for control. The legal framework has also become a challenge because of the need to define jurisdictions, amongst other issues.

The definition of a new agenda needs to start from a new concept of “global” in approaching crime. There is a trend to create international tribunals, to increase cooperation between states on criminal issues. Is it possible to globalize democratic values and human rights putting them at the basis of juridical systems of all the countries in the world? Until now the focus has been put on regulatory initiatives. The problem is that interdependence is still a difficult concept to accept beyond economic transactions. The new necessary engagement should be in the promotion of a shared development (Del Re, 2017). Global crime prospers on inequality that

is an incentive for local crime and is functional to transnational crime.

Many sustain that a criminal justice reform is essential to the 2030 UN Agenda for Sustainable Development (SDGs). The UN Agenda 2030 comprises 17 Sustainable Development Goals (SDGs) and 169 targets. Amongst the many issues, *Prison Reforms* sustains that one important problem is the increased number of inmates due to discriminatory juridical systems in many countries (Penal Reform International, 2017).

One of the most important goals of the Agenda 2030 is Goal 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. The UN lists all the progresses that have been made in 2017 in relation to this goal. While violent conflicts have increased in recent years, homicides have slowly decreased and more citizens around the world have better access to justice. Yet the progress promoting peace and justice, together with effective, accountable and inclusive institutions, remains uneven across and within regions (see <https://sustainabledevelopment.un.org/sdg16>).

Justice reform is fundamental for all the Goals in the Agenda: Goal 1 on Poverty, Goal 4 on Gender equality, Goal 10 on reducing inequality and discrimination.

Crime and victimhood in a globalized world order call upon societies to be tackled. Globalization emerges here as an important tool that should be used in a more productive way especially as an instrument to combat crime. Education is an important social agency in crime prevention as well as systematic information on the effects of crime on individuals and societies. A global sense of responsibility is needed, although the concept is

highly ideological in both the anti-globalization movement and the pro-globalization discourse.

A concluding remark intends to draw the attention on the concept of sustainability itself, wondering on the sustainability of globalization as a consequence. Agenda 2030 intend to promote a global approach to the development of sustainability. The problem is that it replicates a model of intervention based on a socio-economic approach that does not envisage crucial risks such as “unsustainability” deriving from increased demography and others, on which crime and victimhood in the globalized world order are directly dependent.

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Crimini dei colletti bianchi e strategia globale contro la corruzione

Crimes des cols blancs et stratégie globale contre la corruption

White Collar Crimes and a Global Strategy against Corruption

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Riassunto

Lanciata nel 2004 dalla Politica Federale del Brasile, l'operazione chiamata *Lava Jato* è diventata una task force al servizio di diverse istituzioni brasiliane in collaborazione con le organizzazioni internazionali. Le indagini sui reati, inizialmente incentrate sul riciclaggio di denaro, sono state ampliate per andare a coprire i reati di corruzione dei pubblici ufficiali e dei politici. In ogni caso i risultati della *Lava Jato* si basano su una precedente strategia delle autorità brasiliane volta alla promozione dell'allineamento della cornice legislativa e istituzionale alle raccomandazioni internazionali per combattere la corruzione e i reati economici. L'articolo ha inizio analizzando le politiche pubbliche brasiliane adottate per identificare legalmente i reati dei colletti bianchi e indirizzarne le fasi critiche come la prevenzione, il monitoraggio, l'indagine e la loro persecuzione, nonché il recupero dei proventi. In secondo luogo, indaga le possibili deviazioni delle azioni implementate dal ramo Curitiba dell'Operazione *Lava Jato*, che erano principalmente guidate dalla pressione dell'opinione pubblica e dall'interferenza ideologica. Inoltre vigila sull'impatto economico delle azioni nazionali anticorruzione confrontando i risultati dell'operazione brasiliana *Lava Jato* con il suo equivalente italiano *Mani Pulite*. Sulla base delle esperienze italiana e brasiliana, lo studio propone misure legislative aggiuntive a livello globale, volte a neutralizzare l'interferenza dell'opinione pubblica locale e degli interessi politici, con lo scopo di ridurre i risultati economici negativi generati da un'indagine erronea del reato e la persecuzione dello stesso. Il presente documento delinea il concetto di reato e quello di vittima in un contesto globalizzato, in linea con il programma 2030 dell'ONU.

Résumé

Lancée en 2004 par la Police Fédérale du Brésil, l'opération appelée *Lava Jato* s'est transformée en une force opérationnelle au service de plusieurs institutions brésiliennes en coopération avec des organisations internationales. Les investigations criminelles, initialement axées sur le blanchiment d'argent, se sont étendues aux allégations de corruption de fonctionnaires et politiciens. Toutefois, les résultats de la *Lava Jato* se basent sur une stratégie précédente des autorités brésiliennes pour promouvoir l'harmonisation du cadre légal et institutionnel dans le combat contre la corruption et la criminalité économique. L'article commence par l'exploration des politiques publiques adoptées pour définir la criminalité des cols blancs et orienter les étapes cruciales de prévention, détection, investigation et poursuite des infractions commises, ainsi que le recouvrement du produit du crime. Ensuite, il donne une vue d'ensemble de l'impact économique des actions anti-corruption nationales en comparant les développements de l'opération brésilienne *Lava Jato* à l'équivalente italienne *Mani Pulite*. Fondée sur les expériences italienne et brésilienne, cette étude propose des mesures législatives supplémentaires d'orientation globale visant à neutraliser l'interférence de l'opinion publique et des intérêts politiques, et à réduire les conséquences économiques négatives générées par les enquêtes judiciaires malavisées et l'absence de poursuites des infractions commises. Cette étude approfondit également le concept de criminalité et de victime au sein d'un contexte globalisé, conformément à l'Agenda 2030 de l'ONU.

Abstract

Launched in 2004 by the Federal Policy of Brazil, the operation named *Lava Jato* evolved to a task force among several Brazilian institutions in co-operation with international organizations. The criminal investigations, initially focused on money laundering, enlarged to cover allegations of corruption of public officials and politicians. However, the outputs of the *Lava Jato* builds on a previous strategy of the Brazilian authorities to promote the alignment of the legal and institutional framework to the international recommendations for combating corruption and economic crime. The article starts by exploring the Brazilian public policies adopted for legally typify white-collar crimes and address its critical stages such as the prevention, detection, investigation and prosecution of offense, and the recovery of the proceeds. Secondly, it investigates the possible deviations of the actions implemented by the Curitiba branch of the *Lava Jato* Operation, which were mainly driven by public opinion pressure and ideological interference. Further, it oversees the economic impact of national anti-

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corruption actions by comparing the developments of the Brazilian operation *Lava Jato* to its Italian equivalent *Mani Pulite*. Based on the Italian and Brazilian experiences, the study proposes additional global driven legislative measures directed to neutralize the interference of local public opinion and political interests, and aimed at reducing the negative economic outputs generated through misguided criminal investigation and the prosecution of offense. This paper also works out the concept of crime and victim in a globalized context, in line with UN Agenda 2030.

Key words: white collar crimes; corruption; Brazilian Lava Jato Operation; Italian Mani Pulite Operation; globalization.

1. Introduction.

The Lava Jato operation was launched in 2004 by Federal Policy of Brazil with the objective of investigating alleged money laundering crimes related to the financial transactions carried out by central persons of the clandestine foreign exchange market in Brazil. Atypical financial movements were detected by the Financial Activities Control Council of the Ministry of Finance (COAF/MF), which is the Brazilian Financial Intelligence Unit (FIU), structured within the country's domestic alignment initiatives with the global strategies Anti-Money Laundering and Combat Financing of Terrorism (AML/CFT).

This operation eventually evolved to become a task force with the participation of the Federal Public Ministry and with the support of judicial system. Criminal investigations, initially aimed at money laundering, were expanded to cover allegations of corruption among Petrobras officials, agents and political parties, and large Brazilian contractors who were overbilling works contracted by the state-owned company. In addition to corruption, other criminal conduct has been identified, such as: tax evasion, currency evasion, fraud in international trade operations. The actions carried out by the aforementioned task force included international cooperation mechanisms, which allowed the exchange of information among law enforcement agents, international legal assistance for the execution of warrants and the repatriation of assets placed abroad.

In this scenario, this article aims to answer the following research **question**: What were the main normative, political and economic impacts of Brazil's adherence to the international system to fight money laundering crimes, which go beyond national borders and the *Lava Jato* operation in Brazil?

The dialectical approach is adopted and the bibliographic review as a research technique. The work is divided into four parts. In the first one, the description of the global strategy Anti-Money Laundering and Combating the Financing of Terrorism and the insertion of Brazil in this scenario is presented. In the second part, some legal and political reflections related to Operation *Lava Jato* are discussed. Afterwards, the economic impact of the Brazilian *Lava Jato* operation in the third part and of the Italian *Mani Pulite* operation are analyzed and, finally, the conclusions of the work are presented in the fourth and ending part.

2. The International AML/CFT Scenario and the Alignment of Brazil.

The *Lava Jato* operation is part of a vast network of international agreements which in the last 20 years has been engaging the international community in the construction of standards and routines to deal with the detection, prevention and combat of transnational crime. This constellation of initiatives embodies a plurality of agendas that point to the progressive convergence of domestic regimes in the

global fight against money laundering, terrorism financing and other related crimes, such as the crime of corruption. The objective of this topic is twofold: on one side, present the evolution of the international scenario, in which several initiatives have been interconnecting among a number of international organizations and institutions (1); the aim is setting a global platform that combats transnational organized crime; on the other, understand how the insertion of Brazil in this affected developments of *Lava Jato* operation.

In this process of evolution in the international scene, a possible milestone might be the introduction of the definition of money laundering in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Better known as the Vienna Convention, in addition to the concept of money laundering – this tool set the recommendation for the criminalization of drug trafficking in the domestic legislation of the signatory countries, as well as established mechanisms for coordinating national authorities for the exchange of information and international cooperation. Building upon this agreement, the field of action of the international community has been widening and interconnecting in order to encompass other themes and contents. For instance, in 2000, the United Nations Convention on Transnational Organized Crime (UNTOC), signed in Palermo, incorporated into the system the organized crime; furthermore, the Convention extended the number of predicate offenses for money laundering, established the obligation of banks and financial institutions to register suspicious transactions, and considered the creation of Financial Intelligence Units (FIUs) to implement the exchange of information.

Corruption in all its forms, in particular, only entered into the list of predicate offenses for money laundering in 2003, in Merida, in the United Nations Convention Against Corruption (UNCAC). Among the other positive results of this agreement, there is the introduction of the bases for the recovery of assets diverted abroad, the strengthening of the idea of creating and effective operationalization of FIUs and the adoption of reinforced standards to systematize the use of special investigative techniques.

This set of conventions forms the foundation for the construction of the global architecture to fight against Money Laundering (ML) and Terrorist Financing (FT). In parallel, other key pieces in the construction of this building have been added over time. The first of these, contemporary with the Vienna Convention, was the establishment of the Financial Action Task Force (FATF) in 1989, an intergovernmental institution, *whose main objective is* establishing international standards and benchmarks for domestic reforms, in order to develop a comprehensive Anti-Money Laundering and Combating Financing of Terrorism (AML/CFT) and other related crimes strategy. From 1990 on, the FATF's activities involved the establishment of recommendations, which cover “the criminal justice system, the financial sector, certain non-financial businesses and professions, transparency of legal persons and arrangements, and mechanisms of international cooperation” (International Monetary Fund, 2017). The latest version of these recommendations, as of 2012, added nine new recommendations to the pre-existing 40. Then, in 2013, the FATF adopted the common methodology for assessing technical compliance with its recommendations and the effectiveness of

AML/CFT systems, an essential tool for evaluating compliance with the international standards.

The work developed by the Organization for Economic Cooperation and Development (OECD) based on the recognition of complementarity between AML, anti-corruption and anti-tax-related crimes is another pillar in the construction of international standards. In 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed, an important tool to guide the signatory countries' conduct in dealing with corruption in international business transactions by bribery of public servants. Subsequently, in 1998, the G7 Finance Ministers supported the integration of AML actions with the tax information exchange mechanisms, initiating a fruitful dialogue between the OECD and the FATF. These initiatives caused the issues of civil servants' corruption and tax crime to be included in the AML/CFT strategy; this boosted the cooperation of tax authorities with other law enforcement authorities in combating serious crimes against the integrity of the financial system. The reflection of this initiative was the insertion of tax crimes in the focus of the revised FATF recommendations (2012), definitively sealing the inclusion of these crimes in the list of predicate offenses of money laundering (2).

Still in the process of building international standards and principles, it is worth mentioning the confluence of the actions taken by the national FIUs around an informal international network for cooperation and exchange of information, influenced by FATF recommendations, in addition to the resolutions of the UN Security Council, and the declarations of political will of the G7 and G20 (3). The strategy gave rise to the Egmont Group, which bases its actions on the principles of trust and

flexibility, guaranteeing the protection and confidentiality of information circulating among FIUs. The Egmont Group system requires quick provision of requested information, spontaneous exchange of information and confidential use of information.

In addition, the transfer of the information for other purposes is only admitted with the prior consent of the FIU that provided it. FIUs operate in two dimensions: international, involving the symmetrical exchange of information between FIUs or between FIUs and international organizations and/or foreign crime agencies, such as Interpol and the European Anti-Fraud Office (OLAF). The internal one, in which the FIUs serve to optimize AML/CFT coordination of actions and exchange of information with other domestic law enforcement agencies. The extent of these dimensions depends on the provisions of domestic law, and a fundamental principle is the weighting between the right to privacy and the need for information to be used by other institutions.

The AML/CFT international fight must be seen as a dynamic movement that continues to expand the sphere of international coordination of activities, encompassing a growing number of initiatives and international institutions and bodies. The main result in the last two decades has been the creation of a set of standard criteria to define any conduct as a 'crime' and start international cooperation among states.

In this sense, another pillar has been inserted into the system, with the commitment of the International Monetary Fund (IMF) to integrate AML/CFT assessments into its work routine and disseminate capacity building actions. The participation of the IMF has also been significant in the mutual evaluation processes performed since

the introduction by the FATF in 2013 of the common methodology for verifying the effectiveness of AML/CFT Systems.

The World Bank Group's engagement with the United Nations Office on Drugs and Crime (UNODC) in the Stolen Assets Recovery Initiative (StAR), which began in 2007, has significantly broadened the anti-corruption landscape. Evidence shows that in white collar crimes, the possibility of blocking and/or recovering diverted assets is an inhibiting factor for criminal practice, not to mention the plea bargaining's role in having sentenced criminals return the assets (World Bank Group, United Nations Office of Drugs and Crime, 2011, p. 6). The StAR strategy focuses on helping developing countries recover their assets that were illegally transferred abroad. Another positive aspect of the initiative is its alignment with the commitments made at the Doha Declaration on Financing for Development (United Nations, 2018), which focused on the mobilization of domestic financial resources to promote development. In this perspective, the StAR approach addresses the corruption problem in order to involve Illicit Financial Flows (IFFs), an emerging issue in the United Nations (UN) Addis Ababa Agenda (United Nations, 2015), which later reflected on the adoption of the UN 2030 Agenda for Sustainable Development. In this context, the need to reduce or even eradicate IFFs and also all forms of corruption and bribery was targeted amongst the key actions under the so-called UN Sustainable Development Goal 16 (SDG-16).

The experience accumulated in the StAR mechanism reveals that the recovery of assets abroad is a deterrent for criminal activities, increases socially available financial resources, and encourages, together with other moral and financial

considerations, the respect of the law. Concerning the recovery of assets related to the IFFs, requesting country's interests are generally different from the receiving country. As a matter of fact, the recovery of assets is based upon Merida Convention (UNCAC), which do not state any reward for the country that returns an asset; consequently, the only way to have those country return illegal assets, is to base upon their international reputation (World Bank Group, United Nations Office of Drugs and Crimes, 2011, p. 6).

In general, the countries that receive IFFs are global financial centers (World Bank Group, United Nations Office of Drugs and Crimes, 2011, p. 7), and lack of transparency in their financial policies might generate a negative impact on the attractiveness of licit investments. Therefore, just basing upon the reputational issue, international nongovernmental organizations such as Transparency International (TI) and Tax Justice Network (TJN) have advocated a paradigm shift in assessing the integrity of any country's financial system, and a possible correlation with corruption in other countries. Traditionally, the indices for measuring the phenomenon of corruption re based upon the perception of the misuse of public power for private benefit (Transparency International, 2017).

Now, this new proposal focuses on the question: "What are the drivers of corruption - and where?" (Cobham, Jansky, 2017, p. 5) thus, the point is to assess how much the opacity of a country's financial system (Tax Justice Network, 2018a) contributes to the FFIs. The TJN, when comparing the indexes (CPI x FSI) (Tax Justice Network, 2018b), suggests that countries such as Switzerland, USA, Germany, Japan and Netherlands, which perform very well in the corruption perception

index, fail to comply with the transparency rules; this might cause corrupt flows elsewhere” (Cobham, Jansky, 2017, p. 5).

The insertion of the FFI into the debate on AML/CFT and anti-corruption measures raises the question of overlapping the channels used to hide the financial result of the criminal practice and to cover up certain financial transactions. Cobham & Jansky, identified four main groups of IFFs: “1 – Market/regulatory abuse, 2- tax abuse, 3 - abuse of power, including the theft of state funds, 4 – proceed of crimes” (Cobham, Jansky, 2017, p. 7); as a matter of fact, IFF phenomena are not only related to the capital typologies, but also to the transaction channels. Thanks to this broader view of the phenomenon, there has been growing pressure in the international fora (UN, OECD, EU) to broaden the focus of AML/CFT measures to encompass the aggressive rate-voidance practices used by multinational companies. For the time being, the speech and language are still very diplomatic, but to have the problem acknowledged in the political sphere and then convert it into concrete actions, the pressure is high.

In relation to the international scenario outlined, it is possible to affirm that Brazil broadly aligned with the AML/CFT international measures; as a matter of fact, Brazil is not only a signatory to the conventions, took part in the aforementioned initiatives, but also maintained a broad network of multilateral and bilateral cooperation agreements and legal assistance among states (4). The two Brazilian reference institutions that are in charge of monitoring and swapping financial information legal assistance, as well as of implementing the AML/CFT domestic strategy are: The Financial Activities Control Council (COAF) created in 1998 (5), within the Ministry of Finance. COAF acts as a

Brazilian FIU and is integrated into the FATF, either directly or through Brazil’s participation in the Latin American Financial Action Group (GAFILAT); furthermore, COAF being is linked to the Egmont Group FIU network. The second Brazilian domestic reference is the National Strategy for Fighting Corruption and Money Laundering (ENCCLA), created in 2003 under the supervision of the Ministry of Justice. The function of ENCCLA is to articulate, coordinate and align the actions of more than 70 public sectors (6) that have direct and indirect attributions in AML/CFT actions, with the collaboration of civil society.

Brazil integration in international initiatives, guided legislative and institutional changes as well as the internalization of minimum standards for the organization of a domestic AML/CFT strategy. In addition, these international initiatives provided a holistic vision for the design of national public policies and gave Brazil access to a wide network of financial information exchange and asset recovery. These foundations were essential both in the formation of the *Lava Jato* task force and in conducting the investigations. Without them, the results achieved in the operation (7) and the achievement of the 567 requests for international legal cooperation in criminal, civil and extradition matters involving 53 different countries would not have been achievable (Giacomet, 2018).

3. Legal and political impacts of *Lava Jato* Operation.

Another important pillar of the *Lava Jato* operation was the legislative changes in the criminal sphere implemented to bring the Brazilian regime into line with international standards in the fight against money laundering, terrorist financing and related crimes. On this subject, it is important to cope with

some of these changes by taking into consideration their political consequences. Considering that the crimes investigated by the Lava Jato operation, involved corruption, money laundering and conspiracy, we are now going to analyze only those specific changes.

The crimes of money laundering were typified in Brazil in 1998, through Law 9,613, sanctioned by former President Fernando Henrique Cardoso. This Law states that crimes against public administration, including corruption, may be related to money laundering. For this reason, the broad changes of this norm, promoted by Law 12,683 of 2012, which abolished the exhaustive list of predicate offenses, did not affect this relation with the crimes of active and passive corruption.

In this line, it is important to emphasize that the legal definitions of crimes of active corruption (practiced by the third briber) and of passive corruption (practiced by the public official or corrupted political agent), have been the same since the original wording of the Brazilian Penal Code of 1940. In November 2003, Law 10,763 entered into force, which increased the sentences of imprisonment for both offenses to the limits of 2 to 12 years. This law was sanctioned by former president Luiz Inácio Lula da Silva. There was, however, no change in the legal definition of the crimes that remained valid (8).

It would be a mistake to neglect the problems in the application of criminal law and the resulting distortions, although it is acknowledged that there is a certain degree of standardization. This is because the selective application of norms provokes, as a side effect, the concealment of a wide criminal illegality that remains unpunished. The state repression apparatus chooses those who will be criminalized and those who will be spared from the

alleged offenders. Thus, the existence of the penal system, in the way it was conceived, ends up serving as a mechanism for maintaining the structural inequalities of society (Pavarini, 2000, p. 352).

With this caveat, it can be observed that the most controversial situations, at the normative level, involved Law 12,850, of 2013, sanctioned by former President Dilma Rousseff. This law focused on the criminal organization (9) by establishing a series of new procedural and investigative procedures in the Brazilian legal system (10). The main focus of the Law was the fight against money laundering and drug trafficking.

It is important to note that, in addition to Brazil's adherence to international control systems, these normative changes are also justified by the need for expanding the sense of insecurity present in societies, including Brazil. This social panic is fostered by the mass media that exploit criminal actions fostering fear in contemporary societies. On the other hand, the sense of insecurity of the citizens demands for more repressive actions. Thus, the logic of positive special prevention, with a focus on the social reintegration of the offender, is replaced by the logic of their incapacitation through an ideology of fighting the enemy (Pavarini, 2007, p. 16).

Thus, although Law 12,850/2013 is appreciable in several respects, the different treatments among suspected, are the consequence of the criminal justice system in the process of secondary criminalization. *It* is at this point that the dimensions of politics and ideology distort the main purpose of the criminal law. To clarify and express this criticism, some measures taken in connection with the *Lava Jato* operation will be mentioned.

Brazilian law is very clear about the information secrecy obtained through telephone interceptions

authorized by the judicial authority. However, in the course of *Lava Jato* Operation, Judge Sérgio Moro, responsible for authorizing the requests of the task force of said Operation in Curitiba, decided to innovate outside the legal and constitutional dictates. One of its innovations was the intentional transfer of information obtained through telephone interceptions, obtained outside the authorized period, to the main broadcasting companies, especially Rede Globo de Comunicações. The most striking example of this new set of rules, was a conversation between then-President of the Republic Dilma Rousseff, and her predecessor Luiz Inacio Lula da Silva. In this conversation, Dilma Rousseff combined the delivery of a term of office to former President Lula that would occupy the Chief of Staff of his government. Without any support from the Federal Supreme Court, mass media achieved the tapes of this conversation and publicly diffused it.

The scandal was so big that the President, although democratically elected, had no choice but resign.

Although that conversation took place several months before and Lula was not yet the object of legal prosecution at that time, mass media used the audio to give the impression to the public that Dilma Rousseff's intention was to grant him the legal immunity related to that office.

Thus, although the Operation had unfolded in different municipalities, such as Brasília, Curitiba and Rio de Janeiro, it was the actions of the Curitiba task force that had the greatest media repercussion. Such television coverage eventually influenced the country's political course, especially the impeachment of former President Dilma Rousseff. What is most interesting is the perception that the most important politicians involved in corruption scandals not only supported Dilma Rousseff

impeachment process but also assumed the leadership of the Federal Executive Branch through the rise of their political group. Thus, the political-mediatic use of the Operation, through members of the task force, removed a politically awkward president, but without any involvement in scandals of corruption or attempts to obstruct justice, by a political group trained in this type of maneuver. The political bias of members of the Operation put the Country in the hands of a group of people investigated for various crimes of corruption.

In this respect, the criticality re-emerges of the intrinsic selectivity of the criminal justice system, which promotes an abyssal inequality of treatment according to the different interests at stake. From this scope, criminality is no longer an ontological quality of certain behaviors and of certain individuals, but is a label attributed to certain individuals by means of a double selection: "firstly, the selection of the assets protected from criminal deeds and the definition of the criminal deeds on these goods, described in the penal typologies; secondly, the selection of individuals who are target of stigma for perpetrating that kind of deeds" (Baratta, 2002, p. 161).

Another controversial institute, introduced by Law 12,850/2013, was the *plea bargain* agreement. Such an institute appears in article 4 of the said Law, providing that: "the judge may, at the request of the parties, grant judicial pardon, reduce by two thirds (2/3) the custodial sentence or replace it with restrictive of the rights of those who have collaborated effectively and voluntarily with the investigation" and with the criminal process "provided that at least one of the results listed in the device, including the recovery of defaulted values and the identification of other co-authors and your crimes".

In the context of the *Lava Jato* Operation, a series of preventive imprisonment were enacted during the investigations. Some of them, without there being a more detailed analysis on the necessity of ordering the precautionary measure, extending for an extended period of time that, in some cases, exceeded a year. At that time, the key collaborations were negotiated between the defense teams and the task force.

Several defendants opted for the award-winning collaboration in exchange for a significant reduction in sentence or total exemption from it. As a general rule, the main beneficiaries of the *plea bargain* agreement were those with the greatest economic advantages, such as the directors of Petrobras.

While recognizing the importance of the institute of *plea bargain* agreement for understanding how to structure a highly complex criminal organization, some boundaries need to be established in order to avoid distortions. The art. 4, paragraph 6, of Law 12,850/2013, establishes that “the judge will not participate in the negotiations between the parties for the formalization of the collaboration agreement, which will take place between the police officer, the investigated and the defender, with the manifestation of the Public Prosecution Service or, as the case may be, between the Public Prosecutor's Office and the investigated or accused and its defender”.

In Brazilian law, therefore, negotiation on *plea bargain* agreement occurs between the police authority and the investigated or between the Prosecutor's Office and the investigated, and is subsequently approved by the magistrate. However, there are no minimum legal parameters for the conduct of this type of negotiation that even admits the complete exemption of the deprivation of

liberty provided for by law for the employee. Considering that the focus of the *Lava Jato* Operation was mostly focused the participation of political parties, the executives of companies that obtained the greatest economic advantages from acts of corruption were generously benefited from expressive reductions in sentences and exemptions in exchange for the agents, with less participation in said economic advantages. This lack of legal parameters, coupled with the lack of impartiality and common sense of some responsible for the operation *Lava Jato*, have generated deep distortions in the institute of the *plea bargain* agreement.

In addition, art. 4, paragraph 16 of the aforementioned Law, establishes that “no conviction shall be pronounced on the basis only of the statements of collaborating agent”. This norm was not respected by the magistrate responsible for judging corruption cases involving *Lava Jato* in Curitiba.

Thus, while it is recognized that international cooperation in the fight against money laundering and corruption is a step towards criminal prosecution and the prevention of such offenses, many improvements will need to be made at the regulatory level in order to preventing abuses of power, distortions of legal institutes and the political use of these mechanisms as a form of persecution of the enemy on occasion.

4. The Economic Impact of *Lava Jato* and *Mani Pulite*.

The close correlation between corruption and its economic impact is difficult to establish. The first difficulty stems from the methodological and operational challenge in conducting a qualitative assessment of corruption (United Nations, 2010). The reason is essentially one: corruption, consisting

of a variety of illegal thus not valid behavior and therefore hidden from the public, escapes the control of authorities and hinders scientific analysis. In addition, another limiting factor is the strict and objective definition of the phenomenon of corruption, which stems mainly from the asymmetry in the criminalization of offenses of corruption and the possible inconsistency between domestic legislation and international standards. In this sense, the following questions arise: What kind of conduct does the phenomenon of corruption cover? Only the practice of bribery of public servants? Or should also include the exchange of favors, the recommendations, the tax evasion, and the more recently discourse of the international community regarding the tax avoidance of multinationals? To these reflections is added the empirical evidence that cultural and institutional aspects influence the practice of corruption (Gonçalves, 2017, p. 24), because in a corrupt society, most of these practices are not perceived as a deviation from behavior (Enste, Heldman, 2017, p. 27). For example, in a country where family and community ties prevail over citizenship (Bansfield, 1958) ties, asking a politician or a bureaucrat for a favor can be considered as an appropriate rule of conduct.

These problematic aspects have favored the use of indirect methods to measure the dimensions of corruption, whether based on perceived corruption criteria, the use of secondary statistical data, or constructed from sampling or official data reported in criminal justice systems (11). In all cases, the result is that the application of these methods does not allow for the true representation of the real size of corruption crimes. Gonçalves in a paper presented to the Institute of Economics of the Federal University of Rio de Janeiro no. 23/2017

(Gonçalves, 2017, p. 23), adds that this difficulty in measuring the practice of corruption undermines the scientific evaluation of the relationship between corruption and the economic performance of national and corporate economies.

In addition to the question of the limitation in establishing a direct link between corruption and its economic effects, from a theoretical point of view, the analysis of the economic impact of corruption is ambivalent (Enste, Heldman, 2017, p. 23), opposing two theories that correlate state bureaucracy with economic performance. One of them understands that corruption has a “sand in the wheel” effect, reducing the economic efficiency of both countries and companies; while the other sees corruption as a grease-in-the-wheel lubricating effect, favoring economic actors with a greater competitive advantage who, through bribery of corrupt public agents, circumvents the inefficiencies of public policies (Gonçalves, 2017, pp. 17-18). And in the absence of a reliable source of data and appropriate and accurate methodology, the research of Lisciandra and Millemaci (2017), which reduces the authors' performance to simulate the effects of corruption on the production of wealth, is emblematic.

In this sense, Gonçalves' work (2017) is remarkable, since it performs a thorough review of the empirical results about the effects of corruption (“grease vs. sand in the wheel”) on the economic growth of countries and companies, considering three different and complementary approaches: A macroeconomic, from aggregates and indicators of performance of countries, such as income, investment, employment, productivity, etc. Another microeconomic one, based on performance indicators of companies such as billing, profit, employment, innovation, productivity. And a third

meso-economic approach, which employs both preceding indicators, correlating them with the level of governance, the quality of institutions, and the political regime.

In a close synthesis, the conclusions of Gonçalves research can be thus arranged. In the macroeconomic perspective, the complexity of the economic growth process and the variety of statistical and econometric methods employed limit the scope of more robust scientific evaluation. The microeconomic approach reveals a great deal of heterogeneity, depending on economic sectors and countries, and it is not possible to establish a trend regarding the positive or negative effect of corruption on the performance of countries and companies. According to the author's evaluation, the papers analyzed under the meso-economic approach suggest a positive relationship between corruption and economic growth in countries with low degrees of political freedom and institutions of lower quality. And, on the other side, a negative relationship between corruption and investment,

fueled by low levels of governance and respect for the rule of law (Gonçalves, 2017, p. 19). These results may serve to further reflection on the contraposition of the economic impact of the *Lava Jato* operation in Brazil and the *Mani Pulite* operation in Italy.

Another interesting counterpoint, in spite of being conditioned by the perspective of the “sand in the wheel” theory, is presented by Enste & Heldman. In the report of the Cologne Institute for Economic Research, the authors justify their position on the grounds that, in addition to ethical issues linked to corruption, the economic advantages derived from bribery of public agents tend to be minimized in complex bureaucratic processes. Based on the analysis of empirical studies, and aware of the influence that endogenous and causal factors have on the measurement of the effects of corruption on the economy, scholars evaluate the main consequences of corruption on a group of seven variables, according to the following table (Enste, Heldman, 2017, p. 24):

Consequence	Effect of corruption
Total Investment	Strong
FDI and Capital Inflows	Strong
Foreign Trade and Foreign Aid	None
Gross Domestic Product	Unclear due to problems with endogeneity and choice of variables
Inequality	Unclear direction of causality and impact of other influences
Government Expenditures and Services	Unclear, depends on dataset
Shadow Economy and Crime	Unclear direction of causality

Table 3: *What are the main consequences of corruption?*

As in other works, the analysis of the empirical results does not always correspond to the theoretical arguments that corruption has economic effects. However, in spite of these limits, it is worth mentioning a possible dialogue between the conclusions of Enste & Heldman's research and the results of Gonçalves. Both point out the

differences in the impact of corruption on the economy due to the stage of development of the countries and the quality of institutions. In terms of foreign direct investment (FDI) and capital flows, the two studies show a more significant impact of corruption in developed countries than in developing countries (Enste, Heldman, 2017, p. 25;

Gonçalves, 2017, p. 19). From the point of view of economic growth, both corroborate the theoretical argument that corruption has an impact on the economy. Research concludes that corruption functions as “grease in the wheels” in countries with weak institutions, and as “sand in the wheel” in countries with strong political institutions.

Enste & Heldman (2017) further add the perspective of sustainable development in analyzing the effects of corruption on economic growth, stating the negative correlation between corruption and sustainable development. This correlation is also supported by Dib, which, in a theoretical paper based on the evidence prepared by the Federation of Industries of the State of São Paulo (FIESP), identifies seven obstacles to sustainable economic growth caused by corruption: increased cost of economic projects, uncertainty (political, juridical, social and economic), reduction of public revenues, reduction in tax collection, inefficiency in the allocation of resources and deformation of social and development policies.

Thus, in spite of the lack of general theories about macroeconomic and microeconomic performance determinants due to corruption, which discourages generalization and prevents direct measurement between corruption and economic performance, the fact that corruption negatively affects the economy of a country nation is accepted by both literature and public opinion. In practice, corruption reveals a situation where political groups, civil servants and entrepreneurs manage public cash flows that end up in the hands of a small group of private individuals. This implies the impoverishment of the community, both directly, because it is deprived of economic resources, and indirectly, by virtue of decisions that allow the dysfunctional allocation of productive resources.

In relation to Brazil and Italy, countries where corruption is a historical problem, it is not uncommon to find journalistic recompilation works such as those by Barbacetto et al. (2012) and Baptista (2017), who clearly attribute part of the economic problems to corruption, respectively in Italy and in Brazil. The problem, as already widely explored, is to find a reliable and adequate scientific methodology for measuring this loss and quantifying it.

As for Italy, the scientific uncertainty of the correlation between corruption and economic performance is evident when one considers the historical series of gross domestic product (GDP) growth in recent decades (12). As can be seen, there is no regularity in the long-term trend that can be attributed to corruption: while corruption is a historical phenomenon that depends on cultural and remote influences over time (Ginsborf, 2003, p. 179), the GDP suffers very wide variations for reasons attributable to the context oil shock of 1973, rather for internal dynamics.

In this sense, the economic dynamics that followed the famous 1992 *Mani Pulite* case (also known as *Tangentopoli*) are very interesting. The historical data show that in 1993 there was a negative performance of the GDP, and it is reasonable to conclude that it was due to the Tangentopoli Operation, which caused the Italian currency to depreciate, as a result of the negative image of the country in the international sphere, as well as in the difficulties faced in complying with the macroeconomic parameters established by the European Union. This case, however, confirms the scientificity lack of the empirical results, since it only shows an indirect interference of the corruption in the economy, because the negative result was more because of the negative image than by the corruption itself. It is

also important to note that as early as 1994 Italian GDP began to recover and continues to trend in successive years, despite judicial scandals and, according to the media, corruption in Italy is far from being eliminated. The insignificant variation of Italian GDP in relation to corruption would corroborate the conclusions of Italian GDP variations that would confirm the conclusions of Enste & Heldman (2017, p. 25; Gonçalves, 2017, p. 19) and Gonçalves that corruption would act as “grease in the wheels” in countries with weak political institutions.

In Brazil, the inference that the *Lava Jato* Operation would have negatively impacted the economy was disseminated in the journalistic field and was the object of empirical analysis in several works, namely focusing on the performance of the engineering and construction (E&C) and oil and gas sectors. The only references to the impact of *Lava Jato* on Brazilian GDP are due to evaluations conducted by two consultancies, Tendências Consultoria and GO Associados, which respectively estimated the fall in GDP to be around 3.8% and 3.6% in 2015 and 1.8% and 1.2% in 2016 (Oliveira, 2016). The forecast is criticized by Pinheiro (2016), because it is built on data from the “retraction of investments in Petrobras, whose impact on GDP is then enhanced by various multipliers”. Once again, the difficulty in measuring the direct economic effects of corruption, due to the use of indirect methodology, appears, and it is not possible to correlate the impact of corruption on GDP with the level of maturity of Brazilian political institutions.

Under more scientific approach, it is worthy to highlight two of the most consistent studies regarding the analysis of the corruption phenomenon in Brazil and its co-relation with the *Lava Jato* Operation. The first of them, widely

commented above, is the Gonçalves’ one, who after a comprehensive review of economic literature on the impact of corruption in the economic growth of countries and companies, confirmed the hypothesis that corruption in the E&C sector in Brazil operated the effect “grease in the wheels”, increasing the economic performance of contractors engaged in acts of corruption. The second one, builds on a list of political corruption scandals in Brazil broadcasted by the media and analyzes the dynamics in the structure of political corruption networks in the country. Although this study did not address the possible economic impacts of political corruption in the economy, it demonstrated the modular structure of the network and the strong linkage among different corruption scandals. This allowed the identification of a number of agents which arguably were central nodes of the corruption network in Brazil, which could boost further research on the corruption phenomenon in the country.

From all of the above, the only conclusion that can be drawn regarding corruption and its economic consequences, both in the global experience and in those in Brazil and Italy, is that although the fight against corruption is a State and civil society duty, available scientific data for the measurement of the phenomenon are still scarce to guide the formulation of consistent public policies.

5. Conclusions.

As shown in this work, several important advances have been made in the area of international cooperation in combating money laundering crime, along with the crimes that precede it. In this process of evolution on the international scene, the definition of money laundering introduced in 1988 in the United Nations Convention against Illicit

Traffic in Narcotic Drugs and Psychotropic Substances represented a milestone in this mechanism for controlling transnational illicit acts. The ensemble of conventions that followed formed the foundation for building the global architecture to fight against crimes that lead to the use of Money Laundering (ML) and Terrorist Financing (FT) instruments. In parallel, other key pieces in the construction of this building have been added over time, among them is the constitution of the Financial Action Task Force (FATF) in 1989.

However, one cannot fail to consider that the whole mechanism of formal social control, which is based on the support of the criminal justice system, naturally tends to undergo political influences, sponsored by the economic interests that control the management of nations and of international organizations. This influence of political, economic and ideological interests allows the adoption of selective measures within the justice system. In this way, individuals and distinct interest groups receive differentiated, more beneficial or more harmful treatments, depending on the interests at stake.

This problem had already been diagnosed by critical criminology in the 1980s. In Brazil, the *Lava Jato* Operation used the whole international cooperation apparatus to combat money laundering and corruption crimes involving political parties, state enterprises and private companies. However, it ended up interfering in the political and economic direction of the country, possibly unfavorably to national interests. This intervention was made especially by measures of dubious legality or even illegal, in addition to the use of mass media groups as diffusers of tendentious versions of the facts. In addition, the plea bargain, incorporated in Brazilian legislation, needs to be improved in the sense that some limits are established in negotiations with

employees. This is because Brazil adopts the civil law system, which has strict law in its main source of criminal law.

Thus, while it is recognized that international cooperation in the fight against money laundering and corruption is a step towards criminal prosecution and the prevention of such offenses, many improvements will need to be made at the regulatory level in order to prevent abuses of power, distortions of legal institutes and the political use of such mechanisms.

With regard to the economy, as had already happened in the Italian *Mani Pulite* and in the Brazilian *Lava Jato* operations, it is not possible to be said that there is strong scientific evidence that these operations have had a direct negative impact on the economy, as scientific studies on the subject are not only scarce but also based on indirect data. It is possible that the improvement of external control mechanisms of the institutions that integrate the criminal justice system can contribute to reduce the acts of abuse of power and the ideological bias of the agents. In addition, measures to curb media manipulation of information might be useful by avoiding indirect economic spillovers due to the negative image of the country's integrity and the efficiency to combat corruption and money laundering crimes.

Notes.

(1) In order to mention some of them: United Nations (UN), Financial Action Task Force (FATF), Organization for Economic Cooperation and Development (OECD), World Bank Group (WBG), International Monetary Fund (IMF), Egmont Group.

(2) Information available at: <https://www.oecd.org/corruption/anti-bribery/>

(3) Information available at <https://www.egmontgroup.org>

(4) The network of conventions and treaties signed by Brazil is available at: <http://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-penal/acordos-internacionais>

(5) Federal Law 9,613, 3rd March 1998, available at: https://www.planalto.gov.br/ccivil_03/Leis/L9613.ht, articles 14 to 17.

(6) The list of ENCCLA's integrating institutions are available at: <http://enccla.camara.leg.br/quem-somos/gestao>

(7) Lava Jato Operation data, adjourned up to August 2017, is available at: <http://www.pf.gov.br/imprensa/lava-jato/numeros-da-operacao-lava-jato>

(8) The crime of passive corruption, provided for in art. 317 of the Criminal Code, is practiced by the public official and consists of "requesting or receiving, for himself or for another, directly or indirectly, even if outside the function or before assuming it, but because of it, improper advantage, or accept promise of such an advantage". If there is no public function or "causal relationship between it and the fact imputed, one can not speak of a crime of passive corruption, and there may be, residually, any other crime". As for the undue advantage element, it is important to emphasize that it was not necessarily defined as an asset advantage, and may be of a different nature, as long as it is unlawful. It suffices, for its configuration, that "it is enough to corrupt the official venal" and that the action "translates trade of the function, that is, there must be public service merchandise". (Bitencourt, 2012, pp. 113-114). Active corruption, in turn, provided for in art. 333, of the Penal Code, consists of "offering or promising an undue advantage to a public official, in order to determine him to practice, omit or delay an ex officio act". It is required for the configuration of the crime that "the act whose action or omission is intended to be understood in the specific functional assignments of the public servant targeted". Thus, if the act not intended by the individual is not "within the competence of the official, any other crime, but certainly not that of active corruption, may be identified." (Bitencourt, 2012, p 248).

(9) Article 1, para. (1) of Law 12,850 of 2013 defines as criminal organization "the association of four (4) or more persons structurally ordered and characterized by the division of tasks, albeit informally, in order to obtain, directly or indirectly, an advantage of any nature, through the practice of criminal offenses whose maximum penalties are more than four (4) years, or that are of a transnational nature".

(10) Among the investigative procedures adopted by this norm, the interception of telephone communications and the award-winning collaboration are highlighted in this article. The interception of telephone communications had already been regulated by Law 9,292 of 1996, which regulated Article 5, XII, of the Constitution of the Republic. This article defines as a fundamental right of every citizen the inviolability of the secrecy of "correspondence and telegraphic communications, data and telephone communications, except in the latter case, by court order, in the cases and in the form established by law for purposes of criminal investigation or criminal procedural instruction". In this way, the inviolability of communications is a fundamental right. Law 9,292 of 1996, in its article 8, established that "interception of telephone communication, of any nature, will occur in separate files, appended to the records of the police investigation or criminal proceeding, preserving the confidentiality of the proceedings, recordings and transcripts". Thus, the confidentiality of communications is preserved even if there is judicial authorization for the interception of telephone communication. In addition, article 10 of the same Law, criminalized the conduct consisting of "interception of telephone communications, information technology or telematics, or break the secrecy of justice, without judicial authorization or for purposes not authorized by law," and penalty of imprisonment of two to four years, and fine.

(11) For further debate on the methodologies applied for qualitative assessment of corruption at an international level: United Nations, *Quantitative approaches to assess and describe corruption and the role of UNODC in supporting*

countries in performing such assessments, Background paper prepared by the Secretariat, 2009. Available at: http://www.unodc.org/res/cld/bibliography/quantitative-approaches-to-assess-and-describe-corruption-and-the-role-of-unodc-in-supporting-countries-in-performing-such-assessments_html/Pape_measurement_corruption_CRP2.pdf
(12) Available at: <http://seriestoriche.istat.it>, point n.4.

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