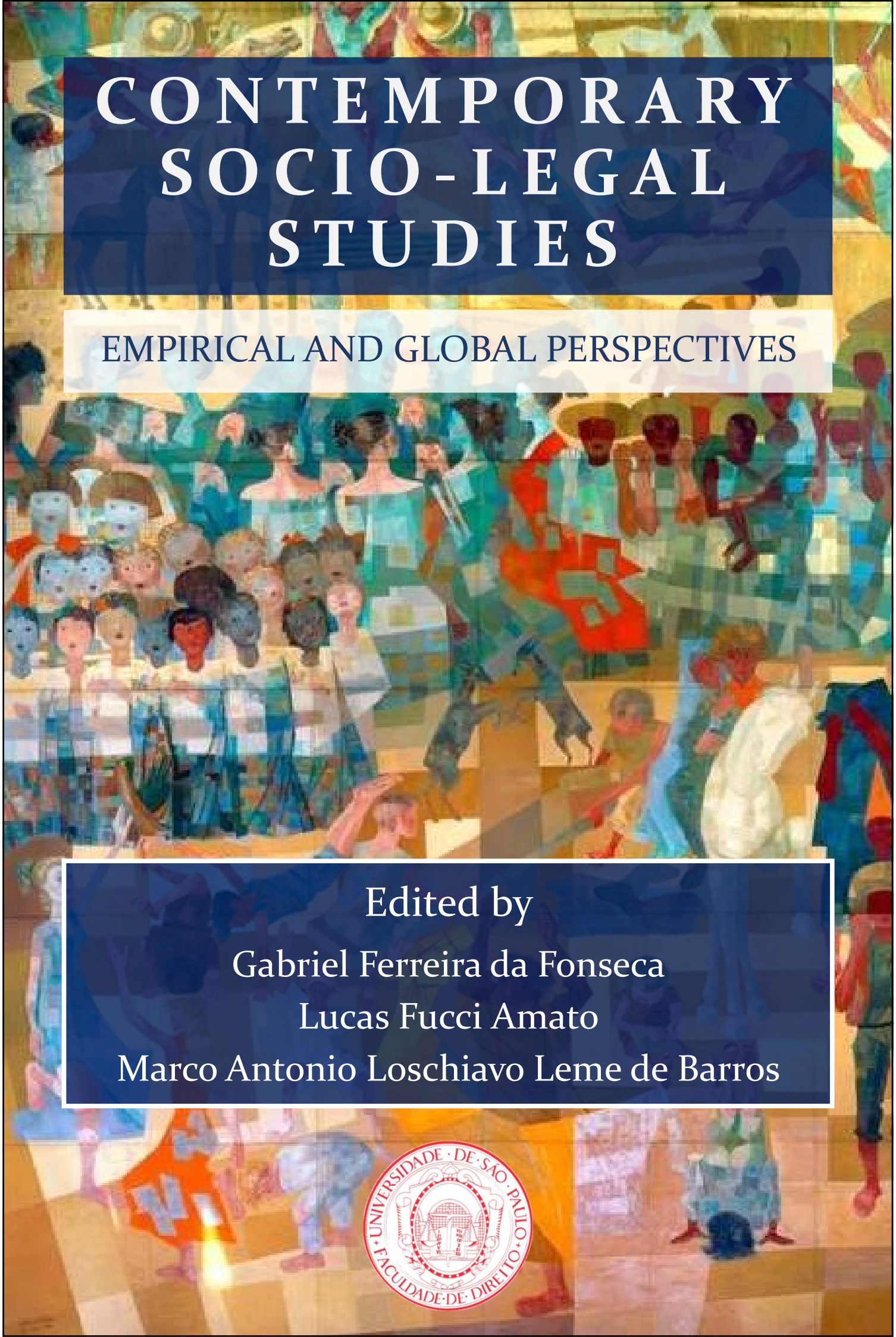

CONTEMPORARY SOCIO-LEGAL STUDIES

EMPIRICAL AND GLOBAL PERSPECTIVES

Edited by
Gabriel Ferreira da Fonseca
Lucas Fucci Amato
Marco Antonio Loschiavo Leme de Barros

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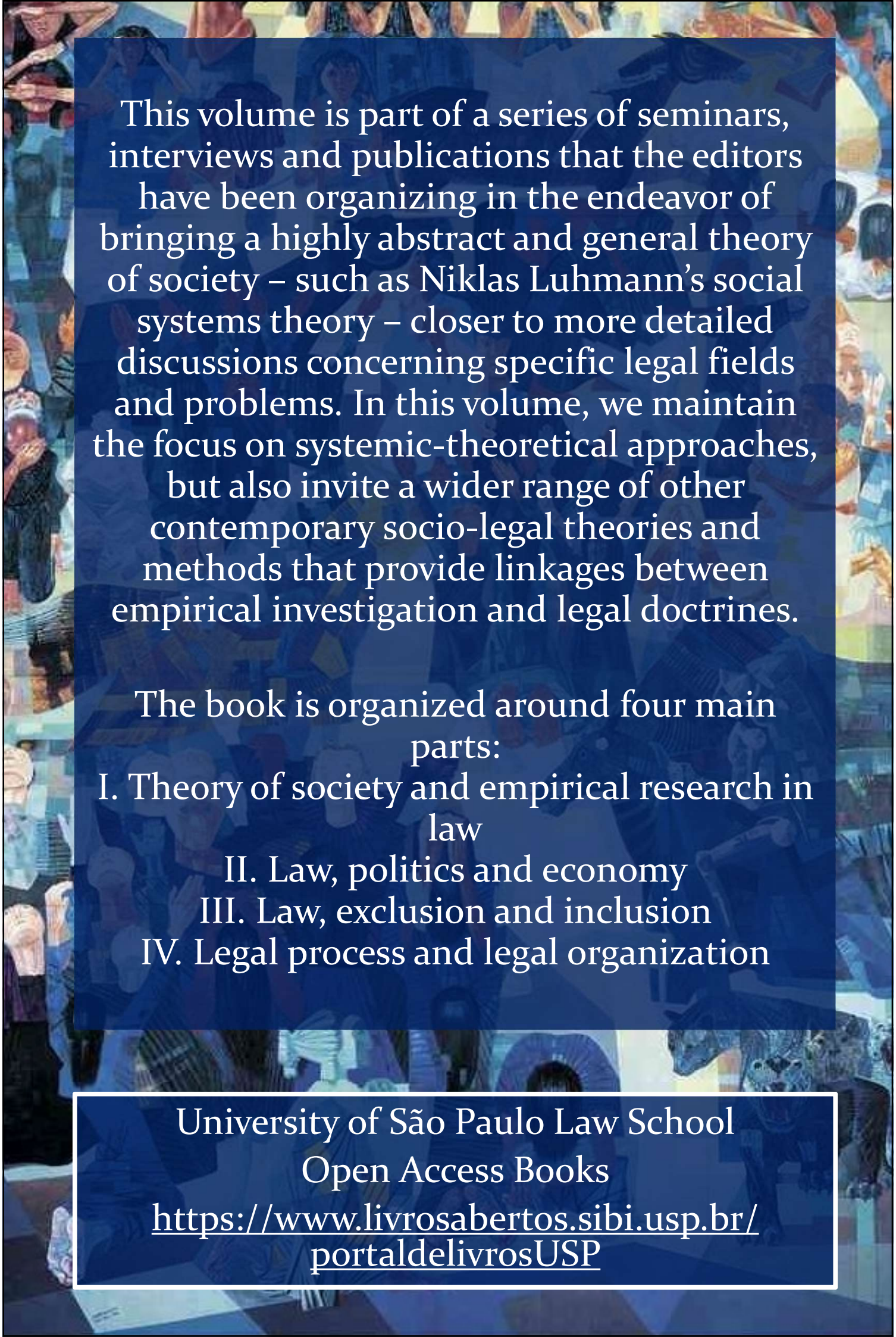

This volume is part of a series of seminars, interviews and publications that the editors have been organizing in the endeavor of bringing a highly abstract and general theory of society – such as Niklas Luhmann's social systems theory – closer to more detailed discussions concerning specific legal fields and problems. In this volume, we maintain the focus on systemic-theoretical approaches, but also invite a wider range of other contemporary socio-legal theories and methods that provide linkages between empirical investigation and legal doctrines.

The book is organized around four main parts:

I. Theory of society and empirical research in law

II. Law, politics and economy

III. Law, exclusion and inclusion

IV. Legal process and legal organization

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EMPIRICAL AND GLOBAL PERSPECTIVES

Faculdade de Direito
Universidade de São Paulo
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Acknowledgment

The contributions collected in this book are mainly results of an international seminar cycle on systems theory, sociology of law and empirical research presented in 11 sessions during August to November, 2019, at the University of São Paulo (USP) Law School, Brazil, under the coordination of Full Professor and Vice-Dean Celso Fernandes Campilongo and the editors of this volume. The cycle had the support from São Paulo State Research Foundation (FAPESP), the National Coordination for the Improvement of Higher Education Personnel (CAPES) and from the Deutscher Akademischer Austauschdienst (DAAD).

Many of the authors in this volume take part in a research network on "Law and Social Systems", in the research group on "Systems Theory and the Critique of Society" (based at the Department of Sociology, from the Faculty of Philosophy, Languages and Literature, and Human Sciences at the University of São Paulo – FFLCH-USP), and in the research group on "Law and Regulation of Society" (based on the School of Law from the Mackenzie Presbyterian University – UPM), all of them registered at the CNPq (Brazilian National Council for Scientific and Technological Development). We also welcome contributions from the leader of the research groups "Law, meaning and social complexity" (DSComplex) and the Observatory for the Ecological Analysis of Law (OBAEDi). Most authors are also active members of the Brazilian Association of Researchers in Sociology of Law (ABraSD).

Papers collected here results also from collaboration with many Brazilian Graduate Programs (Master and PhD) in Law (USP, PUC-SP, Mackenzie, UFBA, UFPE, UFF, UFRGS, Unisinos) and in Sociology (USP). We also emphasize the contribution to this volume of researchers outside Brazil, representing the Faculty of Sociology at Bielefeld University (Germany), the Faculty of Law of Johann Wolfgang Goethe University, Frankfurt am Main (Germany), the School of Law at the University of Manchester (United Kingdom), the Science-Po Tolouse (France), the University of San Francisco (USA), the Center for Social Studies at the University of Coimbra (Portugal), the Department of Law at Monterrey University (Mexico) and the Next Society Institute, Kazimieras Simonavičius University (Lithuania).

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1. Observing law: empirical approaches to systems theory and other venues of socio-legal research

Lucas Fucci Amato

Gabriel Ferreira da Fonseca

Marco Antonio Loschiavo Leme de Barros

This volume is part of a series of seminars, interviews and publications that the editors have been organizing in the endeavor of bringing a highly abstract and general theory of society – such as Niklas Luhmann's social systems theory – closer to more detailed discussions concerning specific legal fields and problems, and linking empirical investigation to legal doctrines and theories. We have collected many pieces of research, from leading researchers from different countries (Brazil, Russia, China, Canada, United Kingdom, France, Germany, Italy, Luxembourg) and covering a wide range of topics: from criminology to environmental regulation, from protests and social movements to courts and argumentation, from constitutional rights to public administration, from economic institutions to political history etc. (see Barros, Amato and Fonseca 2020; Campilongo, Amato and Barros 2021; Pires and Sosoe 2021; Moeller 2021, Amato and Barros 2018)[1].

Materials like these invite us to revisit many concepts and explanations articulated by Luhmann. Some key-points are critical in trying to put systems theory to work within a more concrete empirical setting. A first question may be: how does functional differentiation (among law, politics, economy, science etc.) is empirically combined with and restricted by other forms of differentiation (such as gender, race and national segmentations, centre-periphery dependencies, class conflicts)? A challenge then appears: we need to move from

[1] For those interested, must of the seminar cycle was recorded in video: https://www.youtube.com/watch?v=jvFDXvVbZJw&list=PLAB4tL1hgrl3VALVvrkv6eo_ZouGcUGCd . One can also watch to a round table conducted during the Law and Society Association Conference: https://www.youtube.com/watch?v=mkA7Ky4o5lI .

the purity of theory to empirical syncretisms that are revealed by the particular social instances to which we may apply the universal concepts of this theory as a descriptive tool. Even if functional differentiation is prevalent in modern society, it decodifies other social distinctions. Regional trajectories within world society vary in how to build and sustain those forms of differentiation. This historical process depends on the inner construction of differences within each functional system (for instance, on how law builds its own organizations and procedures) in its variable empirical contexts and settings.

A second topic of interest would be: how are social forms of differentiation entangled with the evolution of dissemination media (from orality to writing and the press)? The increasing digitalisation of communication emerges within functional differentiation but generates risks and dangers for the maintenance of this differentiation itself. For instance, the rise of internet (including the internet of things, big data and other innovations under the current technological revolution) drives the massive spread of misinformation (fake news) in healthcare and education, in elections and the public opinion, infecting as a virus the circulation and consistency of communication chains and networks within world society.

Another source of restlessness for systemic researchers is: how to identify a structural coupling between or among systems (*e.g.* constitution, property, contract, taxes, public policies)? How to differentiate a structural coupling from corruption, 'colonization' or 'de-differentiation' between or among systems? This leads us to focus on the dimension of institutionalization and procedures, observing in a larger scale how systems' autonomy is reinforced or blocked by frictions with other systems.

Another source of insight may emerge from the concern about how to connect these three types of systems: interactions, organizations and functional systems. A way of articulating these levels may be to map the internal structure of functional systems: its core organizations, peripheral organizations and public spheres/internal environments. In the case of law, this exercise may be useful both to map the dynamics and strategies of legal regulation and to think about

institutional alternatives (other setups of procedures, organizations, rights, duties, liabilities and powers, and structural couplings, such as the constitution, property, contract, public policies and taxation).

In this non-exhaustive enumeration, a final methodological concern would be: how to work out the functional method to analyse case law, protest and other legal communications? Luhmann's systemic apparatus leads us to focus on equifinal and functionally equivalent solutions, on complex causalities and self-reference, on contingency and improbability. This reverses the unilineal causal models of traditional empirical legal research, with simple 'input-output' formulations that conceive law as a trivial machine processing demands from the social environment and returning with outcomes of social stabilization. Instead of 'law and society', we are called to study 'law within society', and then to have a non-instrumental, but constitutive approach to legal operations, paying attention to how these operations help to structure social expectations and institutions, both sustaining and being sustained by other systems, media and differences.

There are even studies that explore a trend of naturalization in jurisprudence – that is, the connection of conceptual-analytical frameworks in legal theory to empirical variables and research. Some propose then a connection of social systems theory to radical behaviourism (see *e.g.* Oliveira-Castro and Aguiar 2020), in order to approach legal rules as linguistic behavioural patterns whose application also depends on the reinforcing or punitive consequences signalized by a context of legal materials that also induces some motivational states on the decision-maker.

All these are very tricky theoretical challenges and we expect that the readers find some light and direction about them in this selection of essays and researches. In this volume, we maintain the focus on systemic-theoretical approaches, but also invite a wider range of other contemporary socio-legal theories and methods. The reader is asked to find the contrasts and complementarities between these diverse viewpoints. The book is organized in four main parts: one presenting some theoretical and methodological discussions

on how to couple sociological and legal theory with empirical research, under systemic approaches; the second one presents examples of empirical research adopting a socio-legal background to look to the legal, political and economic systems; a third one focuses on the problems of inclusion/ exclusion in contemporary society; the fourth and final session discusses researches concerning the legal process and legal organization.

In the opening of the ***part I*** of this volume, **chapter 2** presents an interview with Professor **Alfons Bora**, from the Faculty of Sociology of Bielefeld University, Germany – the basis of Niklas Luhmann's academic endeavour for decades. Throughout the 1 hour and 20 minutes interview, sometimes interrupted by the sounds and noises of São Paulo's downtown, Professor Alfons Bora answered the questions with theoretical density and good humor. In the responses, the interviewee addressed, for example, biographical aspects related to his academic background and professional trajectory, such as the historical and personal context in which he developed his interest in Sociology and, later, systems theory. In addition, there were opportunities for the Professor to address some central topics on his research agenda in these areas, such as the adoption of the concepts of "discourse" and "responsivity", the focus on organizational systems, and the use of the distinction between inclusion and exclusion.

Chapter 3 is also by **Alfons Bora** and focuses on illustrating his experience in using the systemic framework to research citizen participation in legal procedures, differentiated modes of inclusion, conflicts between social discourses, and legislative failure. The text also provides methodological reflections on the possibilities of using clinical perspectives and tracing causal explanations.

In **chapter 4**, **Thomas Vesting** provides a great example of historical detailing and discussion of an important aspect of systems theory applied to law. Luhmann (2012: 120-123) not only pointed out to the emergence of differentiated 'success media' – or 'symbolically generalized communication media' (such as validity for law, power for politics, money for economy) – but also stressed the evolution of society driven by the transformations in 'dissemination media' –

from orality to writing, from the press to the internet. In his text, Vesting explores how the conceptions of objective law and subjective rights become important in legal theory precisely when law comes to be seen as a system – for instance, in the books by the classical 19th century jurists. A parallel process is seen in literature, and culminates in the legal abstraction of a subject of law, from private to constitutional law and the general theory of the state. Nowadays, tendencies of a new legal individualism threaten the identification-distinction of individuals, groups and the state as equally legal persons, and make claims against the recognition of unifying conceptions.

In **chapter 5**, **Lucas Fucci Amato** reappraises the debate developed between Eugen Ehrlich and Hans Kensen among the years of 1915 and 1917 in the journal *Archiv für Sozialwissenschaft und Sozialpolitik* (Archives for Social Science and Social Welfare). In that occasion, one side defended an empiricist science of law, focused on observing the 'facts of law'; the other one sustained a legal science focused on the 'ought' to be, that is, in describing legal norms integrated within a staggered structure defined as the legal order – a coercive social order identified with the state. Amato claims that Niklas Luhmann's systems theory advances concepts capable of re-describing the terms of this debate. It disentangles the idea of form from any structural reference (either to the norm or the legal order) and proposes that the legal forms are the indications made in the medium of sense proper to law – that is, they are distinctions about validity. In the place of a definition of law with reference to its structure, this theory proposes a functional definition. Law is operationally closed within the self-reference of communications that use the code 'legal/ illegal'. Finally, systems theory integrates in the legal system, as a social system, both the state and the societal 'sources', the 'living law' as so as the law of courts, and it distributes the decisional programs of law and its organizations between the center and the periphery of the legal system. This is the inner structure through which law processes communications advancing claims of legality, validity or constitutionality. Therefore, Amato claims that systems theory is able to close the gap between analytical-jurisprudential and empirical approaches to law, being

suitable both to sociological approaches (in a range from general social theory to empirical, middle-range inquiries) and to legal theory (with its focus on norms and validity, rights and duties, legal interpretation, argumentation and decision-making).

In **chapter 6**, **Guilherme de Azevedo** aims at discussing the advantages of the functional method, as renewed and reappraised by Luhmann in face of a longstanding tradition in social theory. This is an important theoretical-methodological debate, as social systems theory is often misperceived by different trends in socio-legal studies, such as law and development, law and political economy, critical legal studies, or critical theories in general. How does Luhmann delimits the specific function of law? Does this conceptual clipping imply a de-politization of the legal discourse, an evicerastion of critique and the hidding of themes such as social exclusion and social conflicts? All these are questionings approached in this chapter, making of it a valuable invitation for the dialogue between social systems theory and other socio-legal approaches.

In **chapter 7**, **Wálber Araújo Carneiro** analyzes the role of empirical research in light of an approach called by the author "ecological analysis of law". It sets out from a historical reflection on the place of the empirical for different theoretical conceptions of law and, considering the law's lengthy dependence on knowledge based on experience. Then the chapter proposes an explanation of the resistance that sociologically controlled empirical research encounters in dominant legal theory constructions. Upon hypothesizing that an inherent confusion arises between the normative autonomy of the legal system and the use of empirical research, it proposes "ecological" parameters for the use and resignification of empirical data in legal communication.

We come then to the ***part II*** of this volume, which is focused on presenting examples of a variety of empirical approaches to the legal system in its couplings with other social systems (especially politics and economy, but also education and science) and in its core organizations.

If systems theory has an empirical plausibility to describe the emergence of modern society, this is due to the wide range of historical research that

Luhmann approached and synthetized within his project of dealing with the coevolution between social structure and semantics. In line with this, in **chapter 8**, **Chris Thornhill** presents an illustration of his acclaimed work on the historical sociology of constitutionalism, which connects the designed and positivized legal institutions and rules to the wider political context that marks the constitutional battles, projects, charts and moments. In this paper, Thornhill approaches citizenship and the modern national state in the core feature of both sovereignty (the organization of national armies and military bureaucracy) and citizenship (with reference to the role of a soldier, *i.e.* to military service). The historical scenario of Weimar 1919 Constitution combined the political inclusion of masses through the universalization of suffrage, the constitutionalization of social rights and the famous 'state of exception' (consecrated through the article 48, which allowed the President to take emergency measures and decrees without the prior consent of the *Reichstag*). These innovations rocketed an endurance test of democratic legitimacy, anticipating challenges that face contemporary democracies especially since World War II.

The core concern that guides **chapter 9**, by **José Eduardo Faria**, is the institutionalization of multiple levels of normativity, which constitute efficient legal orders driven by powerful transnational economic actors, being or not taken as valid under the specific law of each national state. Those include are cosmopolitan norms, multinational zones of sovereignty, and stateless global laws – there is a process of denationalization of law. On the other hand, in the domestic legal orders, political power within national states has been increasingly colonized by economic power. Neoliberal policies foster social Darwinism, enhancing exclusion and the hyper-responsibility of individuals. Social vulnerability feedbacks popular dissatisfaction and opens space for authoritarian populism. Under these adverse conditions, a question emerges: to what extent do possibilities of democratic legitimization of the social order and its law persist?

In **chapter 10**, **Nathalia Penha Cardoso de França** studies the recent political crisis in Brazil and its observation by the legal system. She works to

refine the description of authoritarian practices within a democratic rule of law, based on the premise that authoritarianism never ceased to exist in the interior of democratic States. In this scenario, the legal system is not primarily guided by the legal semantics of the textual models of the Constitution, of the law, but becomes guided primarily by other social models of conduct. Therefore, the author advances the analysis of systemic corruption in authoritarian frameworks.

Chapter 11 (by **Celso Campilongo, Diana Saba, Paula Ponce, Lucas Fucci Amato and Marco Antonio Loschiavo Leme de Barros**) presents a systemic approach to the usage of fake news through digital networks in order to erode trust in the electronic voting system conducted and organized by the Brazilian Electoral Justice. The authors point out to at least three paradoxes that have been interwined in contemporary Brazilian coupling between law and politics: in addition to the paradoxes basing the foundation of power on positive law and sovereignty, now they are crossed by the contamination of the public opinion with the liar paradox: 'I am lying'. This paralyzing paradox shifts societal self-observation to a degree of second-order observation in which the legitimatory potential of procedures (such as elections) is pressed and tested.

In **chapter 12**, **Pedro Henrique Ribeiro** presents the proposal of a legal sociology of scandal, counterposing legitimation by procedure to legitimation by outrage or acclamation, as a symptom of a crisis of symbolic legitimation that democratic constitutionalism is currently facing. The author considers that the rise of "scandal" as a form of political and legal performance is made possible by both structural elements (social exclusion combined to the modes of communication enhanced by digital media) and semantic factors (such as the rejection of democratic constitucionalism by some political discourses circularing in today's world society).

Marco Antonio Loschiavo Leme de Barros (**chapter 13**) then brings light to the interface between law, economy and international politics, discussing the relationship between the judicialization of sovereign debts and the process of construction of an international legal regime for restructuring debts, from a

literature influenced by the sociological perspective of Social Systems Theory. The theoretical approach is justified in light of the legal communications produced in world society, identifying the structures and programs of the legal system that deal with the cognitive complexity inherent to the dispute of International Political Economy. The author discusses the concept of international legal regime as a constellation of administrative arrangements constructed and declared by states to coordinate their expectations and organize international behavior considering the fragmentation of global law. Marco Loschiavo presents the study regarding these procedures of developing a legal regime from sovereign debt disputes, focusing on proposals led by the International Monetary Fund and the United Nations. Finally, Loschiavo reflects the dynamics of International Political Economy and Law, identifying that these dynamics are open to contingency and marked by distinct specialized communications, which reinforces the prevalence of potential conflict between institutionalized rationalities in world society.

Concluding part II, **Chapter 14**, by **Laurindo Dias Minhoto**, also deals with the economic system – mainly, with its irritations or interferences towards the educational and scientific systems. The author proposes a systems theory critique of 'academic Capitalism'. His initial motive of argumentation is the presence of some crypto-normative elements in Luhmann's theory and its elective affinities with Theodor Adorno's critique of identity. Then, the chapter moves on to characterize some elements of the neoliberal rationality, presenting academic Capitalism as a project for reorganizing the university along the lines of this rationality.

Part III presents empirical studies adopting systems theory and other contemporary approaches in the socio-legal field to focus on problems of inclusion and exclusion in contemporary society.

Douglas Elmauer (**chapter 15**) focuses on providing empirical data to advance the thesis that the organization of modern society through the prevalence of functional differentiation provides risks and opportunities for universal inclusion, reversing previous stratification through ranks and classes.

The author provides examples of inclusion waves covering many functional systems, such as law, education, healthcare, politics and economy. Regional asymmetries and massive social exclusion, as so as restrictive opportunities for access to social systems, are also to be explained as evolutionary consequences of society differentiation or as obstacles to differentiation posed by entrenched inequalities.

In **chapter 16**, **Gabriel Ferreira da Fonseca** adopts the systems theory to answer the following question: does the political and legal interventions' crisis in different spheres of social life, and especially in the housing area, lead to the replacement of the citizenship's and social rights' logic by the market's and consumption's logic as the way of social inclusion in Brazil? The author develops a case study regarding the Brazilian Housing Finance System (*SFH*) because of the many nuances associated with the idea of social inclusion/exclusion and the relation between law and economy are possible to observe in that area. It is adopted a sociolinguistic-inspired approach to enlarge the empirical potential of the systems theory and to reconstruct the discourses about housing finance in modern society. Fonseca identifies and describes the tensions between law and economy by conducting a literature review, a documentary analysis, as well as some semi-structured interviews. In this way, his work concludes that, in the Brazilian *SFH*, instead of a replacement, there is a tension between the logic of citizenship's and social rights' concretization and the logic of market's and consumption's growth. The convergences and divergences between these two logics dictate the tone of social inclusion's attempts focused on the housing access in Brazil.

Chapter 17 (by **Wanda Capeller**) aims to analyze the complex conditions that determine the desubjectification process of young European women under the impact of totalitarian semantics and ideological propaganda allowing their own auto-radicalization which led them to join a pre-modern way of life in Islamic State's patriarchal society. In Jihadist society, women have an ambiguous social role. On the one hand, a subaltern role of wife and mother devoted to the domestic space, and on the other hand an active role in the community, notably

as a female combatant. After the fall of IS, in 2019, these women have been detained in Syria and Turkey's refugee camps, claiming the right to return to their countries of origin. In order to better understand this new political, legal and social problematic, the Capeller argues on two points: 1) Jihadist propaganda functions as a powerful dispositive allowing them to adhere to subaltern subjectivity; 2) French political position regarding the rescue of jihadist women, provokes legal trouble in the EU.

Chapter 18 (**Izabela Zonato Villas Boas and Gianpaolo Poggio Smanio**) aims at discussing the law concerning refugee's placed in the context of the Brazilian rule of law. The main theoretical tool adopted from systems theory is the difference between inclusion and exclusion, which the authors use to focus on the analysis of primary sources (such as reports and documents from the United Nations High Commissioner for Refugees). The approach to the dignity of the asylum seeker is therefore a challenge to a sociological theory that presents itself as deprived of a normative dimension and focused only on precise tools for description of modern society and its problems.

Part IV of this volume, finally, deals with legal mobilization in decision-making processes, especially in courts. **Cecília MacDowell Santos and Flávia Carlet**, in **chapter 19**, refine the concepts used in the literature on different practices of mobilization of law aimed at legal, political and social change. They try to differentiate popular advocacy and transnational legal activism in light of the Epistemologies of the South (a concept by Boaventura de Sousa Santos), examining them from three case studies. The ultimate goal of this chapter is to identify when and how different practices of legal mobilization intersect and have the potential to promote not only social justice, but also cognitive justice.

In **chapter 20**, **Cecília MacDowell Santos**[2] argues that scholarship on transnational feminist activism overlooks transnational litigation practices; she focus cases of women's human rights presented to the Inter-American Commission on Human Rights against Brazil, showing that a legalistic view on

[2] We thank Oxford University Press for the permission to reprint this paper, originally published in 2018 in the 10(2) *Journal of Human Rights Practice* 191–211.

human rights held by the more professionalized NGOs tends to prevail over grassroots feminist organizations' and survivors' perspectives on human rights and justice. Her thesis is that, to promote global justice, human rights activism must include epistemic justice and must legitimate all types of knowledge produced by all the actors involved.

Chapter 21 deals with law in its procedural and judicial decision-making arena. **Konstantin Skoblik** provides an exemplary application of systems theory to describe procedural law – in this case, the criminal procedures modeled specially since 2018's reform in Russia, which expanded jury trials. These procedures can be seen as a network of self-referred communications applying the code 'legal/illegal' in terms of attributions of the difference 'unguilty/guilty'. The Criminal Procedural Code entails a series of programs that guide these attributions and the hierarchy of the judiciary provides many levels of reflexivity, of second-order observation of how that difference is allocated. However, in this case study the author detected an exploitation of the subsystem of criminal justice by the political system, which aims at legitimating itself through the imposition of a preference towards conviction and against acquittal. This tendency (exposed for instance in informal procedural norms and in intentional/finalistic programs that lead to a presumption of guilt) exemplifies a threaten of de-differenciation. Politics itself cannot produce legitimacy by its own operations, extracting it from its environment, as physical coercion, in a repressive model that walks in the opposite way of the rule of law. The legal system does not master itself the attribution of its code, stops to work as a complex autopoietic machine and turns itself into a trivial machine of inputs and outputs working in a simple linear causality in which acquittal is treated as a risk of loss of legitimation. Instead of preserving rights, justice is then put to work as an assembly line, whose efficiency is measured by criteria of speed and productivity (translated in the acquittal-conviction ratio). 'Differentiation/de-differentiation' is logically a binary universal difference that does not admit a third value; but the particular empirical instances to which it applies may well admit degrees. This text convincingly proves this thesis, showing how the self-reference of law may be

weakened by external interference, such as in a legal semantics that favors the political goal of crime prevention and reverses due process, considered as a series of unnecessary rituals and formalities.

Finally, in **chapter 22**, **Jordana Maria Ferreira de Lima** and **Lucas Fucci Amato** deals with the classic theme of inclusion in the legal systems through access to Justice, but under a new lens. They analyze the proposition, implementation and initial results of the National Policy for Priority Attention to the First Level of Jurisdiction, implemented by the Brazilian National Council of Justice (CNJ). The hypothesis of the research is that this judicial policy contains elements of complex enforcement, bringing the CNJ closer to the role of a reconstructing organ of the judiciary, aimed at identifying structural bottlenecks and destabilizing barriers to access to Justice (jurisdiction). The study proved its hypothesis based on official empirical data collected by the CNJ, analyzed in light of a socio-legal literature; for this, it institutionally situates jurisdiction in light of Luhmann's social systems theory and adopts the concepts of 'destabilization rights' and 'reconstructing' agency or Power, elaborated by Roberto Unger in his proposal for critical legal studies.

References

Amato, LF and Barros, MALL (eds) (2018) *Teoria Crítica dos Sistemas? Crítica, teoria social e direito* (Porto Alegre, Fi). Available at: https://www.editorafi.org/_files/ugd/48d206_55ed2ac8fe01488b89718288359b90c8.pdf (accessed on 2 May 2023).

Barros, MALL, Amato, LF and Fonseca, GF (eds) (2020) *World society's law: rethinking systems theory and socio-legal studies* (Porto Alegre, Fi). Available at: https://www.editorafi.org/ebook/78world (accessed on 16 July 2021).

Campilongo, CF, Amato, LF and Barros, MALL (eds) (2021) *Luhmann and socio-legal research: an empirical agenda for social systems theory* (Abingdon, Routledge).

Luhmann, N (2012) *Theory of society 1* (Stanford, Stanford University Press).

Moeller, H-G (2021) 'Observing observers in social systems theory: an interview with Hans-Georg Moeller [conducted by Laurindo Dias Minhoto, Lucas Fucci Amato and Marco Antonio Loschiavo Leme de Barros]' 33(3) *Tempo Social* 333-353. Available at: https://www.revistas.usp.br/ts/article/view/182052/178270 (accessed on 21 January 2022).

Oliveira-Castro, JM and Aguiar, JC (2020) 'Behavioral analysis of law: an operant interpretation of legal systems' 11(1) *Perspectivas* 92-113. Available at: https://revistaperspectivas.org/perspectivas/article/view/643/328 (accessed on 1st April 2022).

Pires, A and Sosoe, L (2021) 'Epistemological and empirical challenges of Niklas Luhmann's systems theory: an interview with professors Álvaro Pires and Lukas Sosoe [conducted by Lucas Fucci Amato, Marco Antonio Loschiavo Leme de Barros and Gabriel Ferreira da Fonseca]' 17(1) *Revista Direito GV* 1-28. Available at: https://www.scielo.br/j/rdgv/a/ZkQXDKmq6N8tjVHQqsHQCbK/?format=pdf&lang=en (accessed on 16 July 2021).

Part I. Theory of society and empirical research in law

2. Sociology of law and systems theory: an interview with Professor Dr. Alfons Bora[3]

Interviewers:

Gabriel Ferreira da Fonseca

Lucas Fucci Amato

Marco Antonio Loschiavo Leme de Barros

Edvaldo de Aguiar Portela Moita

Henrique Carvalho

Artur Stamford da Silva

Introduction

On September 26th and 27th, 2019, Professor Alfons Bora (Faculty of Sociology of the Bielefeld University - Germany) was at the Faculty of Law of the University of São Paulo (Brazil) to give two lectures in the International Seminar Cycle "Rethinking Luhmann and the socio-legal research: an empirical agenda for the social systems theory?". The event was coordinated by Professor Celso Fernandes Campilongo and his former students Gabriel Ferreira da Fonseca, Lucas Fucci Amato, and Marco Antonio Loschiavo Leme de Barros. It aimed to bring together researchers, mainly in the area of Sociology of Law, and to promote reflections on the potential for mutual enrichment between systems theory and empirical researches.[4]

In the late afternoon of September 26th, before his first lecture, Professor Alfons Bora gave an interview to us, in the meeting room of the Department of Philosophy and General Theory of Law, at Largo São Francisco (Faculty of Law,

[3] Originally published in Portuguese in (2020) *Revista Brasileira de Sociologia do Direito* 7 (2), p. 188-215.

[4] To watch the video recording of this interview, one can access: https://www.youtube.com/watch?v=eM1sWMaAGV8

University of São Paulo). Some questions were previously sent to him, but, in general, they were reformulated during the conversation.

The result of the conversation was the following text, which summarizes some of the main discussions developed in the field of Sociology of Law and, especially, in systems theory. Showing the experience of someone who has dedicated most of his life to such issues, Professor Alfons Bora faces and rethinks classic distinctions in the area, such as those between norms and facts; science and practice; theories and methods.

1. Biographical aspects

GABRIEL FONSECA - Professor Alfons Bora, thank you very much for accepting our invitation to talk about your career, systems theory, sociology of law, empirical research, sociolinguistic studies and so on. We want to start by asking you about your interest in systems theory and sociology of law. How did you become interested in these approaches? Are there biographical aspects related to that interest?

ALFONS BORA - Well, there are actually two questions: one regarding sociology of law and the other one systems theory in particular. I would like to start with sociology of law because that was the first point where I got into contact with sociology. It was in the mid-1970s… Maybe it'll be helpful to say a few words about the historical context. It was a time when the social-scientification of jurisprudence and legal education was very strong. Everyone was interested in sociology as a general science explaining everything, particularly jurisprudence and legal education. So, everybody was critical and wanted to criticize law, and that is why sociology was extremely attractive in those days.

The second point was that in Freiburg, where I was studying, there was a sociologist who was or still is a really charismatic teacher, Günter Dux. As I would say today, he is rather socio-anthropologist – not so much a sociologist –

but he was the one who somehow brought me to sociology, and that was my first step. I studied law and I thought that it should not be all that I wanted to know. I wanted to know more and something different. So, I started studying sociology as a second subject. It could also have been history or something like that, but, in any case, something different from legal doctrine and dogmatics, which seemed to be very old-fashioned in those days. So, I started to study sociology.

The second question – how did I come in contact with systems theory? – that happened later of course. First, with Günter Dux, we were very much interested in critical theory and the improvement, the development of critical theory. Therefore, we read a lot of Jürgen Habermas. The *Theory of Communicative Action*, published in 1981, was our Bible. We read everything and we tried to criticize it because Günter Dux, our teacher, my Ph.D. supervisor, wanted to criticize Habermas. That was the theory we were dealing with and our point of reference, if you like.

Then, in 1984, rather by chance, I read Luhmann, and of course I have read a lot of things before, but, in that moment, I started with *Social Systems*. It was published in 1984, so I read in that year exactly. That was the point when I was completely fascinated and I thought "well, that would be sociology, not Habermas; Habermas is social philosophy". Then, I got an idea of what a good sociology could be or would be. So, this was my first real contact with Luhmann and from that time on I have been trying somehow to understand this theory and the connection with sociology of law, obviously, because I am a lawyer, and more than before, today I would say I am also a lawyer. I am a sociologist, but I am also a lawyer. This is why I am interested in that particular field.

GABRIEL FONSECA - How did you get in Bielefeld, how was your access to Bielefeld University?

ALFONS BORA - That is a long story. First of all, I was in Freiburg. There was only one place where, as a sociologist, you could work for money: that was the Max Planck Institute for Foreign and International Criminal Law. They had a

research group on criminology and this was a place where sociologists were needed as empirical research assistants. They had to do all the deliveries for the lawyers. The lawyers asked questions and the sociologists had to do the empirical work. That's where I started to develop empirical researches on abortion, bankruptcy, criminal procedure etc.

When the time was over and I couldn't get a new job, I was a bit helpless. I had my second state examination in law at that time, and then I was working on my Ph.D. thesis in sociology. So, the question was what could I do, where could I get some money from?

And, then, there was an ad in a big newspaper, *Die Zeit*. A position was advertised at the Social Science Research Center Berlin (*Wissenschaftszentrum Berlin für Sozialforschung*, *WZB*). Wolfgang van den Daele was the leader of the group "Norm Building and Environment" (*Normbildung und Umwelt*), a research group on environmental regulation. We studied procedures, alternative dispute resolution procedures, mediation and something that was called Participatory Technology Assessment Procedures, which was the main subject. At this point, I came in contact with participatory procedures and I started suggesting my own projects, a bit different from what was going on in Berlin at that time. It was the subject of my habilitation thesis.

When I just finished the habilitation, the next lucky chance came just at that point in time in Bielefeld. There was a vacancy, a professorship chair for Technology Assessment. I applied and got it. Ever since that time I have been in Bielefeld.

It is a boring biography. It was all about luck, chances, and contingency, if you like. It was more or less contingency, besides my interest in theory and the combination of theory and empiric research in a field that you could roughly describe as sociology of law, sociology of regulation, sociological theory of the law. I have no history with Bielefeld going back to my studies as some of you have.

2. Systems theory in Brazil and Germany

MARCO BARROS - In Brazil, we usually observe systems theory having a great presence in Law Schools. So, you can take for instance references from Professors Marcelo Neves, Celso Fernandes Campilongo, Willis Santiago Guerra Filho, and Artur Stamford da Silva, but we cannot usually see this kind of discussion at Departments of Sociology. For instance, here, at the University of São Paulo, there is just one Professor that I actually know that studies systems theory at the Sociology Department. So, I would like to ask if you can see the same situation in Germany or in Europe in general. What is your perspective on this?

ALFONS BORA - I'm not really sure about this point. I don't have valid statistical data, but I think I'm not wrong in telling you that the situation in sociology in general is very similar to what you described in Brazil. Systems theory is a marginal, very marginal phenomenon, a microscopic part of sociology at which other sociologists look with some suspicion and from a very big distance because it's difficult, it's not easy to get into contact with the language, is a bit strange and all these things. So much about sociology.

Now, I could extend your question to the relation between sociology and many other fields: how is it in economics, how is it in political science, how is it in history…? Sociology of law is only one of many possible fields where you could ask your question.

However, coming back to sociology of law, my impression is that, in Germany, the general interest in systems theory could perhaps be a bit more intensive in Law Departments than in Sociology Departments. Nevertheless, I say it with great reluctance, because I don't know how to measure it. How do we measure interest? We would have to ask people and to count and to do statistics. Or we could for instance go to the syllabi and look what are the issues of teaching or research things. It is a bit difficult is what I want to say.

My impression is yes, I know quite some lawyers, law professors, colleagues from big Law Departments who are interested in systems theory. That's wonderful because it gives me some resonance, I get responses, and that are people with whom I can argue and discuss, but I'm not sure about the general point. Intuitively, I would say yes, maybe it is very similar. Maybe.

3. Sociology and responsivity

GABRIEL FONSECA - You started to talk about critical theory and I have a question about this distinction between normative (or critical) and descriptive (or analytical) sociolegal researches. How do you see this distinction? Do you think that the idea of responsivity you are developing can help us to rethink these two perspectives on sociology of law and on systems theory? Or are they different issues?

ALFONS BORA - If you go back to Max Weber you'll find, I think, the most important answers to that question about the nature of the distinction between normative sciences and empirical sciences. Although Weber himself tried to find a middle position in his methodological works, but, cutting the long story short, I would say that, since Weber, not many important things have been said about the point. I mean there's a deep gap between normative arguments (*sollen*, ought) and empirical observations (explanations, causal relations, whatever you like) that is nothing you can easily bridge.

What made Critical Theory so promising and so attractive in the 1960s and 1970s was the idea that, since Adorno and Horkheimer, the early Frankfurt School has promoted: the idea that it's possible to bridge the gap, to build normative arguments on empirical knowledge. Those were the studies about authoritarianism and the early critical theory works. They were all based on this attempt to somehow come to an empirical justification of, in this sense, "normative" assertions (sentences about good society, what makes our life good

and valuable). That is of course enormously attractive for young people who want to be critical.

That was the reason why we were interested in Habermas. He tried to reorganize the theory because some core elements of Marxist thinking had been collapsing during the 1930s and 1940s, especially class consciousness. Things like that were no longer viable. You couldn't claim things like Marx and, later, Lenin.

So, that was Habermas's large attempt to somehow modernize and to rebuild critical theory on the basis of communication theory, and that made his attempt really attractive and at a certain point – it was mainly in my doctoral dissertation – I came to the conclusion that Habermas's solution doesn't work. He tries to reorganize sociological arguments in parts of "Parsons meets Durkheim" in the *Theory of Communicative Action* and he does it in a very eclectic way, a sort of bricolage. He just puts the theoretical parts together in order to make them fit his theory of communicative action. That is not very convincing. For me it wasn't sociology, at the end of the day. It was social philosophy. I'm very much with him, with discourse theory, when it comes to normative arguments. That is a strong way of arguing normatively, but the foundation, as I think, is rather weak.

So much about the general relation between norms and facts.

"Responsivity" is somehow related to that, but it's more abstract and a bit more behind that. I will elaborate more on it later. It's about reflective theories in sociology and the way they relate to the social environment of science. This is a newer development in the sociology of science and reflective theory of science. I will try to sketch it out.

A former student of mine, David Kaldewey – who is now a professor in Bonn –, tries to argue that systems theory, in a way, over-exaggerates the momentum of closure, of autonomy, and that Luhmann, in a way, has neglected the fact that science, since Aristotle, has always been reflecting about this environment, that there always have been discourses of what you could call practice. That's a very difficult and specific understanding of practice because it's a discourse within society, it's part of society. It has a limiting function against

over-exaggerated autonomy. So, this is where responsivity might be located, at the end of the day.

There's a loose connection with this old binary distinction between facts and norms and between "is" and "ought", between empirical science and normative science, but I think it goes a bit further. It's very strongly based on system theory and on non-normative science. Although I confess that, in relation to Gunther Teubner, for instance, he tries to re-establish many thoughts of critical theory and I think he should be more cautious in many respects. What I try with this idea of responsivity is to somehow follow him, but only to a certain point where I say: "Don't be so normative."

EDVALDO MOITA - May I just have this point? Because I was in a Conference there in Bielefeld and a Professor from Sociology said: "any normative Sociology is a bad Sociology." Do you agree with that?

ALFONS BORA – The sentence is too strong, too short. It is not really reflective. I wouldn't agree with him in that formulation. Sociology of course is not a normative science. It is an empirical science, an *Erfahrungswissenschaft*, as we say in German. There is no reason to argue about that. However, responsivity and reflectivity (this idea of practice as part of internal mechanisms of science) go beyond this simple distinction between facts and norms. It is a bit more complicated, as I would argue. Therefore, it might be really attractive. I like responsivity very much.

4. Research questions and methodologies

GABRIEL FONSECA – We can go now to another topic that you are working on. You have many works based on sociolinguistic studies. How do you articulate systems theory and empirical research? Can the sociolinguistic approach really help us with that? Do you see other useful approaches for this link between empirical research and systems theory?

ALFONS BORA - Let me perhaps start with sociolinguistics and give you a very short and rather reluctant answer. Sociolinguistics can help to conduct empirical studies, but only in a very specific sense, not with respect to a certain theory. It's related to subjects, and fields and questions.

Now, let's start with the beginning of your question. In general, I would argue that there is no necessary connection between theory and empirical methods. No, there isn't. It depends on the questions. I would say that you have to think about methods when you know what questions come from your theory and that can be very different in various kinds of questions. So, the theory does not trigger or fix, by no means, methods. Methods are open in this sense and there are no necessary relations. I would be interested to hear arguments if you think the contrary. I can't see that.

That is the general remark. And now as regards methodologies and their relation to specific types of questions, I think it can help us to distinguish two types of questions.

Questions that aim at numbers, if you want to know how many cases, and how are the relations between those cases and other cases… In other words, statistical generalizations. You draw conclusions from *n* cases to *n* plus *x* cases. This is a very important methodology, empirical analytical paradigm, and is very powerful. I do not want to attack these kinds of methods. There is a very unfruitful struggle between different methodologies in sociology and that's completely useless, as I would argue. You have to judge or decide upon methodologies depending on what you want to know. Given the first type of questions – questions of numbers, frequencies –, how many children will we have in ten years, so that we know how many kindergartens we have to build? That is very important, it's a real question, it's a practical question. It's all also theoretically interesting if you are in political sciences, in political planning or in government things.

The second type of question is related to cases and to causal explanations, more strongly than the first one. The statistical, the empirical analytical paradigm

also claims to deliver causal explanations, but that's a bit difficult because causality and correlation do not necessarily go together. Correlations do not say anything about causalities. Where do we get causalities from? We can take medicine as an example. Causal explanations, traditionally, not always, but traditionally, come from clinical research. Pathology: you open a body, you look into it, and you try to understand what you find. You see: "Oh! There is this little organism and here I have the symptoms, they may be related." Now, I try to understand the mechanisms. Robert Koch, Paul Ehrlich… that kind of clinical perspective reconstructs the internal "logical" mechanisms of a single case in order to understand all similar cases. Once you have found the bacterium you can claim in a generalizing way – structural generalization – that all similar cases will be explained in the same way. So, this is a very different perspective, a very different kind of question, and there you find clinical methods, case methods, reconstructive methods…

Now I end the analogy with medicine and would say the same holds true for social sciences in general. We also have clinical perspectives, case studies. Understood correctly, case studies are aiming at producing causal relations, explanations, that provide for a certain kind of generalization, structural generalization, meaning that all cases showing similar structures will find the same causal relations. This is a very different question from the first one. Both types of questions can be connected and related to any kind of theory. There's no relation between theories and methods.

And, finally, coming back to the second part of your question, sociolinguistics usually can be used, and I have done this for a long time of my life together with Heiko Hausendorf, mainly for case studies, for communication studies, in particular. Therefore, they are apt for a kind of theory that is based on the term of communication in a specific understanding of communication, but they are aiming at a clinical perspective. I don't know whether this is clear. I will repeat it tomorrow in my presentation ["Observation and practice: Examples and future prospects of sociological systems theory in socio-legal research"].

5. Systems theory and empirical research

LUCAS AMATO – My question is about the use of systems theory to conduct empirical research: if sometimes it is superfluous, if some phenomena can be better described by other theories… How do you see this non-dogmatic way to study phenomena?

ALFONS BORA - Well, firstly, in my own research I found questions which, as I thought, had not been answered sufficiently or solely by systems theory. Phenomena mainly relating to the internal differentiation of what Luhmann has described as functional systems, organizations, and interactions. His systematics and his terminologies are quite convincing, as I would argue, but maybe it could be developed a bit further when you use it over certain kinds of phenomena.

In my case that was mainly the phenomenon that later on I called "discourse". I found things in the world that didn't smoothly fit into Luhmann's terminology and my conclusion was not to skip the theory, but rather to try whether it offers options to somehow integrate the phenomena in a more detailed description. That's why I started using "social position" in theory with Heiko Hausendorf. We took that from sociolinguistics, and I myself somehow adopted the term "discourse". However, it's not Foucault, it's not Goffman, it's not Habermas, it's a systems-theoretical understanding of the certain type of phenomena which I named "discourse". David Kaldewey, whom I mentioned before, made use of this idea in his sociology of science in a slightly different way, but that would also be an example of how to further develop the theory. Point one.

Point two: the aspect I had been talking about, some minutes ago, practice. The internal relevance of the environment. You could argue that this is already embedded in the standard of systems theory: in the term of external reference, observation, distinction, things like that. That's true of course, but, in that respect, Luhmann maybe didn't go far enough or he didn't have time to go far enough. I

was struck by David Kaldewey's idea of practice as an internal part of science and the idea of how you could develop systems theory in a way that the external world – the environment – has a say within the system – that is Kaldewey's words, "*Umwelt spricht mit*". That's completely heterodox, it's a crime, it's not part of the official canon, but I think it's interesting and it's productive. I learned a lot from it and I would certainly try to use it further on. So, it is another example where the theory has a high potential for further development. Luhmann himself – that's not an argument, it is just anecdotical – was strongly against this attitude, against the classics (you admire them and you light candles, "don't touch them"). He was always very ironic and he laughed at this attitude.

Findings that contradict theoretical premises… I'm not sure. I think you can't falsify theories. You can falsify hypotheses, sentences, but not theories. If a theory is really a good theory, that means, it is comprehensive, complex, valid in a way, so it covers the phenomena that it attempts to cover, you will usually not be able to falsify it. A good universal theory is able to describe the world. Parsons, even Foucault… How would you falsify them? No… You can try to attack single sentences, claims, validity claims. Something very old-fashioned. Somebody says "x" and you try to find "no, it's non-x". "All swans are white or black", and you try to find the first blue one, and once you find it you can affirm that sentence was wrong. However, with theories, that's different. I think I didn't find an argument to attack systems theory so far.

Phenomena with regard to which systems theory might be superfluous, frankly speaking, surprisingly, no, I didn't find them. My personal experience always has been that systems theory is a very rich offer that enables me to see phenomena *ad libitum*, without any limitation, in a new way. Yesterday, we talked about our researches and contacts with other colleagues and I gave a brief account about my relation with Frankfurt, with Max Planck Institute… They invited me to a conference about diversity and I've never thought about diversity before, so I sat down and, a few months later, I had a rather long article about diversity from a sociological perspective and it was with systems theory. I didn't go into books in order to learn what diversity is, but my task was to find out what

this kind of theory would think about a phenomenon like "diversity". It was enlightening for me. I learned a lot, and I hope others also did, naturally, but I learned a lot and that is the aspect of this theory that makes me, if I can confess that, happy as a scientist. It's always surprising and leading you to completely new points of view. So, I don't find it superfluous.

6. Systems theory and organizations

MARCO BARROS - My question is about the observation of organizational systems. I think it is an important driver in order to think about the possibilities of empirical legal research. You mentioned before the idea of case studies… So, do you think that focusing on organizational systems, like courts, banks, firms etc. is a promising way of conducting an empirical legal research based on systems theory?

ALFONS BORA – I would agree, at least very often. Not in general. There's no point to say that you should always address organizations, but very often, and especially in those points where you have critical debates about systems theory where people claim: "The theory doesn't explain that and doesn't see that…". Very often I find that they don't see organizations. That's one of the problems with systems theory: everybody is talking about functional systems ("the law is not possible to…"; "economics cannot do…"). I train myself to go back one step that and to ask: "What is economy in that case? What is law? Is it really *the* 'law' or is it a specific type of organizational system or network or whatever (there are many varieties) that makes use of the law among other things?"

For instance, some years ago we had a debate on juridification, *Verrechtlichung*, a wonderful German word. Habermas made use of it: the juridification of modern society. Once I realized I did not understand what that meant, I simply didn't understand. Where did I know from that the society was juridified? When we are talking about societies that are functionally differentiated and have universally operating specified systems, the law is a

functional system of world society. How could it 'juridify' society? It operates! However, I thought that they had a point when they talk about juridification. It's not wrong, there's something about it, there are many spheres, many fields in our world, in our experience, where you think: "Oh, there's a lot of law in a way that it wasn't before, so there's something changing". That was when I learned for myself that we should better talk about organizations. Organizations can be juridified, and systems theory provides us with the conceptual terms to explain that: multiple programming, multiple references, and a change in weights between the different programs. That's very easy.

Courts produce legal sentences, but they are programmed legally, economically, politically, you name it. The reference to the law is always number one, the other references stay back. Of course, you need money in order to pay your secretary and you need money to buy papers and to buy computers in court, things like that. Money is important for the programming of organizational operation. Of course, you can observe economization when, for instance, economy becomes more important than law in courtrooms.

Then, it suddenly gets empirical, it gets instructive, you know what you have to look for. So, yes, I agree, there is a certain weakness, not in systems theory, but in a widespread focus on functional systems. Very often problems that seem to occur can be led back to organizations and, then, they are not problems anymore for systems theory.

7. Inclusion and exclusion

EDVALDO MOITA - I will just make a point because it connects my question quite clearly. You have recently published in Brazil a paper[5] that provides a useful contribution to systems theory, showing the transitions from functional systems to interactions and organizations and so forth. You work with the distinction "inclusion and exclusion" in a non-binary way. So, how do you

[5] BORA, Alfons. "Quem participa?" Reflexões sobre teoria da inclusão. Tradução de Edvaldo de A. P. Moita. **Revista Brasileira de Sociologia do Direito**, v. 6, n. 3, set./dez., p. 3-29, 2019.

use this distinction in your research? That would be the first question. The second question is: by applying this distinction in organizations and interactions, you seem to avoid the discussion about inclusion and exclusion that appears in the late works of Luhmann at the level of functional differentiation. He even asserts that this form of inclusion and exclusion is a meta-code, which comes before the code of functional systems. Do you agree with this kind of presupposition? Or would you put it differently? Or perhaps would you just stick with the concepts of inclusion and exclusion at the operational level of organizations and interactions?

LUCAS AMATO – And I would just add that some people say that the German welfare state at the time of Luhmann was what guaranteed functional differentiation, because it guaranteed inclusion. So, was functional differentiation just describing that German State from the 1970s or is it something that can be observed in the modern world society, as Luhmann claims he is describing?

ALFONS BORA - I'm not so sure about the close connection between functional differentiation and the welfare state, because functional differentiation is a process that covers centuries. He was very ambivalent when defining a point in time where functional differentiation starts. Sometimes, he begins in the 11th century… So, be as it may, it is a very long process, a time shift from medieval times to modern times. According to how I understand Luhmann, it is strictly associated with modern society and the process of evolution of modern society.

The welfare state is an episode in modern society, a rather recent episode, and I'm not sure whether we still are in a welfare state or we are facing something different. It is probably something different. So, I cannot easily see a close connection between the two theoretical terms, they co-occur between our post-war period and maybe until 1989 or something like that. I don't know. I'm not sure. I'm not an expert in welfare state theory. I have to be very cautious at that point.

Functional differentiation is much easier and, as I understand the theory, it is not necessarily related to the distinction between inclusion and exclusion. It is a different level. I know Luhmann's remark about meta-code and I'm not sure whether this is more than a remark. I don't want to talk about the author of that grand theory in that way, it doesn't help us further, but I think that the point is not strongly developed, I can't find a systematic place for this remark.

There is, however, a similar argument about secondary codes: morals as secondary codes. This is very clear in the theory. They help to program the application of the primary code. The relation between morals and law: which law should you follow? Then, you come to moral theory, to philosophy, and that is meant to help you program the application of this "first order", the primary code.

But meta-code… Does inclusion/exclusion program the application of codes? Does inclusion help us to distinguish between lawful and unlawful? No, I wouldn't say so. Inclusion is itself a normative issue and you can normatively prefer inclusion over exclusion, but I'm not sure if this is a very prudent position. There are many situations where you prefer exclusion over inclusion. I could easily give you examples: big data, surveillance. Do we want to be included in this camera observation system here? I'm not sure. There are people arguing against it. They prefer to be excluded. That's okay. I just want to say that's a difficult relation. I can't see that the distinction between inclusion and exclusion works in the same way as a secondary coding by morals, for instance. "Meta-code" or whatever, I don't feel comfortable with that, you see, it's tricky.

My own understanding of inclusion and exclusion: that is always a very good question and it's not easy to answer. I would perhaps start with the comment that the two terms, inclusion and exclusion, are not related, as it might seem at the first glance, like other binary distinctions, as if one would be the contrary of the other. I don't think so. I simply can't see so. What I want to say is that the relation between inclusion and exclusion is non-trivial, it's not a simple binary distinction.

Let's start with exclusion: how could you understand exclusion? It seems as if it is the silent negative side of inclusion. Inclusion must be communicated:

you don't have inclusion if you don't address people. I address you, and we address each other, and that's how the persons are included in the interaction system. It's not a person who does it, it's the interaction, the communication, that does it. So, inclusion is well defined, but whom do we exclude? Tell me. Do we exclude Lucas [who just left]? Or do we exclude 22 million *paulistas* [São Paulo natives]? Do you see my point? It's easy to define one side, and it's very difficult to define the other side. The next idea is that "it is an unmarked space", but I'm not sure. I'm not sure if we can apply George Spencer Brown here, because exclusion is not unmarked. There is an expression for it: "unmarked-space", by George Spencer Brown – you know him –, always means you just can't express, it is anything else, but "exclusion"… There is a term for it.

So, first aspect: exclusion seems to be the silent negative side of the inclusion. Silent in so far as, at this very moment, we exclude 9 billion people, who are not included in our interaction. But is it a problem? No, of course it isn't, it's an advantage. It's a great advantage that they are not included.

However, that's not the whole story, obviously, because there's a concern about exclusion and that makes it so tricky. Where does exclusion come into the game? It comes into the game as a normative claim and now a negative foundation for a positive normative claim: "We feel excluded, please include us!" That makes it so tricky. It's an explicit negation of a given situation that justifies, well, not only normative claims, but, I would say, more prominently, political claims. "Give us power! We don't have power, give us more!" So, I find it really difficult to talk about the distinction and somehow get it into a precise systematic theoretical scientific terminology.

Maybe that was the hidden reason I didn't reflect at that time. It's more than 20 years ago. I focused on inclusion, inclusion was the problem. We had these participatory procedures, claiming [interruption by sirens outside]… That was a specificity of the German legal debate in the late 1970s. They started to include a broad public into legally organized administrative procedures (licensing procedures, procedures of various kinds…) with normative arguments that proved to be very political at the end. The justification was that

"juridification" of the procedures had negative political effects: "*Die politischen Kosten des Rechtsstaats*" (The political costs of the rule of law), a very famous, small, and influential text by Fritz Scharpf.

So, the conclusion in legal theory and dogmatics was: "Include people, let them participate, and then the procedures will be more valuable, more effective, less costly, they will be justified, legitimate at the end"… things like that. From a sociological point of view, I asked myself: what's going on here? How can we describe it? And the term that fitted the situation was inclusion (make social addresses, in a given context, addressable, make them relevant, give them voice). So, I was dealing with inclusion and the consequences of unlimited inclusion. That was the problem at that time, to let the general public, literally speaking, everyone, everybody in a given societal context, participate in procedures, to give the right to participate. It is a form of inclusion that may, not necessarily, but it may cause severe problems in certain circumstances, namely, especially, when the situation is predefined by law.

The effect of the broad inclusion was that people started communications about legislation: "Why do you apply this provision, this genetic engineering? It's unethical, it's against God, it's against natural law, just forget about it!". That was the type of communication that the administration was confronted with, and you can easily imagine what happened. They were forced to apply the law. There was no possibility to be flexible in this specific situation. It was a binding provision in the Genetic Engineering Act: you *have* to license if the conditions are fulfilled; if science says it's ok more or less, the risk is low, then you have to license. At this point a communication that claims for norm-building, for legislation, creates serious problems. That was the kind of thing that you could explain with this sociological observation and with the term *Vollinklusion*: full inclusion creating serious problems in given circumstances. Long answer, short question. Sorry.

EDVALDO MOITA – That was a really good answer. It pointed out the main idea behind the use of the concept. And this leads me to the second

question: the relation between inclusion and exclusion. It seems that you, as in your [previously mentioned] text, point out two different things, two different levels. Then, I would bring you back to confront Luhmann in this regard: If you see a mass of exclusion, for instance, everybody is, in thesis, included in the economy, but if you don't have money, how can you operate through such social system? When you have this mass exclusion, then, it might – that's Luhmann's point – bridge the concepts of exclusion and integration in the sense that high levels of social exclusion create a high level of integration, but the contrary is not true, it cannot be converse. In Brazil, it can easily be seen that poor people, if they don't have documentation, they cannot be addressed, for instance, they cannot be matriculated at schools. Even if they go to other organizations, they cannot take part into. So, he bridges the concepts of integration and exclusion in this sense. How do you react to this? Do you think that it is not a clear example of how to bridge the concepts, or is it confusing and doesn't help to understand this kind of phenomenon that we address generally as social exclusion or mass exclusion?

ALFONS BORA - I just can continue my previous answer. First, I would like to ask: where is the exclusion? In your question you treated it as an objective fact, something we can observe: "there it is". I'm not so sure. In your example, they don't have documents, so they cannot be registered at schools. When does it become exclusion? It becomes exclusion at the very moment when it's communicated, when they claim for, when somebody says: "They should be addressed", "they should have documents", "they should have the rights to it". Everything is always about rights. So, this is my first difficulty with the example. I find it really difficult to talk about exclusion in a way like we talk about families or interactions, as given objective facts that we simply can see. I'm not sure, you see, I don't have fixed and definite answers. It's a tricky field, it's very complex.

The relation between integration and inclusion: there I would follow Luhmann. You can define integration as you like, but it's perhaps preferable to understand it as a certain kind of interrelation between systems,

interdependency, the amount of freedom they offer each other, degrees of freedom in systemic operation. If the degree decreases, then there is interdependence and that means integration in Luhmann's sense. It is maybe the reason why he says: "There's no society that is not integrated"; "each and every society necessarily is always integrated, always have interdependences". How would it be possible not to have interdependences? Whatever kind, there are interdependences between those poor people who don't have documents and the administration, the judiciary, and the economy. Of course, there are interrelations and maybe – that's Luhmann's point – those people are more strongly integrated into other parts of society, because they have all these problems and conflicts. Conflicts are the most stable social systems, don't forget it. Conflicts are very strong social systems and they tend to persist, to survive, and that is exactly what we have here: a strong integration where people could claim that they should be more included.

So, again, for me it is really difficult to distinguish, to separate, the levels of argument. The things are somehow interrelated, but it's not easy to describe high degrees of integration at points where semantics of exclusion and demands for more inclusion could arise. But, again, it is difficult to say. How do we measure integration? The earlier point: how do we measure it? Can you give me the methods? It's difficult. I think it's not by chance that Luhmann always touched the point, and there is no elaborated solution for that, and I'm very curious how you will manage to solve the issue.

8. Politics and science

HENRIQUE CARVALHO – My questions are connected with others already made. Recently, we noticed a series of events worldwide, which, to some extent, challenge the paradigm after the Second World War, that is, the construction of human rights on the solid basis intended to prevent the regrowth of problems, such as the raise of racists groups in the USA, the "neo-nazi" movement in Germany, and also issues related to migration in different regions.

In the last few years these topics could take a very significant part of discussions also in media and politics. So, this context brings back to the spotlight old discussions also in social sciences, and here is the connection with normative theories. So, here, I relate explicitly to the political engagement of normative theories, for example, the Frankfurt Critical Theory and, as I may say, the human rights theory too. In that context, I would like to hear from you about the following question: what role have these theoretical approaches played, if they still play, or could have played, in such a challenge?

ALFONS BORA - May I start with Max Weber again? If you remember *Politik als Beruf* and *Wissenschaft als Beruf* [Politics as Vocation and Science as Vocation], these are the basics, and I can't remember his expression literally, but he says: "As politics is regarded, each and everyone has to follow his or her own star." Science has no access to the definition of ends, science is there, it's very much up to check the means. Given the ends, science provides you with scrutiny and with expertise to check the means, and I find it difficult to go beyond that insight. For me, it's still fundamental, although we might come to some improvements, as regards systems theory.

Now, the examples you were talking about. They are of course relevant, they are very much concerning, but where do they take place? It's politics. The political system of world society, I would claim, is currently changing in a dramatic way, namely in a way that populism – more even than right-wing aspects – gains dramatic relevance. Populism, I think, is one of the core issues. It overrules the old link between politics and science. Science as advising politics in order to improve it is really in the defense against populist attacks, with a wrong understanding of relativism and constructivism. That's very interesting, they make use of wrongly understood constructivism, mainly by claiming that there is no truth, which no constructivist ever could have claimed, neither Niklas Luhmann, nor Rescher, nor anybody else. No, that's stupid, it's nonsense, but it is extremely effective in the political system.

So, there are dramatic changes, and what could be the role of science in general, and of sociology in particular, and especially in systems theory? First of all, I will follow Weber and say: "Engage yourself in politics, stand up and play your role as a political addressee, include yourself, don't feel excluded by populism". That's a hell of a problem, it's really tricky. Systems theory again may help to understand what's going on. It might be able to explain populism. I don't know, I haven't been dealing with these issues, but that will be the role of science: to try to understand how the mechanisms are built and from that you could perhaps go back to politics and try to give advice.

That's, in a very different field, not so dramatic as in your question. That is what I did with my research on participation, the book on participatory procedures ends with legal policy. I made suggestions for the amendment of the Genetic Engineering Act, of the Public Administration Procedure Act, things like that. Nobody wanted to know them [laughs], but that is not the point. It is possible, of course. If the end is defined, if the end is to improve your procedure, try to avoid these deadlocks that had occurred in the old procedure where people felt very uncomfortable, the legitimation bases were very weak, and so on. If that's the problem, I can tell you how to improve the procedure, but not by inclusion, by full inclusion, general participation. I can explain why that didn't work.

Without being able to give you a particular answer, I would claim in general that, also with respect to the dramatic and global problems you have addressed, sociology as a discipline and systems theory as a particular theory should be able to give some answers, not as normative [answers] – telling people what is right and not right –, but as an attempt to give scientifically sound and based advice.

9. Sociology of law, sociologists, and jurists

HENRIQUE CARVALHO – So, I'm moving forward to my second question, which connects with the first one from Gabriel, about your biography

and your expertise as professor. I remember in one of your seminars on sociology of law, while reconstructing the discipline's historical roots, you addressed a singularity, namely: that sociology of law is a branch of sociology primarily composed by jurists. This assertation not only matches the profile of this International Seminar Cycle, held in a Faculty of Law, organized and visited mainly by jurists. It also, with the due respect, resembles to some extent your career profile, as your undergraduate studies were in law, and afterwards directed towards the path of sociology. Which factors have contributed and contributes to such a character of sociology of law? Moreover, how would you compare the path of a jurist with a professorship in a Faculty for Sociology and a jurist who teaches sociology of law in a Faculty of Law?

ALFONS BORA - Speaking about Germany, a person who is only a jurist will not be able to survive in a Faculty of Sociology. You need both in that case, you need some sociological qualification. However, there are some cases, as in my own case – and I think there are very few similar cases, such as Pierre Guibentif or Doris Schweitzer, for example –, in which the qualification as a lawyer gives you a strong advantage in sociological departments. It's very diffuse, it's not explicit, you can't explain that, but it is there, and that has to do something with the general respect against the profession. It has advantages, yes, in that combination, but it will not be possible to make a career as a sociologist with only a law qualification. Like in your cases here, there's always some sort of sociology, a sociological dissertation.

Regarding your first question, I will try to speak about that in my talk ["Sociology of Law in Germany: Reflection and Practice"]. It has to do with sociology. The common narrative, the widespread and widely accepted narrative in the field, in the whole sociology of law is that: "The stupid lawyers do not see the tremendous advantages of sociology, they just neglect it", "sociology *ante portas* and the jurists do not open!", "*Soziologie vor den Toren der Jurisprudenz*", a very famous book by Rüdiger Lautmann in the 1970s. That's the metaphor for the common understanding, and I would claim that this common understanding

is profoundly wrong, it is a misunderstanding. Not the only one, but one of the main causes of the weakness of sociology of law lies in sociology, namely that sociology is not interested in law, it's not interested in many small fields. Do we have a sociology of economy? I'm not sure. Do we have currently a sociology of religion, a real sociological theory? I'm not so sure.

So, I would try to argue more in detail that there are weaknesses in sociology closely related to its history, weaknesses that as one effect lead to the strange situation you described in your question, that sociology of law is mainly represented by non-sociologists, by lay sociologists… No, sorry, that was a joke. There are many excellent sociologists of law in Law Faculties. The weakness comes from sociological theory. And now I get provocative: in a very strong sense it [the weakness] comes from systems theory, from systems theory's particular understanding of the relation between science and practice, from systems theory's hypothermia, as I call it, with respect to the social environment of science. It comes from, as André Kieserling explicitly calls it, a presupposed gradient between the reflective science of sociology being able to explain everything and to tell you what you are really doing and the subject fields being engaged in first-order observation and not knowing what they do. There's no place for this relation that I will call later responsivity, namely for a sociological theory that, as a comprehensive and complex theory with high aspirations, finds a concept for describing and integrating this relation of responsivity. That will be my longer answer and is also in this article of 2016.[6]

10. Justice and principles

ARTUR SILVA – If we put together all the questions, a friend of mine, Marcelo Neves, told me that you are an expert on Luhmann's books on the legal system. So, I ask you: what elements from these books do you use for speaking

[6] BORA, Alfons. Sociology of law in Germany: reflection and practice. **Journal of Law and Society**, v. 43, n. 4, p. 619-646, 2016.

about justice and Latin American problems? Luhmann says the law doesn't need to abandon the idea of justice…

ALFONS BORA - No, that would be not a good idea, speaking from a sociological perspective, because all systems need contingency formulas, semantics that help them to deal with ambiguities, in points where the application of the binary code is not very clear. They are two possibilities that are equally logical or convincing, and, then, what do you do? What do judges usually do? They balance their arguments. What is balancing? Balancing is rhetoric mainly. This is the point where our contingency formula and similar instruments, principles, for instance, are useful. Principles are maybe even more important than the contingency formula of justice, coming into play, helping to communicate a particular solution in a given situation by somehow veiling the ambiguity that is behind it. How do principles work? Principles work with the play of rule and exception: "Generally speaking, we are in favor of…, but, now, in this case, that's completely different." That is the principle. Principles allow for not applying a rule, they have the non-application in themselves. So, my answer is: all systems need these kinds of mechanisms, as the law does, of course.

Thank you very much for your very interesting questions.

3. Observation and practice: Examples and prospects of sociological systems theory in socio-legal research[7]

Alfons Bora

Introduction

In this chapter, I want to briefly discuss four points. In the first section, a few theoretical considerations are presented regarding the issue of *practice* as an internal reference of reflection and secondly empirical forms of citizen participation in legal procedures as a *sociological* problem. In the second section, I illustrate these points with a very brief account on research about inclusion in functionally differentiated society, discussing how I worked with citizen participation in legal procedures, differentiated modes of inclusion, conflicts between social discourses, and legislative failure. The third section points at the relevance of theory in explanations by interpreting sociological systems theory as a strong explanatory tool, capable of leading to conclusions for *practice*. The fourth section, finally, offers some methodological reflections about the relation between theory and methods, clinical perspective, and causal explanations.

The chapter, in its essence, is not so much a scientific argumentation in itself. It rather reports on two decades of research in the field of Sociology of Law. Against such background it tries to outline the theoretical and practical relevance of the research and to bring it into line with the current debate on Niklas Luhmann and socio-legal research. Moreover, it tries to sketch out some key points for empirical research in the context of sociological systems theory. Altogether, it is not more than a brief and sketchy meta-narrative aiming more on strategic orientation instead of detailed analysis.

[7] Adapted from a lecture presented at the International Seminar Cycle "Rethinking Luhmann and the socio-legal research: an empirical agenda for social systems theory?", on September 2019, at the Faculty of Law of University of São Paulo (Brazil). The colloquial style of the presentation has been preserved in the written text.

1. Theoretical preface: practice as an internal reference of scientific reflection

My preceding talk[8] ended with a pledge for what I called a "responsive sociology of law". The term "responsivity" stands for internal theoretical reference to external phenomena. In the sociology of science, it represents – in David Kaledwey's (2013) words – reflection, in contrast to limitation. Whereas references to scientific autonomy limit the possibility of communicative junctions and transitions via the scientific validity claims, references to practice, on the other hand, allow for the observation of prima vista non-scientific external phenomena as *practically relevant.*

Against such background, issues of citizen participation in legal procedures perform as practical problems that gain theoretical relevance in sociology. The current paper gives a brief and sketchy outline of this argument.

Starting with the historical background it may be important to mention that normative debates in the 1970s in Germany had criticized legal procedures as too strongly bound to the rule of law, thereby apparently causing political costs in terms of decreasing acceptance. The political price for the constitutional state of law seemed too high, as some political theorists claimed. Not only on the political level, but also in the academic world, namely in jurisprudence, arguments in favour of a "democratization" of formal procedures were put forward. They were supported by a number of presupposed legally relevant functions that citizen participation should fulfil in formal legal procedures. Such functions were, for instance, better information to the administration, better information to the public, voice, standing, transparency, increased acceptance, and legitimacy (cf. Bora 1994).

With respect to the scientific perspective, according to Max Weber (1919), sociological theory cannot take on board such normative goals as internally relevant aspects, due to the epistemological hiatus between "is" and "ought".

[8] The argument presented in that lecture had been published before in Bora (2016).

Insofar, scientific autonomy has a limiting function (Kaledwey 2013). In the Neo-Kantian epistemological position, denying the possibility of the conclusion of an "ought" from "is", we can identify a scientific autonomy that limits itself to a certain realm or universe of sentences. However, as Weber also clearly pointed out in the sociology of science, sociology can refer to the ends as given and can check functionally equivalent means in order to evaluate them in the pursuit of given ends. In this sense, sociological theory can prove to be *responsive* to its environment, to practice, in other words. Practice, then, can have a say within science. It can trigger theoretically and practically relevant questions.[9]

Against this background, a theoretical argument should be highlighted, namely the point that practice as a symbol for the social environment of sociological theory also means: jurisprudence, reflective theories of law! In other words, theories may be understood as part of practice, namely insofar as they are external to sociology as a scientific field. Jurisprudence in this sense, as reflective theory in law, is part of the environment to sociology as science of the society as a whole. Against this theoretical background, a few remarks can be made about empirical research in social inclusion, referring to citizen participation in legal procedures.

2. Empirical research on inclusion in functionally differentiated society: citizen participation in legal procedures

My engagement with the theory of inclusion goes back to a series of research projects between 1995 and 2010. In these projects, we studied public participation in legally bound administrative decision-making procedures, that is, public participation in procedures that are mainly or exclusively shaped and pre-formed by the law.

Provisions for citizen participation had been made in many legal regulations in Germany since the 1970s. Our research was concentrated on the Genetic Engineering Act of 1990. The statute regulates the question of whether

[9] Cf. again for an elaboration of this argument Bora 2016

genetically modified organisms can be licensed or set free into the environment, whether a bio-industrial plant applying genetic engineering gets an administrative license, and related issues. The public hearings that had been introduced in the licensing procedures by the original legislation of 1990 very soon proved to be problematic and, finally, dysfunctional. They rather caused increasing social conflicts, instead of bringing peace to the political debate and fulfilling the before mentioned functions. A few years later an amendment of the Genetic Engineering Act abolished this form of citizen participation.

This was, in a few words, the legal and political situation in the 1990s, when we conducted our research in social inclusion and citizen participation. The following bundle of projects was more or less circled around the topic of participation in general and of Genetically Modified Organisms (GMOs) in particular:

- From 1995 to 1998, a project founded by the Volkswagen Foundation on citizen participation in public hearings within the licensing procedure for GMOs (Bora 1999);
- In 2001, a small project on the Evaluation of a Mediation procedure for Frankfurt airport (Bora/Wolpert 2003);
- From 2001 to 2004, an EU-funded project, with ten groups from seven European countries, on biotechnology licencing: PARADYS (Participation and the Dynamics of Social Positioning – The Case of Biotechnology. Images of Self and Others in Decision-Making Procedures) (Bora/Hausendorf 2004);
- From 2001 to 2004, a dialogue project on Alternative Dispute Resolution (ADR) in general licensing financed by the Federal Ministry of Education and Research (Münte/Bora 2004);
- In 2003, an overview over participatory procedures in the context of representative democracy that resulted in a book that I published together with Gabriele Abels and was financed by the German Federal Parliament (Abels/Bora 2004).

This whole series of research projects had been linked to the issue of citizen participation in the context of the law. Beyond the practical relevance of democracy and the rule of law, these cases also proved to be theoretically challenging. My theoretical and sociological research interest in the projects mentioned above concerned the effects of the semantics of "inclusion" in functionally differentiated society, mainly under the condition of positive law. This is at the first glance a purely sociological interest in its core. Against the background of the high practical relevance of the empirical cases, one may see rather easily how and why these cases became sociologically – theoretically – instructive. My theoretical interest was guided, in other words, by the practical impetus to find an empirical explanation for practically and theoretically relevant phenomena. Returning to the research projects mentioned before, one can report the main empirical findings and the methods applied as follows.

Starting with the simple observation that functional differentiation leads to differentiated modes of inclusion, we found that citizen participation in the cases we observed was charged with semantics of all-inclusion, of unmodified, widespread, undifferentiated, full inclusion. Such all-inclusion means the possibility of participation for literally everybody in the whole country. The legislation provided that everyone, whose rights might be touched by the deliberate release of a genetically modified plant, has the right to participate in the particular licensing procedure. In the course of such procedures, large meetings (public hearings) were held with hundreds of participants raising objections against a licencing application for a given GMO. These hearings usually lasted for a couple of days. They were characterized by strong conflicts about both political and legal issues and by a widespread critique of science. Most of the applications for deliberate release came from industrial actors, but were concerned research questions; the purpose of the release, in other words, was declared as scientific. All different aspects related to such an application had to be discussed publicly in the hearings mentioned above. From a sociological point of view, these hearings realised a quite far-reaching form of all-inclusion.

By a detailed communication analysis of several public hearings, we came to the result that the effects of this undifferentiated, widespread, all-inclusion, in combination with a very strong and sometimes exclusive legal orientation of the procedures, were inescapable and inextricable conflicts between social discourses or positions oriented either towards law application or to norm building. From a legal-theoretical point of view, the problems caused by the merger or mingling of law application and norm building (legislation) in one and the same communication are obvious. The two sides of the distinction represent incompatible validity claims that are contradictory in a way. Such contradiction becomes communicatively evident, whenever all-inclusion allows for the co-presence of very diverse social positions.

In a comparative perspective across legal, cultural, and national boundaries, these effects could be observed in various types of procedures in different countries and legal cultures. In the PARADYS project founded by the European Union we applied our findings from the European projects in a comparative way, and indeed we could see that the same effects could be observed in a variety of conditions.

A few words about methods may be appropriate here, to give a sketchy impression about how these findings were produced.

Firstly, it was possible to explain the causal structure of the conflicts and to identify key situations in the communications by a reconstructive analysis of the tape-recorded communications. The details will be given further below.

Secondly, we could identify distinct discourses, which differ from each other on a structural level – norm building/norm application – in a way that does not allow for the continuation of the communication. That is what we call a "differend" (différend) in the sense of Jean-François Lyotard (1988): a situation where communications cannot continue. It was interesting to see that is exactly what happened in these critical situations during the public hearings.

Thirdly, a quantitative correlation of the conflicts between discourses with critical phases of the formal procedure (threats with challenge on grounds of bias, or with termination of the procedure, e.g.) showed the structuring effect of the

conflict constellations. They could be identified as the cause for the difficulties in the procedure. Important to note is the fact that these discourses were not individual attitudes, but rather the result of the communication. They were generated in communication itself by the logics of communication.

Fourthly, we interviewed participants with relation to the before-mentioned discourses, because we wanted to cross-check the relation between discourse and the acceptance of the procedure.

The practical consequence was that, in many cases, legislation in later amendments abolished the respective provisions in their administrative procedure acts and in the respective subject regulations (genetic engineering, for example).

3. Remarks on the relevance of theory in explanations: systems theory and conclusions for practice

In explaining the effects sketched out above, I use a theoretical concept of inclusion understood as a *mode of addressability in social systems*, a form in which communications – and only communications – attribute addressability to persons, organizations, sometimes also to objects. (cf. Bora 2019)

While using sociological systems theory, I suggest – and this is in a certain contrast to some approaches of systems theory – understanding inclusion as a multi-modal concept, a concept that allows for smooth distinctions. The distinction of inclusion and exclusion, as I would argue, is not strictly binary. It does not refer to a brute "either, or". On the contrary, inclusion can be conceived of as a modal quality, a phenomenon that manifests rather on a scale of "more" and "less". To my conviction, this concept of inclusion is empirically instructive and substantial. Besides the binary distinction of inclusion-exclusion we find a broad variety of modalities, in which social systems include or exclude possible addresses. For lawyers this should be a very common argument. One can, for instance, consider the manyfold ways in which persons are made addressable within the law. There are age differences with regard to the right to vote; there

are differences with regard to the right to exercise certain jobs and professions; even the constitutional principle of equality, at least in German constitutional law, does not prevail unconditioned. A long-standing jurisdiction of the German Constitutional Court (*Bundesverfassungsgericht*) rules that *essentially equal circumstances* have to be judged equally, whereas essentially unequal circumstances may require different treatments. Inclusion, or addressability, in other words, is constructed in a modal way, taking differentiated conditions into consideration. A broad variety of norms, in this sense, regulates the "in" or "out", the inclusion or the exclusion, the addressability of a specific entity (person, organization, object). The law is, in that respect, not binary, but rather modally differentiated. It produces modalities in which it includes or excludes social addresses (entities).

The crucial point in the before-mentioned research was that the frictions, the differences, the conflicts between those modalities may cause very deep, fundamental, and in fact unsurmountable communicative conflicts. The frictions that coined the public hearings can be described as profound communicative contradictions between a broad and rather unlimited all-inclusiveness of the procedure *versus* very specific legal modes of inclusion ruling the whole process. Such a contradiction, for instance, becomes obvious, when participants claim that a given law is unethical in a situation where they are communicating with a law applicant and an administrative institution. The administration is legally bound to the GMO Act and the criteria given for a licensing decision. Interestingly enough, the German GMO Act does not even provide for discretion. The decision is a so called "bound" decision, where the result is strictly attached to the legal criteria. If they are given the applicant has a (constitutionally guaranteed) right to release GMOs. The administrative discourse, not very surprisingly, refers to this specific character of the legal situation by claiming a legal duty to decide the case according to the regulation. The decision, in other words, is programmed by the law, without a space for discretion. Nevertheless, certain discourses in these procedures try to argue against the application of the law. Although one can relate these discourses to attitudes and to opinions, one will find that

communication, once being faced with these contradictory positions, tends to go in a situation where it cannot be continued. There is no bridging argument between the two positions of norm application and legislation. The fundamental gap of the "differend" cannot be reconciled.

Against this theoretical background, the conflicts mentioned before could be understood as a specific form of social order resulting from the circumstantial conditions that manifest different modes of social inclusion. As a sociologist, observing these phenomena you can clearly understand and describe them as a certain point of the order that emerges under given preconditions, resulting from different modes of addressability, interfering with each other in a very fundamental incongruence.

The advantage of this theoretical perspective can be seen in comparison to theories that draw on inclusion as a form of social integration. Such theories necessarily have to neglect empirical conflicts like the ones I described. They rather must describe them as pathological aberrations. For instance, Jürgen Habermas used this argument in *Theory of Communicative Action*. Such a position is conclusive against the background of a normative theory. Starting from a normative point of view it is convincing to speak about pathologies. From a sociological point of view, it is difficult to decide, where to get the criteria of "normality/pathology" from. Sociological theory – as I tried to indicate – rather tends to understand the described phenomena as aspects of social order that emerges under given conditions. Insofar, there is a fundamental theoretical difference between theories of social (normative) integration and theories of social differentiation. Normative theories would not be able to explain the empirical phenomena other than by a deficit of rationality, i.e., as pathologies. From the perspective of differentiation theory, however, we can reconstruct the fundamental conflicts as results of a basic differend (*différend*, Jean-François Lyotard) between essentially contested rationalities. In contrast to normative approaches, differentiation theories assume a plurality of rationalities. For them, rationality is a phenomenon that has more than one expression. It always occurs in plural.

At this point, a responsive sociology of law becomes relevant. With this term, I refer to a theoretically comprehensive sociology inspired by practical questions. That was, to remind the reader, the starting point of this brief account: we observed practical problems with certain legal procedures. When sociology applies its attention to these phenomena, it takes a scientific position that is different from that of a legal theory. Sociology does not judge on normative issues. It refers to its own sociological (scientific) references and relevancies. It gains its internal orientations from scientific rationality and in debating competing theories. However, it starts with a practical problem and provides scientific answers to it. That is what I would call "responsivity".

4. Methodological reflection: theory and methods, clinical perspective, and causal explanations

Against the background of the debate on an empirical agenda for the sociological systems theory, a few remarks on the relation between theory and methods shall close this contribution.

With respect to the very general abstract relation between theory and method, I would claim that there is no stringent and necessary relation between a given theory and a specific method. Theories are complex descriptions of the world aiming at the assignment of truth values to propositions. Conceiving them as complex descriptions first of all means that they are not binary in their structure. Methods, on the other hand, aim at assigning truth values (true/not true), to propositions. Thus, they provide for binarization. They are programs for conditions under which sentences can be coded as true. As science performs this process of coding, we can identify the conditions under which such coding can be performed, as the task and the function of methods. As programs for binarization they refer to the internal function of science. They limit the internal variability: not *any* arbitrary coding can be acknowledged as scientifically valid, but only those applications which can be related to scientific methods. In this respect, methods close the scientific universe. In contrast to methods, theories are

generally open. They provide for scientific concepts that allow us to describe and understand a respective segment of the world. They do, however, not predict or prescribe which kind of binarization mechanism would be theoretically acceptable. Then, theory is open to each scientific binarization mechanism in general.

On the methodological side, as a matter of fact, there are several possibilities: methodologies occur in plural. Usually, the distinction between qualitative and quantitative methods is used. I would not recommend doing so but would rather suggest the distinction between *clinical* or *reconstructive methods*, on the one side, and *epidemiological* or *statistical* approaches, on the other.

The connotative connection of clinical methods with medicine is not by chance. It helps understanding the particular potential of methods that usually are a bit underestimated as so called "case studies". Medical research may serve as a convincing example for the fact that the study of an individual case, an individual body – even a dead one, in pathology –, has the potential to produce *causal explanations by understanding the inherent mechanisms linking causes and results,* especially by identifying their structural links in the individual case. Against this background, case studies, the clinical perspective, and reconstructive methods in sociology allow for causal explanations in a very strong epistemological sense. They make the structural relation between causes and effects visible in a single case.

Major breakthroughs in medicine often, very often, have come from exactly this type of research (clinical research). Think for instance of Robert Koch and bacteriology, Alexander Fleming and Penicillin and many similar cases. These scientists started with the reconstruction of mechanisms in single cases (clinical perspective). They opened dead bodies, or conducted bedside research by investigating individual cases, and there they found basic insights in the mechanisms that constituted the cases. This is its core, what we could call the clinical perspective.

In a very similar way, some sociologists speak about *clinical sociology* as a scientific approach. This approach is oriented towards cases, their structural

analysis with respect to problems and their causes, not only in the health system, but rather in a very general sense. The term clinical sociology was coined by Louis Wirth, a sociologist of Chicago School, in the 1930s, but it has also been used by contemporary scholars in Germany, such as Ulrich Oevermann and Bruno Hildenbrand, scholars who are not focusing on medicine. They use the idea of the clinical cases related to reconstructive perspective in a very broad and general sense.

The theoretically relevant aspect is not so much the potential of clinical sociology for practical intervention, which is indeed significant, but rather its epistemological implication. This epistemological stance very clearly differs from the one of the empirical-analytical paradigm, the before-mentioned epidemiological/statistical approaches. When asking for the generalization of results, their respective validity and scope, the answer of the empirical-analytical paradigm is "*empirical generalization*", meaning the conclusion from *n* cases to *n* plus *x* cases. From a given sample the researcher draws conclusion to the general population with a given ratio of mistake – which doubtlessly is a very powerful approach. In contrast to this approach, the reconstructive studies that I have associated with the notion of clinical perspective allow for "*structural generalization*". Structural generalization extends the conclusion from a structurally grounded *causal relation* in the analyzed case to *all structurally equal cases*. Against the background of an empirically observed relation between cause and effect in *one* case the method allows us to draw the conclusion that all structurally similar cases level will show the same relation between cause and effect. Such Structural generalization, – which could also be described as the methodological production of an empirically grounded hypothesis – is independent of the number of cases, of the numerical relation between sample and population. On a structural level it draws the conclusion from a single case to an arbitrarily large number of similar or equal cases, thereby formulating empirical hypotheses about causal relations.

Any causal explanations, as I would argue, immediately call for this reconstructive perspective. Without question, the empirical statistical paradigm

also claims to produce causal explanations with statistical methods, and reasonably so. On the other side, beyond the overwhelming success of quantitative approaches, they face the problem that they are causal explanations based on correlations, at the end of the day. Behind all this very sophisticated and very complicated statistical methods, at the end, there are correlations, numbers, *n* to *n* plus *x*. This point is not trivial, because, as every statistician will easily agree, correlations do not tell us anything about causal relations. To understand causality, I would therefore argue, it is at least extremely helpful to find the causality in the structures of cases observed, so that you know why *x* is the cause of *y*.

Niklas Luhmann's systems theory – as any other sociological theory – paves the way for both methodological approaches. The particular choice of the methodological approach depends rather on the particular research question than on the theoretical background.

With respect to specific research problems, there are of course many cases in which scientists are indeed interested in numbers. The important epidemiological issues connected to the COVID-19 pandemic, give a striking example. Another, more mundane case refers to political planning in so many social fields. If, for instance, we know that the number of children in our society will grow over the next decade, this information helps us to govern society with respect to the future need for kindergartens, schools, and universities. For such planning purposes it is essential to have exact methods and models for this calculation. In other words, many important research questions necessarily require this kind of methods.

In other cases, quantitative, epidemiological methods will probably not be very helpful. If, for instance, we want to understand why certain administrative procedures are so problematic and dysfunctional, it doesn't matter how many of these procedures would empirically occur, neither how many participants they have, nor even, what participants would think about the procedures. That might be an interesting question in the third or second instance. However, in order to understand the problem in its causal structure, a survey will not be the

appropriate method. The causal-strucutural research question requires structural reconstruction. Reconstructive methods in a way open the black box of the case in order to find out which structures connect causes and effects. In our research, communication analyses – based on hermeneutics and conversation analysis – fulfilled this reconstructive task. Reconstructing the procedure as a process of communication allowed us to understand, under which conditions the before-mentioned profound, fundamental, and unsurmountable communicative conflict emerges and how it is related to the structures of the procedure.

With respect to Luhmann's sociological systems theory, it sometimes seemed as if he himself would reject the idea of causal explanation. Such an impression might be due to the strong emphasis on functional analysis and the identification of functional equivalents as basic elements in his theory. On the other hand, he never dismissed the possibility (and, as a matter of fact: the existence and scientific relevance) of causal explanations (cf. for instance, Luhmann 1995).

Each of the methodological approaches will suit, finally, specific questions in the framework of the theory. The justification for the question will always come from theory, at least insofar as every practical problem has to be checked against its scientific relevance in order to make it a scientific problem. Practical or everyday questions are beyond number, but only very few of them become scientifically relevant problems. Therefore, the justification for scientific relevance comes from theory.

Coming back to my own work with respect to a responsive sociology of law, I would again like to invoke Max Weber. With given ends from legal theory and legal politics, our sociological research was able to explain why certain means were not apt to reach these ends. The internal causal relations in the cases we analysed did not meet the *a priori* assumptions in legal theory. The presumed functions of participation, namely mutual information between citizens and administration, voice, standing, acceptance, and legitimacy were clearly lost in the empirical realisation of the legal-theoretical model. From the sociological

perspective the explanation of this failure was rather clear on the structural level: it directly resulted from the communicative conflict described above.

Against the background of the few thoughts presented in this chapter the consequences of this scientific approach to practically presupposed questions and problems can be described as twofold:

The empirical findings allowed to give political advice with respect to the means that were chosen to reach the legal-theoretical and legal-political goals. Forms of social all-inclusion – a very broad citizen participation – were chosen in order to achieve stronger political integration. This approach led to increasing conflicts, which could finally be interpreted as a complete failure. The sociological reconstruction of this outcome shed new light on the causal structures of the procedural stalemate. Against this background, one recommendation was to choose different, more suited means, fulfilling the presumed functions, in other words, to reflect about the evaluation of means.

A second recommendation – and this might be the more important version – aimed at the reflection of the ends, the normative presuppositions of the legal-political model, in other words. These ends, as we could argue from the sociological perspective, might be profoundly blurred, given the explicable and understandable difficulties with respect to the means.

In our research when making practical suggestions, we took both consequences equally. As a result, it was possible to formulate suggestions from the point of view of legal policy with respect to the evaluation and arrangement of participatory procedures – but also with a critical impetus towards the presupposed normative functions – a way back to Luhmann's *Legitimation by Procedure* (Luhmann 1969), which had given explanations for the procedural functions that could perhaps help to better design legally and politically satisfying forms of participation. This is, in other words, the responsive relation between science and its environment, that is, practice as a scientifically relevant and scientifically organized and guided discourse.

Sociology of law, in this sense, as I hopefully could indicate, might take practical problems on board, make them sociologically relevant questions,

transform them into empirical research, produce theoretically meaningful outcomes, and convert these into practically substantive suggestions for legal policy.

Rethinking Luhmann and socio-legal research against such background, I would finally dare say that the empirical agenda for the social systems theory is quite clear, if and insofar as we understand it as responsive theory.

References

Abels, G and A Bora (2004) *Demokratische Technikbewertung* (Bielefeld: Transcript).

Bora, A and H Hausendorf (2004) *PARADYS - Participation and the Dynamics of Social Positioning. Final Report to the European Commission*. Available at : https://pub.uni-bielefeld.de/download/1862967/2904486/final-report-update.pdf

Bora, A and M Wolpert (2003). ‚Das Mediationsverfahren Flughafen aus der Sicht der Teilnehmer und Beobachter? Daten zur Evaluation' in J-D Wörner (ed), *Das Beispiel Frankfurt Flughafen. Mediation und Dialog als institutionelle Chance* (Dettelbach, J. H. Röll), 107-137.

Bora, A (1999) *Differenzierung und Inklusion. Partizipative Öffentlichkeit im Rechtssystem moderner Gesellschaften* (Baden-Baden, Nomos).

Bora, A (1994) ‚Schwierigkeiten mit der Öffentlichkeit. Zum Wegfall des Erörterungstermins bei Freisetzungen nach dem novellierten Gentechnikgesetz' 27(3) *Kritische Justiz* 306-322.

Bora, A (2016) 'Sociology of Law in Germany: Reflection and Practice' 43(4) *Journal of Law and Society* 619-646.

Bora, A (2019) '"Quem participa?" Reflexões sobre teoria da inclusão', translated by Edvaldo Moita, 6(3) *Revista Brasileira de Sociologia do Direito*, 3-29.

Bora, A (2021) ‚Rechtssoziologie zwischen Wissenschaft und social engineering. Zum historischen Verständnis interdisziplinärer Reflexionsprobleme' 2 *ZfRSoz*.

Kaldewey, D (2013) *Wahrheit und Nützlichkeit. Selbstbeschreibungen der Wissenschaft zwischen Autonomie und gesellschaftlicher Relevanz* (Bielefeld, Transcript).

Luhmann, N (1995) ‚Kausalität im Süden' 1 *Soziale Systeme* 7-28

Luhmann, N (1969) *Legitimation durch Verfahren* (Frankfurt/M, Suhrkamp).

Lyotard, J-F (1988) *The Differend: Phrases in Dispute* (Minneapolis, University of Minnesota Press).

Münte, P and A Bora (2004). *Strukturprobleme der Kommunikation zwischen Genehmigungsbehörde und Bürgern in Verwaltungsverfahren. Rechtspolitische Empfehlungen für das BMBF auf der Grundlage einer Untersuchung der Kommunikationsstrukturen im gentechnikrechtlichen Anhörungsverfahren. Abschlussbericht im Rahmen des Projektteils ''Dialog'' des Projektverbundes ''Kommunikationsmanagement in der Biologischen Sicherheitsforschung'' im BMBF-Förderschwerpunkt ''Sicherheitsforschung und Monitoring''*. Available at: https://pub.uni-bielefeld.de/download/1961226/2904487/Endbericht-update.pdf

Weber, M (1975) *Wissenschaft als Beruf* (Berlin, Duncker & Humblot).

4. The transposition of the objective into subjectivity: a contribution to law and literature[10]

Thomas Vesting

I. The experienced speech as a prosaic form

The formula of the 'transposition of the objective into subjectivity' comes from Charles Bally, a student of Saussure[11]. Bally (2012) used this formula in an essay on the indirect free style in modern French (*Le style indirect libre en francais moderne*), which was published in 1912 in the Germanic-Romanic Monthly Journal (*Germanisch-Romanischen Monatsschrift*).

In this essay, he deals with indirect or free indirect speech. The first experiment with free indirect speech – as Franco Moretti did in *The Bourgeois* (2014) – was the bourgeois novel, the *Bildungsroman*. Flaubert's *Madame Bovary* was therefore already the logical endpoint of a development in which European literature left behind its didactic function and replaced the omniscient storyteller by long passages of indirect free speech (Moretti 2014: 144, following Auerbach 2003: 453). Something like when Emma Bovary, after her first infidelity, locks herself in her room and immediately, as in *Taumel*, walks toward the mirror:

> Of course, when she came across her face in the mirror, she was surprised. Never before had her eyes been so large, so dark, so deep. She had transformed something extremely delicate into her entire physiognomy.

[10] Translated by Lucas Fucci Amato. Originally published in (2008) 14(79) *Revista Direito Univille* 210-222 and in (2019) I Mülder-Bach, J Kersten and M Zimmermann (eds), *Prosa schreiben* (Leiden, Brill) 75-92.

[11] Bally was also one of the editors of the *Cours (de linguistique generale)*, Sausurre's classes on the fundamental questions of the general linguistic science.

> Several times she said, 'I have a love! a love!' and she intoxicated herself with the idea that she was granted a second blossoming. She would from now on finally experience the pleasure of love, that feverish fortune, in which she had already stopped believing. She was faced with something wonderful, and everything promised passion, ecstasy, euphoria; the bright blue immensity was all around her, the summit of feeling shone before her thoughts, and the usual life showed itself simply too far away, deep down into the darkness at the foot of that height. (Flaubert 2012 [1857]: 215)

According to Franco Moretti (2014), indirect free speech belongs to the specific prosaic style of the bourgeois novel. The bourgeois prose style is, for Moretti, not only an indicator, but also a factor, a type of action, a linguistic 'instrument' (in Emile Beneviste's sense), with whose help the world and society are put in order (Moretti 2014: 36). Bally's (1912) formula about the transposition of the objective into subjectivity then means, more precisely, the predominance of analytical, impersonal, and impartial descriptions in bourgeois prose (Moretti 2014: 139). Precisely, indirect free speech makes possible a kind of two-way intersection of speech, a literary form that allows one to oscillate between subjectivity and objectivity. As Moretti (2014: 141-142) also said, the original prosaic form of indirect free speech ensures, on the one hand, the perspective of the figure, more specifically, it does not hide the subjectivity of the protagonist. On the other hand, because of elements peculiar to supra-personal speech, the protagonist would be subjected to a 'commonality' and standardization. As an example, Moretti (2014: 140) refers to Jane Austen's *Emma*, where the "verb tenses of the narrative objectify her conduct and feelings and, as a consequence, somehow alienate her from herself." (Moretti 2014: 140).

II. The literary production of reality

I would like to appropriate the formula of the 'transposition of the objective into subjectivity' and use it in a more general sense. I also do not want to restrict myself to the mixture of direct and indirect speech in indirect free discourse, but I intend, in fact, to universally focus such a formula on the procedure of linguistic production of reality. To be more precise: of linguistic production of reality under the condition that this reality is produced by authors, who need to hide themselves as producers in order to be able to maintain an objectivity independent of subjective impressions, (or rather) a universality (or universal validity) of prosaic reality. In essence, the formula of the transposition of the objective into subjectivity describes a procedure that is not only constitutive for the literary prose of bourgeois novels, but that helps to find a relevant gateway to modern communication proper to legal science, as well as to its style of discourse – its prose.

In this approach with Franco Moretti (2014: 36), I start from the assumption that legal prose style is a type of action, a linguistic 'instrument', with whose help the world and society are organized. Legal and juridical prose is, from the beginning, the product of a rhetorical strategy, which produces a historically determined prosaic reality – and no timeless truth. However, it is necessary in practical terms. This was already true of early modern literature, as in Hobbes. The performance of this prose consists in, through symbol formation and imagination, letting an obligatory order appear beyond the circumstances given by tradition and religion. Printing and early modern literature make it possible, in other words, (i) to construct, after the collapse of the Aristotelian-Christian general order, proper to the middle ages, an original artificial (secular) frame for the relations, amenable to regulation, among men and (ii) to find for the objectivity and for the consistency of this frame a literary-aesthetic form[12].

[12] Early modern law is seen from the beginning as part of this fundamental process of organizing reality through linguistic artifacts, through prosaic truths, whose inner uniqueness was perhaps first recognized in Giambattista Vico's New Science (1744): Vico makes mention of the imminent new realm of truth in all kinds of human conduct and action and seeks to understand this realm

In the modern world, both law and legal prose accumulate no less importantly the task of introducing, in advance, available possibilities and horizons of meaning in which subjects can invest themselves – for example, through the discovery of an artificial person as the center of a political community, designed for the purposes of representation and implementation of common concerns and interests. This was true especially after that the recourse to the naturalness of a God-founded order and entity could no longer have the capacity to produce universal validity.

I would like to differentiate between three proper configurations of the transposition of the objective into subjectivity:

(1) a shift from the objective to subjectivity by means of a prose style that refers to a universal validity, whose objectivity is asserted or presupposed as self-evident;
(2) a shift from the objective to subjectivity by means of a prose style that contains a plurality of subjects and multiple reflections of meaning, which coordinate themselves and first need to find or produce their universal synthetic-objective validity;
(3) a shift from the objective to subjectivity by means of a prose style that dissolves universal validity into fragments and instants and – in a paradoxical way – personalizes and individualizes it.

III. General validity and objectivity as self-evident prerequisites

First, with respect to the first configuration, let me approach the transposition of the objective into subjectivity by means of a prose, which refers to a universal validity, whose objectivity is affirmed as self-evident. This configuration is that of bourgeois prose in the sense delivered by Moretti (2014), by which legal science was also dominated in the 19th century. To this end, one

as 'poetic,' in which, for the first time in history, was also included in the field of human arts. See Blumenberg (2015: 28, 75) and Kahn (2014: 6 ff.).

must first point out the not-so-evident fact that German legal science initially came into being through the printing of books. Just as the founding phases of national literatures were marked by letter novels, the Bildungsroman or by autobiographies, all written by one author (modern literature and authorship are only two sides of the same coin), the founding phase of modern legal science in Germany was determined by individual monographic works. Just as Rousseau, as a literary author, is placed in the center of his own aesthetic activity and identified by his audience even with his own figures and his own heroes (Blanning 2012: 10-11), in the same way authors such as Savigny, Windscheid, Gerber, Laband or Otto Mayer become heroes of German legal science. As individual authors, they write large manuals and build between the covers of these manuals elaborate systems with the claim of being identical with the law itself[13]. The prosaic style that dominates these systems is one of impersonal, objective, and impartial descriptions, often intertwined with a conception of legal science similar to that of the natural sciences, which understands its own meaning production as a logical and conceptual support of clarity. Some examples that prove this:

III.1. First example: Savigny's Spirit of the People in the mid-1840s

The authority of (civil) law can no longer be traced back to the authority of the divine will, not even to the sacred tradition of roman law anchored in that will, a new foundation of intramundane authority needs to be conceived for securing the binding character of law. Against this backdrop Savigny transfers the foundation of law to the Spirit of the People. Regarding this Spirit of the People, Savigny frames it to be a collective consciousness of a common culture and history. With this idea, Savigny does not refer to a 'People' in an empirical

[13] These include in particular Savigny and his eight volume *System des heutigen römischen Rechts* (1849), Windscheid and his three volume *Lehrbuch des Pandektenrechts* (1870), and Paul Laband and his four volume *Staatsrecht des Deutschen Reiches* (1876). Yes, these authors are not only heroes of German legal science, who even today are considered (unattainable) classics, but even the law itself was, for a long time, compared and identified with their works.

sense, to a political and social reality of the historical nation, especially not in the sense of an individualistic concept of nation, of the Nation as a sum of free and equal individuals. Savigny rather constructs an ideal entity, an ideal or imaginary body (Meder 2015: 182), whose supra-personal objectivity cannot be disputed. To this end, the collective layer of his spirit is modeled as a subject with the help of a supra-personal speech in the first person plural – 'we'. And this subject, the Spirit of the People, is objectified in the sense that henceforth all legal authority and all binding character for each individual consciousness necessarily comes from it.

> If we ask ourselves moreover for a subject, in which and for which positive law ought to be, then we find as such the People. In the common consciousness of the People lives positive law, and therefore we must also call it *People's Law*. However, one should by no means think of the conscience of the people as if it were each individual member of the people, whose arbitrariness creates law, because this arbitrariness of each individual could perhaps accidentally select the same law, perhaps, however, and more likely, a different law. In fact, the common conscience of the People is the People's Spirit, alive and effective socially in all individuals. It produces the positive law, which is, therefore, for the conscience of each individual, not accidentally, but necessarily one and the same law. If we accept on this basis an invisible origin of positive law, we will need, because of this, to renounce all documentary evidence of this same law. (Savigny 1840: 14-15; see also Rückert 2012: 35-42)

III.2. Second example: the State as a legal subject in Paul Laband's work after 1871

A comparable operation takes place in public law approximately thirty years later. In Paul Laband's work on German constitutional law, on the body of

rules organizing the political institutions of the German Empire, no longer the People are designated as the 'subject of law', but the German Empire newly created at Versailles. To be a legal subject, means, for the German Empire, to be a legal person capable of expressing its own will (Laband 1964 [1876]: 56-57). At this point, legal personhood also functions as a guarantor of the objectivity of the form of legal subjectivity (see Ladeur 2012: 182); the collective body conceived in this way also retains its provenance arising from subjectivity, when this same collective body is again treated as a special case of the individual body. Just as any (rational) physical person can be the bearer of rights and obligations, the state can be treated as a legal person, so that it is possible for him, for example, to appoint officials or even to buy a pencil. Constitutional law can then – objectively – exist in the form of subjectivity. It has an autonomous will, which, for example, an administrative official or a judge deciding a case exercises and enforces by means of a logical – therefore purely objective – conclusive procedure. In this respect, Laband, who well knows what his protagonists are like, leaves not the slightest doubt:

> The legal decision consists in the subsumption of a set of pre-existing data and facts (typicality) to valid law, it is, like every logical conclusion, independent of the will; there is no freedom to determine whether the deduction and its implications should or should not occur, it takes place – as it is said – by itself, with an internal necessity. […] Nevertheless, the judge must exercise and enforce not his will, but that of positive law, he is the *viva vox legis*, he does not elaborate the major premise, he accepts it, when given by a power that stands above him. (Laband 1964 [1876]: 178)

III.3. Third example: the public subjective right by Georg Jellinek around 1900

In the context of the discussion of the question as to whether individuals also beyond private law could be recognized by the state as the bearer of rights, Jellinek develops the concept of the subjective public right. For him, the public subjective right is a 'status', not just a reflection of state activity. Law is possible only between legal subjects and a legal subject is the one "who in his interest can set the legal order in motion." (Jellinek 1905: 418).

> These rights [the public subjective rights] are distinguished, however, from private rights essentially because they are based directly on personality. They have no object other than the person, unlike private rights. The claims arising from these rights [...] emanate directly from capacities that the legal order grants to individuals. All these capacities describe an enduring relationship of the individual to the state, they are legal conditions […] and form the foundation of individual publicist claims. Every claim regulated by public law therefore stems directly from a particular position of the person in relation to the state, which, corresponding to the model of classical antique law, can be outlined as a status. (Jellinek 1905: 418)

IV. Interim summary

The examples show how the procedures of a transfer from objective to subjectivity feed the construction of the science of law in the nineteenth century. Like bourgeois literature, legal science also cultivates a prosaic style, in which the author, with his knowledge of objective truth, acts as a superior, leading instance (Auerbach 2003: 498). Jellinek knows that the subjective right manifests itself as a claim which originates from the position of individuals in their relationship with the state; although his construction of rights in truth articulates the specifically continental European and especially German tradition of an 'insular

individualism', in contrast to England and America, where liberties emerge from an 'interactive individualism'.[14] A difference between the compositional procedures of literature and those of legal science may be seen, at most, as follows: as to prose, legal science works much more strongly in its own than does literature in structuring rhetorically the operation of the transposition of the objective into subjectivity, in such a way that super-personal speech and objectivity stifle or even suffocate any trace or remnant of an individual, subjective, or even eccentric position. The aim is to hide the subjectivity of the protagonist. Who would still like to claim that Laband's construction of the German Empire of 1871 as a legal subject brings up only an individual feeling, a temporary mood, a whim or a particular interest?[15]

V. Generality as synthesis

V.1. On the change of prosaic procedures in the late 19th century

The second configuration deals with the transposition of the objective into subjectivity through a prose style that reveals a plurality of subjects and several reflections of meaning, which coordinate themselves and must first find or produce their universal synthetic-objective validity.

This configuration originally refers to the transition from the prosaic procedure since the end of the 19th century. The late 19th century is not only the era of a second industrial revolution, in which the most heterogeneous forms of life clash against each other, but it is also the era of the rise of an unprecedented mass culture, beyond printed books, with hitherto unknown media such as daily newspapers, photography, silent film, radio, or paperback books (Vesting 2018). In this situation, bourgeois consciousness stumbles into a deep identity crisis. I

[14] Yaron Ezrahi, *The Descent of Icarus: Science and the Transformation of Contemporary Democracy*, Cambridge (Mass.) u. a.: Harvard University Press, 1990, S. 186.

[15] Nineteenth-century legal science avoids even the slightest suspicion of the emergence of such an impression, because legal science corroborates and sustains the objectivity and super-personality of its results through a systematic method. Its core is even, as in Savigny, the linking and connection of different legal concepts and legal rules to 'a great unity', that is, to a system.

would, however, like to put emphasis on this point in a different way than Franco Moretti does. In Moretti's (2014) analyses of modern prose style, it is clear that it is ultimately about the unmasking of bourgeois prose's claim to objectivity: for him, in fact, indirect free speech is a procedure of the internalization of socially predominant thought patterns: indeed, bourgeois prose achieves an unparalleled aesthetic objectivity, but it only achieves it in such a way that it no longer knows at the end of the nineteenth century – as in Flaubert *Bouvard et Pécuchet* (1881) – what it must preserve of its object. In the end, the original seriousness of bourgeois prose leads to nothing but perfect works that lack any sense and purpose (Moretti 2014: 147).

This perspective is more directed toward the collapse of the bourgeois world in the literature of the late 19th century. According to Moretti (2014) that decline is already reflected in Ibsen, who dramatizes the ambiguity of the bourgeoisie, the potential conflict between the respectable citizen and the refined financier, and finally the "impotence of bourgeois realism against the megalomania of capitalism" (Moretti 2014: 268). In this perspective, the industrial and then digital revolutions "have produced a simply unbelievable mélange of scientific illiteracy and superstitious religiousness, a new sentimental transfiguration of social conditions", a "drastic infantilization of culture" through the American way of life as a 'Victorianism of the present' (Moretti 2014: 42).

Similar or at least comparable cultural-critical motifs can be traced in a more media-theoretical perspective, for instance, in John Bender's and David Wellbery's (1990: 32) text on the ends of rhetoric, in which these authors assume that in the world of mass communication, of images and sounds, of slogans and advertising, rhetoric has been displaced from the classical *trivium* into the undergrowth of triviality: individuality is now represented only imaginatively or fantastically, and the public sphere is manipulated by pretending that products are the result of individual creative effort.

In contrast, in my opinion, it is important for any description of the change in literary prose, to describe it in a proper and reasonable way and, for example,

without a tragic pathos (an emotionality) à la Weber (to which Moretti gladly refers). One must accentuate the following insight: if previously the bourgeois prose style had relied on the universality of its forms, flexible and oscillating categories now move more forcefully into the foreground, that is a prose style that no longer simply and easily presupposes or upholds the universality of its categories, but migrates more forcefully toward dynamic motifs (Auerbach 2003: 499). This prose style also comprises the author, instigating the end of the sovereign narrator and the associated knowledge of objective truth and, last but not least, linking authors to the phenomenon of mass culture. This is preferably true with respect to the use of recursive procedural forms of meaning formation, which refer to reproducibility, a constitutive phenomenon of mass culture.

Already in Nietzsche one can see an influence or reaction to the phenomenon of mass culture. This influence, however, can also be found since the end of the 19th century in literature, both in its self-reflection and in its changing prose style. As an example of a self-reflection one should briefly allude to Hugo von Hofmannsthal. Hofmannsthal labels the new situation a 'world of relations' (Hugo von Hofmannsthal and Eberhard von Bodenhausen, *Briefe der Freundschaft*, 1953, quoted by Schorske 1981: 19). As for many of his contemporaries, his starting point is that the old bourgeois-aristocratic world has fallen to pieces. "We must take leave of the world before it collapses." (Hofmannsthal as quoted by Schorske 1994: 8). Hofmannsthal does not, however, limit his attention to aestheticized scenes of the disintegration and demise of bourgeois-aristocratic culture. He views the flight, so widespread in the Vienna of his time, into aesthetics and art more as part of the problem, and less as part of its solution.[16] For art does not exist, according to Hofmannsthal, only for beauty or grace, not only for the medium, which allows man to escape from the daily routine. Art is simultaneously linked to a sphere of instinct, of the natural and the irrational, a connection that Hofmannsthal considers dangerous, but that

[16] Until his marriage and until his greater openness, as a consequence of marriage, to what he calls 'the social,' Hofmannsthal indeed bets on the map of art as the source of all reality. But Hofmannsthal recognizes the danger, which threatens the subject outside of self-confinement in the temple of art.

at the same time opens up for the subject – in a kind of dialectical movement – the possibility of an access to the world of the social and the state, and that pulls him out of the paralysis of narcissism. Modern culture appears, on the one hand, as hopelessly pluralistic, without coherence or direction. Its essence, writes Hofmannsthal in 1905, is 'ambiguity and uncertainty'; on the other hand, it can, however, "rest on the sliding (the slipping, the moving – *das Gleitende*) and be aware that it is the sliding that other generations believed to be firm" (Hofmannsthal 2002 [1905]: 205, a formula that was later repeated by Luhmann). With this Hofmannsthal makes visible the crisis of bourgeois culture, but also brings to consciousness a new and viable paradigm (see Ladeur 2012: 189, Wellbery 2006: 235).

With this recourse to what is oscillating, about which Nietzsche had also already spoken, Hofmannsthal opens a door to synthetic-objective approaches to interpretation, in which, initially, the universal is produced in a continuous process. Correct life emerges for Hofmannsthal no longer as subordination to a stable universality, whose necessity remains certain and firm, but rather as the result of a constantly renewing human sensibility, which always highlights new forms of references and relations. This conviction makes Hofmannsthal finally realize that the conflicting energies of mass culture need a valve. This valve is the participation of each individual in the political process, whereby Hofmannsthal suggests with it something very specific, concerning the continuous participation of individuals in the 'ceremony of the whole' (quoted by Schorske 1981: 21). Only in a ritualistic ceremonial form, from which no one feels excluded, can the antagonistic energies harmonize with each other and new dynamic forms of life and statehood be built.

In Hofmannsthal, reality is thus dissolved in manifold and ambiguous references, which the author encounters but which is not controlled by him or his concepts. Correspondences for this movement are also found – preferably in literature after World War I – in other countries and languages. Erich Auerbach (2003: 496), for example, has shown, following the example of Virginia Woolf's literary procedure in *To the Lighthouse* (1927), that the author, now as narrator,

gives up objective facts and almost everything that has been said is reproduced as a reflection in the consciousness of the people in the novel. What is more: the author not only has inserted into the consciousness impressions of a single subject, but of 'many, often alternating subjects'. The effect is that the respective people bring their own reality into play, and that, in addition to this reality, an objective reality separate from it no longer seems to exist (Auerbach 2003: 498). One can also say briefly that, at any time between the end of the 19th century and the beginning of the 20th century, the intention and ability of the narrator's voice to stage an objective reality about a single subject disappeared, and in the place of a representation of subjective consciousness of a single person "enters a representation of consciousness of several persons, directed toward a synthesis" (Auerbach 2003: 499).

V.2. On legal prose since the late 19th century

Since the end of the 19th century, legal prose also leaves behind evidence that runs exactly parallel to this. For civil law, one could mention Jhering, in his later phase, with regard to his jurisprudence of interests. This jurisprudence brings to the fore the 'struggle' of interests, both of individuals and of groups. I want to restrict myself to a few examples proper to both theory of the state and constitutional theory. What Hofmannsthal describes as a 'world of relations,' and Auerbach (2003) as a 'representation of the consciousness of various people, directed toward a synthesis,' occurs in German state theory in the Weimar Republic as an 'integration,' after World War II as a 'formation of political unity,' and more recently, in a short text by the former President of the Federal Constitutional Court of Germany, as a 'constitution of the middle.'

If there is no doubt for an author like Laband that the relationship between state and individuals can be constructed as a legal relationship between two intrinsically stable persons, for Rudolf Smend, one of the most prominent authors of state theory and constitutional theory of Weimar Republic, this relationship and its poles become precisely that problem to which he applies the so well

known 'principle of integration' (Smend 1994 [1928]: 119). Behind this principle lies the thought that the unity (or entity) of the state can no longer be simply presupposed, but that the collapse of all traditional authorities accompanying the First World War forces state theory and constitutional theory, to conceive of this relationship dynamically, as a 'constant self-renewal', as a 'perpetual new understanding and joint action', as relentless processuality (Smend 1994 [1928]: 135, 138). For Smend it is not possible to regard the political community as 'a collective self that rests on itself.' Rather, the state, as a 'structure of unity,' is only comprehensible as a 'dialectic that fluidly realizes and transforms itself.' (Smend 1994 [1928]: 138).

> State theory and constitutional theory deal with the state seen as a part of the spiritual reality. Spiritual collective entities are part of real human life, acts of a social spirit. Their reality is that of a functional actualization, reproduction [...] – only in this process do they become real again and again at every moment.
>
> Thus, the state especially is not a fixed totality from which individual manifestations of life, laws, acts of diplomacy, judgments, and administrative actions proceed. Rather it only ever exists in these individual manifestations of life, insofar as they represent activities of an overall intelligible context, and in the even more important renewals and revisions which have this context itself as their object. […] This core process of the life of the state […] is what I have proposed calling integration. (Smend 1994 [1928]: 136)

In this text, it is shown to what extent the state as a subject of law must enter into relationship with other subjects, about whose consciousness neither the state nor the author has comprehensive knowledge. Rather, it is a majority of subjects that the state must win for itself in an ongoing process, with which Smend also expressly counts groups (Smend 1994 [1928]: 149). In other words, Smend's integration aims at the production of a whole, or rather aspires to win

over social forces, different interests and worldviews for the 'entirety of the state.' (Schmitt 2007 [1932]: 25). For this purpose, Smend calls for the procedure of objective integration, under which he comprises 'integrative symbolizations' such as flags, coats of arms, heads of state, political ceremonies and national festivals, joint war experience or a landscape of the country like the Rhine River; reflections that are not so far removed from Hofmannsthals' 'ceremony of the whole.'

In the opposite sense, also in Carl Schmitt (2007 [1932]) one can demonstrate the state's dependence both from idiosyncratic individuals and groupings ahead of him. The difference consists only in the fact that, for Schmitt, that it is not a synthetic-objective reasoning, but a myth of decision, with whose help Schmitt believes to find the way back to a stable objectivity. One could also speak of a dynamic of extreme intensification and polarization: the rise of a world of references – as in Hofmannsthal, Virgina Woolf or Smend – is not answered with a search for a new dynamic form, but with an enhancement of the polarizing elements. In this regard one finds, for example, Carl Schmitt's *Concept of the political*. Here the polarizing is totalized, or rather "the real possibility of the grouping of friends and enemies" (Schmitt 2007 [1932]: 35): the political then appears as the polarizing, and the polarizing as the totalizing, which annuls all other differentiations and makes the state again a determining and authoritarian entity, *e.g.* a single (sovereign) subject.

VI. The personalized and individualized generality

Finally, let me approach very briefly the third configuration: the transposition of the objective into subjectivity by means of a prose style that dissolves universality into fragments and instants and – in a paradoxical way – personalizes and individualizes them.

This configuration is that of our present. It can be found, in philosophy, in Axel Honneth's (1996) *Struggle for Recognition*, and its first literary evidence can be seen in characters like Emma Bovary; a figure who, according to Lionel

Trilling, was authentic at least in being unhappy to the point of delusion. More recently, the orientation towards a novel form of individualism and authenticity, which is either directed against the 'alienation' and the 'false consciousness' in 'capitalist society' or is articulated as a search for a personal life beyond group conventions of the working-class milieu, has become central, for example, in Annie Ernaux's *The Years* (2008) or Didier Eribon's *Return to Reims* (2009). The French sociologist Alain Ehrenberg (2014), in this context, speaks of a personal turn of individualism, by which he means that the subjective, the affections, the emotions, the feelings, the psychic life, the suffering (which traditionally has even been treated in a negative way) now move to the foreground and are brought to the fore against the institutions and against the finding of a common reality and universality.

A turn toward the personalization of individualism can also be found in law. Here, among other things, an understanding of freedom as a right to individual self-interpretation has prevailed, which I have described elsewhere as the 'new legal individualism'. If bourgeois individualism involves seeing oneself in others and others in oneself, the new personal individualism tends to erase the other and only sees oneself. This movement is legally driven by the unreflective inflation of rights, for which the tendencies of adapting freedom of expression to the new forms of documenting experiences and feelings without reflection or the sweeping extension of rights of data-protection into private relationships are only two examples. Like the liquid identity concept of contemporary subjectivism, the new legal individualism knows only one thing: a self-determination without *nomos*, an autonomy of which only the *autos* remains, while unifying conceptions and the need to maintain an impersonal objective order are seen as incompatible with freedom.

Finally, I quote from a minority vote of a decision of the Federal Constitutional Court of Germany on the law of collective agreement, which formidably proves this trend.

> In a final analysis, we also cannot proceed with judgment as far as it rests on the assumption advocated by the federal government that the subsequent subscription to a collective agreement from another union organization limits the loss of the collective agreement itself. [...] Behind this lies a dangerous tendency toward a *unifying* notion of employee's interests; the exercise of the fundamental right to freedom of Art. 9, Subparagraph 3, Item 1 of the Constitution [*Grundgesetz*] is reinstated here in favor of a conception of *objective appropriateness*. This appears not only as absolutely unrealistic, considering the current structure of wage labor, and raises the price of collective bargaining. [...] This contradicts the fundamental idea of art. 9, subsection 3 of the Constitution, which rests upon *participation* in collective bargaining being *self-determined* by the members of any profession. The right to freedom of art. 9 par. 3 of the Constitution also protects the diversity of interests in coalitional pluralism and does not justify any 'act of subjection' in the course of collective bargaining. (Dissenting opinions from Justices Paulus and Baer in the ruling of the First Senate of the Federal Constitutional Court, 11.07.2017, Index n. 19)

In this dissenting opinion, a 'culture of difference' is cultivated, which, in place of a common reality as a universality, inserts an errant conception of self-determination, beyond 'acts of subjugation'. This unreflective notion of self-determination is seen as legitimate, provided that this 'commitment' is directed only against the "dangerous tendency [...] of a unifying conception" and against "conceptions of objective correctness." If bourgeois prose (and not only that) used to count as objective and certain, what was universal and necessary, today one takes as the highest pattern a free-floating self-reference of the subject, its incessant search for self-determined authenticity.

References

Auerbach, E (2003) *Mimesis. The representation of reality in western literature* (Princeton, Princeton University Press).

Bally, C (1912) 'Le style indirect libre en francais moderne' *Sonderabdruck aus Germanisch-romanische Monatsschrift* 549-556, 597-606.

Bender, JB and Wellbery, DE (1990) 'Rhetoricality. On the modernist return of rhetoric' in JB Bender and DE Wellbery (eds), *The ends of rhetoric: history, theory, praxis* (Stanford, Stanford University Press).

Blanning, T (2012) *The romantic revolution* (London, Phoenix).

Blumenberg, H (2015) *Schriften zur Technik* (Frankfurt, Suhrkamp).

Ehrenberg, A (2014) Narcissism, individualism, autonomy: society and its discontents? 78(1) *Revue Française de Psychanalyse* 98-109.

Flaubert, G (2012 [1857]) *Madame Bovary* (Munich, Hanser).

Hofmannsthal, H (2002 [1905]) 'Der Dichter und seine Zeit' in R Spahr, *Jedes Wort is doch auch ein Ereignis* (Frankfurt, Fischer Taschenbuch).

Honneth, A (1996) *The struggle for recognition: the moral grammar of social conflicts* (Cambridge, MA, MIT Press).

Jellinek, G (1905) *Allgemeine staatslehre* (Berlin, O. Haering).

Kahn, V (2014) *The future of illusion: political theology and early modern texts* (Chicago, Chicago University Press).

Laband, P (1964 [1876]) *Das Staatsrecht des Deutschen Reiches* Bd. I (Tübingen, Laupp).

Ladeur, KH (2012) '"Finding our text...": Der Aufstieg des Abwägungsdenkens als ein Phänomen der "sekundären Oralität" und die Wiedergewinnung der Textualität des Rechts in der Postmoderne' in I Ausgberg and S-C Lenski (Hrsg.), *Die Innenwelt der Außenwelt der Innenwelt des Rechts* (Leiden, Brill).

Meder, S (2015) *Doppelte Körper im Recht: Traditionen des Pluralismus zwischen staatlicher Einheit und transnationaler Vielheit* (Tübingen, Mohr Siebeck).

Moretti, F (2014) *Der Bourgeois. Eine Schlüsselfigur der Moderne* (Frankfurt, Suhrkamp).

Rückert, J (2012) 'Methode und Zivilrecht beim Klassiker Savigny (1779-1861)' in Seinecke, R (Hrsg.), *Methodik des Zivilrechts von Savigny bis Teubner* (Baden-Baden, Nomos), 53-95.

Savigny, FC (1840) *System des heutigen römischen Rechts* Bd. 1 (Berlin, Bei Deit. und Comp).

Schmitt, C (2007 [1932]) *The concept of the political* (Chicago, Chicago University Press).

Schorske, CE (1994) *Wien. Geist und Gesellschaft im Fin de Siècle* (München, Piper).

Smend, R (1994 [1928]) 'Verfassung und Verfassungsrecht' in R Smend, *Staatsrechtliche Abhandlungen* (Berlin, Duncker & Humblot).

Vesting, T (2018) *Legal theory and the media of law* (Cheltenham, Edward Elgar).

Wellbery, DE (2006) *Seiltänzer des Paradoxalen: Aufsätze zur ästhetischen Wissenschaft* (München, Hanser).

5. Social systems theory as a conceptual apparatus for surpassing the schism between empirical legal sociology and analytical jurisprudence (or re-describing the debate between Kelsen and Ehrlich through Luhmann's lens)[17]

Lucas Fucci Amato

1. Introduction

The debate between Hans Kelsen (1881-1973) and Eugen Ehrlich (1862-1922) that took place between 1915 and 1917, based on a review by Kelsen of Ehrlich's book *Fundamental principles of the sociology of law* (published in 1913), was another version of the confrontation between different conceptions of the 'legal science': 'formalist', 'normativist' or 'positivist' views on one side; on the other, 'realist', 'sociological', 'pragmatic' or 'functionalist' currents[18]. With the fall of natural law, sociologically oriented jurists were the preferred opponents of the positivists. The disagreement between the two sides was highlighted on at least four axes; these are the debate:

(1) on the 'sources' of law and the relations of subordination or prevalence among them (formal or material sources, institutional or non-institutional, state or societal organs, monism or pluralism);

(2) about the 'foundations' of law (a hypothetical or fictional scientific foundation, such as the fundamental norm, a foundation of legitimation or authority of lawmaking bodies, or also 'rootedness' in customary social practices);

[17] This chapter is a translated, revised and extended version of a paper originally published in (2016) 35(2) *Nomos* 227-254.

[18] Kelsen (1949 [1945]: 162-178) presents an argument almost identical to the one he directs against Ehrlich when analyzing the 'sociological jurisprudence' of the American realists.

(3) on efficacy (identified or not with validity, i.e., technical effects within the legal order; focused on courts and organized sanctions or on diffuse social practices);

(4) and on interpretation (focus on the determinability or consistency of norms' content or formal validity, or on the exploration of language antinomies, gaps and indeterminacies in favor of a 'social function', of an 'alternative use' of law, or of the recognition of 'internal orderings' of social groups).

Certainly, there is neither *the* sociology of law nor *the* theory of law, but different forms of self-description of law that have presented themselves historically and that can be roughly subsumed to these contemporary conventional labels. Thus, the debate between the one who is considered the founder of legal sociology (Ehrlich) and the constructor of the most influential analytical conception of the science of law in the countries of Roman-Germanic tradition during the 20th century (the pure theory of law) has antecedents and equivalents coetaneous to its unfolding. One antecedent is the opposition, in 19th century Germany, between the 'jurisprudence of concepts' (Puchta, Windscheid, Jhering in its first phase) and the 'jurisprudence of interests' (Philipp Heck, Jhering in its second phase) (for systemic re-descriptions of those debates, see Campilongo 2012: 143-157, Gonçalves 2013: ch. 4).

Certainly, this is not the same debate: if the 'jurisprudence of interests' can somehow be seen as a close antecedent of Ehrlich's 'living law', and if Ehrlich (1917 [1903]) can be considered a precursor of Kantorowicz's 'free law' school, Kelsen is not simply a continuator of the 'jurisprudence of concepts'; on the contrary, he overcomes the typical argumentation of this 'school' and founds a new kind of self-description of law. No longer able to sustain the determinability of legal interpretation, as the classical formalists, Kelsen turns his attention to the mere determination of the formal validity of legal norms, distinguishing this question from the content of these norms (Kelsen 2000a [1929]; see also De Giorgi 2017 [1979]).

A polemic that, like the confrontation between Kelsen and Ehrlich, unfolded in the first half of the 20th century, was the criticism of 'formalism' by American legal realists (Oliver Wendell Holmes, Jr., Roscoe Pound, Benjamin Cardozo, Karl Llewellyn, Jerome Frank, Felix Cohen). It should be noted that Pound was an enthusiast of Ehrlich's work, contributing decisively to its dissemination in the United States (he wrote the preface of the American translation of Ehrlich's *Fundamental principles of the Sociology of Law*, and managed to have Ehrlich's articles published in the *Harvard Law Review*). The opposition of 'realist', 'sociological' or 'functional' views to analytical jurisprudence (closer in some way to 'dogmatics' or 'formalism') have been, therefore, a constant in the 20th century.

In his debate with Ehrlich, at the beginning of the century, Kelsen (2010a [1915]: 3) already started by commenting that there had been a series of attacks, under the fashionable label of 'sociology', against legal theory, presented by the former as backward and unscientific. Ehrlich (1936 [1913]: ch. 1), for his part, defined the sociology of law as a purely theoretical science, contrasting it with practical legal science (doctrine or dogmatics), which confuses description and prescription in its way of proceeding by abstractions and deductions – an inadmissible confusion for the modern scientific canons.

But it is also worth noting that there were authors who challenged the contraposition between 'sociological' conceptions and 'formalist' descriptions of law. Weber (1978 [1922]: ch. 8) had as one of the central points of his political sociology the analysis of modern domination as a 'rational-legal' based domination and, as the axis of his sociology of law, presented the analysis of the rationalization of legal thought and practices through the rise of a formalistic law (in detriment of the 'material rationality' of natural law). Weber also noted, however, anti-formalist tendencies of 'materialization of law', that is, the emergence of irrational (*i.e.* non-generalizable) references to political, ethical and economic concepts within law and legal interpretation[19]. Also, Hart (1994 [1961]:

[19] Weber's (1978 [1922]) definition of the object of the sociology of law (as being the human conduct guided by an order that is considered valid) seemed to be the most acceptable to Kelsen

v), the paradigm of analytical jurisprudence in the Anglo-Saxon world, defines his *The concept of law* at the same time as an 'essay on analytical legal theory' and as a 'descriptive sociology essay', presenting a theory with influences from both sociology and analytical philosophy[20].

The thesis of this chapter is that Luhmann offers a version of sociology of law that integrates descriptive claims typical of both jurisprudence and the sociology of law. To advance such thesis, the chapter focuses on the debate between Kelsen and Ehrlich, understanding that it can be the object of a 're-description' from four conceptual pairs (or forms) that Luhmann's systems theory presents: 'medium/ form', 'normative/ cognitive', 'code/ program', and 'center/ periphery'. The concept of 're-description' (Hesse 1966: 176) designates an observational operation that brings about changes in the meaning of what is observed and an extension in the vocabulary of what it is about. In the present work, we seek to observe the forms or distinctions used by Kelsen and Ehrlich as contingent, re-definable in terms of other forms – those proposed by Luhmann.

As a result, systems theory is presented as a conceptual approach that serves both to more empirically focused inquiries (typical of 'middle range' sociology, in the sense of Merton 1968 [1949]) and to more analytical and conceptual theorizations concerned with legal validity and application (typical topics of jurisprudence). Besides that, systems theory can be worked out even in a more abstract and general level of social theory, also with critical concerns or with constructive aims, in interface with the problems, institutions and doctrines of specific legal fields. Even if Luhmann himself developed his sociology of law as a subsystem of his theory of society, we may adopt and refine his legacy for these other scientific endeavors. This chapter then concludes with some illustration and argumentation on this claim.

(1949 [1945]: 177-178), although not without corrections (after all, the illegality of the conduct does not depend on whether the agent is aware of the rule that punishes it).

[20] Calvo García (2014) points out to a 'philosophical imperialism' in legal theory and claims for the development of a sociological approach within jurisprudence, presenting examples of how it could be articulated for instance with Hart's analytical positivism.

2. From 'content/ form' to 'medium/ form'

In the Kelsen-Ehrlich debate, a contrast between content and form in law was presented. In Kelsen's positivist-normativist view, the theory of law had the status of an autonomous science and is responsible for describing the form, the structure of law: that is, the legal norm and the legal order (a system of legal norms described as a system of legal propositions). The contents only count as matter of the norm: "While the legal norm is law *per se*, even without reference to a concrete fact, the *fact* is never law or legal relationship in itself, because, as a being, it is *per se* indifferent to values and *deprived of meaning* if it is not referred to a norm or to an objective value: more precisely, if it is not thought of as a *fattispecie* in the form of ought to be instead of in the form of being" (Kelsen 2010a [1915]: 23, original emphases; see also Kelsen 1949 [1945]: 162).

Outside the norm, a content is an expression of the world of being, of nature, of causal determinism. Only as a factual hypothesis of the norm does matter enter the plane of 'ought' to be, of society, of freedom – to the extent that a sanction is imputed to a conduct. What science has to describe is the formal relation of validation between the norms of an order, based ultimately on an act of wanting to know: the presupposition of the fundamental norm. By identifying law with the State, Kelsen (2010a [1915]: 39) conceives: "The State is a form of the social unit, not its content."

What is the counterpoint of Ehrlich's sociology of law? It is the defense of a law immanent to society, defined in terms of fact, of efficacy of normative contents identifiable in diffuse social practices. But, as Kelsen (2010a [1915]: 25, original emphases) reaffirms, the only meaning that can be given to the relationship between fact and law is that "the rule refers to a fact as an *object of regulation*". Kelsen (2010a [1915]: 6, 15-17) defended the need to presuppose the legal norm in order to determine the content of the ought-to-be. A "sociological legal theory presupposes the normative concept of law" (Kelsen 1949 [1945]: 175-178).

But it would be a problem for the scientificity of the sociology of law to presuppose the norm insofar as this would imply an evaluation (even if according to the norm). And a science must be descriptive, not normative, Ehrlich (1936 [1913]: 389) stressed: "it is the function of the sociological science of law, as of any other science, to record facts, not to evaluate them [...]". Ehrlich (1936 [1913]: ch. 2) criticized those who considered it impossible to speak of legal relations, legal business, marriage, contract, will without presupposing a legal rule or proposition that identified them as such; on the contrary, it would be possible to identify the legal only starting from what is generally effective within a community, from a social practice, from the 'internal ordering' of this practice located and observed by the sociologist, from a 'living law', concrete, prior to the abstract verbal formulation of legal propositions. Ehrlich (1936 [1913]: 84) states that "law is not constituted by legal propositions, but by legal institutions". Legal propositions, for Ehrlich (1936 [1913]: ch. 20), can only be scientifically analyzed as to their origin and efficacy, but not as to their interpretation and practical application, as the traditional pseudoscience of law did, with its method that mixes normativity and descriptiveness.

Faced with this answer, Kelsen (2010a [1915]: 22, original emphasis) inquired as to what 'legal institutions' would be: "physical facts, or psychic facts, or events of the external world (considered from the point of view of the observer) or *meanings*, which the observer attributes to those facts or events on the basis of a certain presupposed norm?". For Kelsen, Ehrlich, in providing a historical explanation of *nomogenesis* (holding that the family precedes family law, that the state precedes state law, etc.), would make a confusion between the "logical presupposition of the legal norm" (presupposing it, state, family, etc. become creations of law) and the "*temporal* precedence of a fact" (Kelsen, 2010a [1915]: 27, original emphasis). If "[c]onstitution, family order, property, contract law are examples of legal propositions successive to concrete legal relations", in order to consider such institutions as legal, one would have to presuppose legal norms (Kelsen, 2010b [1916]: 62).

Where is law, after all? Or, in Kelsen's (2010a [1915]: 6) formulation: "how, by a purely causal consideration, therefore (relatively) deprived of presuppositions, can a sector of social reality be delimited as law or life of law, in relation to another type of social rule, without recourse to a certain norm (deontic rule) presupposed by the observer as valid"? Impossible! The sociology of law would not be able to solve such a dilemma, which is its cornerstone. As Kelsen (2005 [1960]: 3-4) formulates in his *Pure Theory of Law*, the (valid) norm is an 'interpretation scheme' of reality: it dictates what ought to be, that is, it delimits what is legal. For Kelsen (2010a [1915]: 48), Ehrlich's 'living law', as "the regular content of legal relations, is not a legal category, but it is certainly an interesting object to describe the economy and explain society", besides providing important data for the legislator.

For Ehrlich (1936 [1913]: 84): "Law and legal relations are a matter of intellectual concepts that do not exist in the sphere of tangible reality, but in the minds of men". Kelsen (2010a [1915]: 22) rebuts: Law does not belong to psychic reality; the science of law is not a branch of psychology. Nor does a proposition such as 'this fact is unlawful' belong to the physical world. Nobody is obliged because of what one thinks, feels or wants, but because there is a norm presupposed as valid that imposes as its content, as objective will, an obligation.

This counterpoint between a normative, deductive, formal, structural science (Kelsen) and an empirical, material, inductive science (Ehrlich) is re-describable when one moves from the 'content/ form' dichotomy to the 'medium/ form' distinction. This is a conceptual pair with which Luhmann's systems theory operates the description of law. 'Media' are loose couplings of elements that allow for the stricter coupling into 'forms'. Air is a medium for sounds. Light is a medium for objects. Only with the difference between medium and form we perceive and distinguish sounds and objects (Luhmann 2012 [1997]: 116-117). The medium of society is meaning; communication draws forms, concepts, distinctions in this medium of meaning; among such forms, the 'system/ environment' distinction is determinant. With the differentiation in functional systems, these also start to produce a specific meaning, with the

drawing of forms in their own medium. The proper medium of law is 'validity' – to produce legal meaning is to make distinctions about validity (which is the symbol that circulates through the legal system) (Luhmann 2004 [1995]: 71, 2001 [2000]: 19-71, 2012 [1997]: 419, note 350). The opposite of form is no longer content, but medium.

But presupposing the medium – the meaning – to give meaning (drawing forms) to juridicity is a systemic operation different from presupposing a legal norm (as Kelsen wanted) or considering the meaning given by a subject that acts (to verify if someone acts having the legal norm as a reason for his conduct, as in the Weberian sociological paradigm). Luhmann's matrix in this aspect is closer to Durkheim's (1982 [1895]: 56-57) methodological proposal, attentive to the 'social facts': "A social fact is identifiable through the power of external coercion which it exerts or is capable of exerting upon individuals. […] it exists independently of the particular forms that it may assume in the process of spreading itself within the group".

Meaning, for Luhmann (1990: ch. 2, 1995 [1984]: ch. 2), is the basic concept of sociology. Meaning is not, however, the attribution of a subject to an object. It is the production of the comprehensive system of society itself and the common ground of the various partial social systems – the interactions, the protest movements, the organizations and the functionally differentiated systems. Only by this means is it possible to produce communication (the basic element of society) and to establish expectations (the elementary social structure) – outside of meaning there are only machines and organisms, since psychic systems also have meaning as their medium (and, through language, minds are structurally coupled to social systems). If we consider the internal differentiation of society into (sub)systems, the medium 'meaning' is an expression of the paradox of self-reference: it is common to all social systems because it is specific to each system. The general distinctions between actuality and potentiality and between system and environment are the product and the factor of the operative closure of the systems in their permanent oscillation between self-reference and other-reference.

From the point of view of the specifically legal sense – given by the circulation of the symbol of validity – the attribution of a value (validity) to a norm is always made possible as a contingent operation by the system. Currently a norm can be considered valid – but the possibility remains of recognizing it as invalid in the future. The system maintains its operational autonomy – only the law, with its programs and organizations, its semantics and its experts, defines what is legal or illegal (as fact), applying a norm (on which it must decide whether it is valid or invalid). Interpretation is a mode of operation that conjugates the legal system's self-reference and other-reference, unfolding its perennial paradoxes in localized decision-making procedures, which are raised when contradictions surface. The indication of what is legal is also a form: the difference between what is and what is not legal. This difference contains a paradox: one can only define the unlawful because it is legal. The distinction between the legal system and its environment re-enters law itself. Only the law can decide about the illicit. But this decision needs to be unfolded (de-paradoxized) into a decision about self-reference (the decision between validity or invalidity of norms) and a decision about other-reference (the decision about the lawfulness or unlawfulness of facts).

Meaning – the disposition of validity – is what allows the processing of decisions in an unlimited time horizon: a decision is made now, considering past decisions, but this decision does not end the system. It can always be called upon again to make decisions and, moreover, it can change its orientations (no longer considering a norm valid, no longer considering a type of fact illicit), because the medium of meaning allows repeated uses. The memory of the system remains registered in it, but the options rejected in a moment are also preserved, and can be chosen in the future. Hence, in temporal terms, meaning is the unity of difference between actuality and potentiality (Luhmann 1990: 39, 1995 [1984]: 65).

It is worth noting the parallel between 'meaning' in Luhmann, as a fundamental sociological concept, and Kelsen's effort to classify the science of law as a 'science of the spirit', as opposed to the natural sciences (with which Kelsen identified Ehrlich's sociology). Kelsen (2005 [1960]: 72) recognized that,

"according to Kant's epistemology, the science of law as cognition of the law, like any cognition, has constitutive character – it 'creates' its object insofar as it comprehends the object as a meaningful whole". However, Luhmann frees the delimitation of legal meaning from any transcendental foundation. Meaning is rather a mode of operation of social systems – so it is that they produce communication, information, expectations – than an external attribution of a scientific observer.

Another distance in relation to Kelsen concerns what he understood as the form of law – notably the idea of a legal order. If Kelsen saw the formal structure of law as a staggered ordering of norms, Luhmann does not identify the concept of system with that of ordering or order. The legal system as a social system (and not a philosophical or ideal system) is not a set of norms and a structure that arranges them hierarchically. It also encompasses organizations (such as courts), interactions, procedures. Its structure, moreover, is not presupposed and hierarchical; it is the normative expectations themselves, circularly related and chained in autopoiesis, in the opening to facts by means of norms (which are also facts, as we shall see below). Therefore, validity – for Luhmann, unlike Kelsen – does not imply any determination about the 'structure' of the 'legal order' or the 'legal ordering' - synonymous with 'legal system' for Kelsen, but not for Luhmann.

3. From 'fact/ norm' to 'normative/ cognitive'

The contraposition between fact and norm was clearly stressed by Kelsen. In his view, there were two modes (both possible and legitimate) to study the 'legal phenomenon', which differed in object and method: the study of legal norms (as forms of 'ought' to be, deontic rules) turns legal science into a "*normative and deductive* science *of values*", close to ethics and logic; the study of law as a process or fact of social reality turns legal science into an explanatory, inductive and causal science "that proceeds according to the model of natural sciences" (Kelsen 2010a [1915]: 3-4, original emphases, see also Kelsen 1949

[1945]: 162). One science records what effectively occurs in social relations (at most, it concerns a customary law); the other, what should occur, norms, obligations, rights ("even the concept of 'person' is, well seen, normative", says Kelsen 2010a [1915]: 6). It is inadmissible to mix the two modes, promoting a "methodological syncretism between (normative) legal science and (explanatory) sociology of law" (Kelsen 2010a [1915]: 5, see also Kelsen 2000b [1911]: 59). Kelsen (2010a [1915]: 4-5, note 2) rejected Radbruch's conciliatory attempt to place law as an 'intermediate domain' between being and ought to be, and conceiving the science of law as a cultural science: if law was a form of being, any evaluative perspective would already cause it to enter the realm of values, of ought to be; if it was a normative, evaluative manifestation, it could not be reduced to an empirical fact. Moreover, for Kelsen, sociology in general (Comte, Spencer, Durkheim, Marx, with the exception of Weber) – and not only the sociology of law – often fell into the same errors of natural law, by postulating an order of values or normativity inherent in the observed reality, making an illegitimate passage from description to prescription (see Treves 1992: 164-172).

The 'fact/ norm' dichotomy is central to the description of law: one of the sensitive points to cause confusion on both sides of this form is the concept of rule. Kelsen and Ehrlich are jealous about the difference between ontic rule and deontic rule, although Kelsen (2010a [1915]: 8-9) accuses the sociologist of confusing them in his study, as if being caused the ought to be, as if from factual regularity one could infer the imposition of a duty, without the mediation of a norm (see also Ehrlich 2010a [1916]: 51-58, 2010b [1916-1917]: 65-66, Kelsen 2010b [1916]: 59-63). What sociology can do, says Kelsen, is only to reveal the regularities, how people act and always have acted, the laws of the functioning of social facts, just as biology studies the laws of the natural world.

Ehrlich (1936 [1913]: 164-169) tried to delimit legal norms from the feelings provoked by the transgression of the norm (we would say, in Luhmannian language, from 'normative expectations', but only at a psychological level). In his classification scheme of norms, there was room for emotions as diverse as a sneer, a critical disdain, or the feelings of revolt, indignation, resentment, and

disapproval. What defined the legal, notably, would be the feeling of necessity, the *opinio necessitatis*. In fact, Ehrlich's object was defined in a paradoxical way: his legal sociology had as mission to identify 'facts of law'. But how can law, normative as it is, be a fact, arise from being? These facts would be those "to which the human spirit associates these rules" (Ehrlich 1936 [1913]: 85); they are the very form of internal organization of social groups, the definition of the place of individuals in these groups, their 'internal orderings' (Ehrlich 1936 [1913]: ch. 2).

Luhmann (2014 [1972]: 31-40) replaces the 'fact/ norm' dichotomy by the 'normative/ cognitive' distinction. Much of the controversy between Kelsen and Ehrlich stems from the view that science is supposed to describe facts, but the theory of law would have a problem in its scientific status insofar as it would be a normative science, describing norms, and norms would be the opposite of facts – hence Ehrlich's defense of the empiricism of the 'living law'. For Luhmann, however, the elementary unit of society is communication and its structures are expectations: the normative and the cognitive expectations. Both are facts. Therefore, it is possible to *describe* both cognitive expectations (such as those typical of economics and science) and normative expectations (such as those typical of law or religion).

Associated with the postulate that each functionally differentiated system, such as law, is operationally closed and provides self-descriptions, legal sociology can be defended as a kind of theory of law, no longer as a purely external point of view that would disregard the normative structures through which law reproduces itself (Luhmann 2001 [2000]: 71-73). However, there are legal theories that do not set out to reveal the paradoxes that sociological analysis illuminates, but specialize themselves precisely in making the paradoxes invisible, degrading them to casual contradictions that can be overcome by decision; in this case, theories more oriented to the practice of judicial decision (such as legal dogmatics and even theories of law that are more abstract but focused on guiding the decidability of legal conflicts) differ radically from the type of sociological analysis propounded by Luhmann (2001 [2000]: 34, 57, 64).

We can deep the contrast between the systemic proposal and the understandings of Kelsen and Ehrlich. As mentioned, Ehrlich accused a lack of scientificity in traditional legal science, for mixing descriptive empirical judgments and normative judgments, *i.e.*, evaluative, prescriptive considerations. Although Luhmann considers normative expectations as facts amenable to description, he (Luhmann 2004 [1995]: ch. 11, 2001 [2000]) also notes the difference between:

1) a theory that seeks to problematize the functioning of law in reference to society, indicating paradoxes that, if they always surfaced in the functioning of the system, would hinder its reproduction (this is the sociology of law produced by Luhmann);

2) a theory that reflects the legal system in a more comprehensive and abstract way, with a more or less indirect concern with the decidability of cases – especially judicial decision-making (a field usually designated as 'jurisprudence');

3) dogmatic or doctrinal theories aimed at directing the interpretation of specific problems or branches, with guidance for decision making.

In this sense, this appraisal about the forms of description of the legal system does not differ much from Ehrlich's one. Sociology is the description produced by the scientific system, doctrine or dogmatics is an operational self-description of the legal system itself, and the field of 'jurisprudence' oscillates between sociological or philosophical foundations and the orientation to legal practice itself.

Another point of contrast emerges between the proposals of Ehrlich (to describe facts – and legal propositions only as facts, in their historical genesis) and Luhmann (to describe the paradoxes circumvented in the operation of law as a social practice). If both propose to be descriptive and, in this sense, empirical (not producing normative or prescriptive judgments), there is a chasm between Ehrlich's proposal, in fact aimed at an experimental verification based on methods similar to those of the natural sciences (or through historical empirical

research) and Luhmann's vision – the sociology of law as the delimitation of a comprehensive theory of society, founded on facts (in this sense, empirical), without pretensions to guide action (in this sense, descriptive), but with a speculative character and a much higher degree of abstraction.

The view of the sociological theory of law as a science that proceeds according to the same methods as natural science (such as physics and biology) is not only an indictment of Kelsen; it composed the self-image of early 20th century sociologists of law (on the American realists, see Kelsen 1949 [1945]: 165-167). However, if for Kelsen causality is an attribute identified in nature, it is certain that there is a causality in society itself. Luhmann does not deny this. He only admits the complexity of modern society: the excess of possibilities, some contingently realized, a great part left only as virtuality. This complexity implies a series of concurrent causes and possibilities that prevent a sociological observation from delimiting the determining causes (a functional analysis is to be produced instead of a factor analysis – see Luhmann 2014 [1972]: ch. 1, 2005 [1967]).

Ehrlich repudiated the disdain of traditional, normative, statist legal science for the law of society outside the state. Such legal science had been reduced to the commands of the state directed to courts and other authoritative bodies (Ehrlich 1936 [1913]: ch. 1). In contrast, a science of law such as the legal sociology founded by Ehrlich would have as object, in Kelsen's (2010a [1915]: 24) view, "not the law, but the way men think, feel or want the law, that is to say, the opinions that men have of the law, and what they do and do not do about it". This science, Kelsen (2010a [1915]: 24) continues, is unable to say anything about the decision between what is lawful and unlawful; it is as evaluative as biology: it only describes what has occurred, not what should occur. The difference between such sociology and a normative legal science is comparable to the distance between the history of religions and theology. Interesting how this interpretation – that a sociology of law along the lines of the natural sciences would limit itself to reporting the past – brings it closer to a conception forerunner to American realism: law as "the prophecies about what the courts

will actually do" (Holmes, Jr. 1897: 460-461). However, one was focused on the law of society at the margin of the state and the other, on the core of state law: the courts.

We should note then Kelsen's considerations about the 'sociological' (and not 'legal' or 'normative') theory of law of the American realists. Since the sociological view proceeds according to the method of the natural sciences and investigates causes, it could deal with predictions. This attempt of the realists is challenged by Kelsen (1949 [1945]: 165): mapping causes only means recording past facts and, through them, explaining the present situation of things; trying to extract from the past a prediction for the future would only be authorized by an unfounded conception that the future is a repetition of the past. For Ehrlich, legal sociology identifies law from facts, from the genesis of social practices and institutions, but can provide an orientation for the future, insofar as the 'facts of law' are consecrated in customs – and custom means that practices reiterated in the past (therefore, *facts*) are fixed as *norms* for the future (Ehrlich 1936 [1913]: ch. 19) – if Americans were skeptical about rules, Ehrlich was not skeptical about customary rules; on the contrary, he believed in their power to bind conduct. Here too the polemic about ontic and deontic laws or rules returns, but in a different way: Kelsen (1949 [1945]: 168-169) points out that a rule concerns neither subjective intentions or desires nor what in fact, objectively, the judge will do – as an objective meaning of an act of will, the rule merely prescribes what the judge *ought* to do.

At this point another contrast emerges with Luhmann. For Luhmann, the sociology of law does not serve to guide predictions. Law is a social structure that discerns and keeps in stock a high number of communication possibilities and counterfactual expectations that are not selected, not generalized for the moment, but that may be recognized and generalized in the future. Contingency – the possibility of this different selection, of an outcome contrasting with the current one – is a decisive attribute of positive law (law modifiable by decisions) that indeed allows empirical observations, but any specific prediction about the

outcome of future productions of meaning (attributions of validity/ invalidity, legality/ illegality) would be foolhardy.

4. Code and program: towards a functional (rather than structural) definition of law

Ehrlich (1936 [1913]: ch. 5) stresses the economic genesis of certain legal institutes, such as possession and civil liability. How to classify them: are they in fact law or are they economic phenomena? How to delimit law? The attempts to identify where the legal phenomenon is, to discern it from other kinds of facts, emerge with legal positivism, which, when detaching the decision on the law from moral, religious or directly political grounds, needed to delimit the material that would count as a guide for the decision. Once admitted the postulate that facts only count for the law (reduced especially to judicial decision-making) as the content of a norm, a problem and a solution emerged. How to delimit the law? By differentiating legal norms from other types of norms (generically, moral norms and 'social rules'). The endeavor was replaced by Kelsen with the idea that norms that belong to the legal order are legal – this pertinence is the very 'existence' of the norm as a legal norm, it is its validity. Both attempts to delimit the law – by form, be it the norm individually considered, be it the order – went in the direction of a structural definition of the legal.

If the pure theory of law sought a definition of law by law, for law (seeking to exclude philosophical and ideological references), so did Santi Romano, who theorized the legal order and saw in this unity the distinction proper to positive law – his fate, however, was to be received not as a theorist of (positive) law, but as a sociologist. After all, as Luhmann (2005 [1967]: 54) notes, Romano "identifies law with the structure of any social system". Romano's (1917) central idea is that law is not or is not only the norm that is posited, but the entity that posits it. Institutions or legal orders are the state, the church, the international community, economic organizations, and even individual families. The norms represent the object and the means of the activity of the legal order, rather than an element of

its structure (see Amato 2017a). This theoretical construction differs little from Ehrlich's (1936 [1913]: ch. 3) own theory, which identifies 'living law' in the customs of civil society, in the 'internal orders' of social groups, which define the positions of individuals within the group and structure the internal organs of these collectivities.

The structural definition of law – in both the analytic jurisprudential or sociological variants – does not achieve its goal: to delimit the legal phenomenon. The legal phenomenon is spread throughout society. Any fact can be or become legal. An extensive solution to the definition of the legal phenomenon – as a structure immanent to every social practice, permeated by 'legal institutions' – does not cease to be structural, even if it opposes another type of structural solution: that of starting from the definition of the legal norm or legal order (roughly understood as a set of norms).

Ehrlich (1936 [1913]: 455) strongly criticizes the idea that law consists of a sum of legal propositions, defining 'legal proposition' in two ways: 1) as a "stable legal rule, expressed verbally, emanating from a power superior to the individual and imposed on him from without [...]" (Ehlich 1936 [1913]: 28); 2) as "the generally binding formulation of a legal precept contained in a text of a law or in a legal book" (Ehrlich 1936 [1913]: 38). But "[a]ll legal propositions [...] have at no time exhausted all the living law of a community" (Ehrlich 2010a [1916]: 54). In contrast to the focus of traditional legal science on legal propositions, Ehrlich conceived as "the first question of legal science" the problem of "[w]hat are the actual institutions which become legal relations in the course of the development of law, and what are the social processes by which this takes place" (Ehrlich 1936 [1913]: 85). The definition of the legal norm seemed to him a secondary operation of theory: "Although it may be difficult to draw with scientific exactness the boundary between the legal norm and other species of norm, this difficulty in practice presents itself only rarely. [...] The problem of the difference between legal and non-legal norms is not a problem of social science, but of social psychology" (Kelsen 1936 [1913]: 164-165). Ehrlich's sociology of law thus presents, in Kelsen's (2010a [1915]: 49) consideration, a "very serious obstacle" to

its constitution as an autonomous discipline, for it would have to be linked to a sociology of morals, customs and all social norms – its definition of which norm is legal tends to be arbitrary. For Kelsen (2010a [1915]: 12), sociology, by limiting itself to empirical data, can only describe a 'legal order' in reference to rules in the sense of regularities followed in a logic of reciprocity within a social group, and not as a 'sum of norms'.

Commenting on Ehrlich, Luhmann (2014 [1972]: 18-20) reiterates that law cannot be determined from itself or from principles of reason, but depends on its reference to society in order to capture society's law, that is, the unity and difference between law and society. This reference could not imply, however, a model of sources of law with the replacement of natural law by society as the 'source' of positive law – this approach by Ehrlich is an obstacle to capture the specific character of modern law: positive law, set and modifiable by decisions. Nor would it be possible to use the outdated scheme of separation between state and society that underlies Ehrlich's thinking; rather, the autonomy of law could only be defined in terms of the differentiation of social roles and social function. This function – the "congruent generalization" of normative expectations in temporal, social, and material dimensions (the normatization, institutionalization and identification of expectations) (Luhmann 2014 [1972]: 31-83) – means nothing more than the production of decisions on a pre-existing material: the set of normative expectations. The decisions made consist in the production of legal meaning by the use of the distinction between actuality and potentiality. It is a matter of deciding which expectations will be recognized for the moment (dignified with the symbol of validity), keeping as repressed potential expectations that in the future may be selected by a legal decision. This is the service that law provides to society, structuring a high degree of complexity while maintaining a deposit of unrealized possibilities.

It is not precise to suppose – as Bourdieu (1986: 4) does, criticizing Luhmann – that this functional definition of law implies something like the idea of the classical legal 'formalism' (the image of an axiomatic and deductive system of rules). To say that law is a closed system is something different in the tradition

of Western legal thought compared to Luhmann's systems theory. The operational closure of law implies the performance of a specific function, but such operationalization (*autopoiesis*) goes far beyond logical reasoning about prescriptive texts – it involves a series of structures (expectations), processes (procedures, interpretation, argumentation, decision), social roles (citizens, lawyers, judges) and organizations (parliaments, courts). Defining law by its function – and not by its structure – implies something more radical than Kelsen's assumption that any fact can be legal to the extent that it is regulated by a legal norm. It means discerning social facts – or 'institutions' – as bundles of expectations (Luhmann 2010 [1965]: 85-86). Whether they will be considered as legal – symbolically dignified as statutes or precedents, customs or contracts – is a contingent fact, dependent on the operations that the legal system performs. Those expectations need only to be defined as legal if and when they are invoked in a situation in which it is necessary to decide between the legal and the illegal – and this will be the decision of an organization and procedure capable of institutionalizing and congruently generalizing the recognized normative expectation or the opposite.

Although we may reject a structural definition of law (common to both 'sociological' and 'normativist' views), preferring a functional definition such as Luhmann's, there is a problem that the 'sociologizing' theorists of law have had to deal with: one of their merits was to have emphasized the plurality of empirically observable legal orderings in overlapping domains of validity (binding, at least partially, the same people and matters, in overlapping spaces and times). There are real problems of expression when, assuming the existence of a self-produced law outside the state, it is necessary to describe it. In legal anthropology (Gluckman 1964, Bohannan 1968 [1957]), there is a famous controversy about how to describe the law of non-Western and non-modern peoples: should we proceed by using our categories (of Roman origin) of contract, property, etc.? Ehrlich (1936 [1913]: 29) tries to describe the 'legal orders' produced outside the state from the category of contract, but stripping it of all its

assumptions (about contractual requirements and private autonomy, forms of interpretation, etc.).

Here arises the third distinction by which systems theory can re-describe and overcome the contraposition between an analytical legal theory and an empiricist sociology of law: it is the distinction between code and program (Luhmann 2004 [1993]: ch. 4). The unity of the legal system is no longer the norm, nor even the sets of norms (legal orders). Law can only be differentiated in society on the basis of the specific service it provides in relation to society: it is a differentiation on the basis of function, no longer of structure. The unity of law can no longer be presented from the norm (or the legal proposition) or the sets of norms (legal orders), but only in functional terms. Law is a system no longer because it is a closed and self-integrated set of norms, but because it is a boundary in which the production of meaning takes place using a specific medium (the medium of validity), producing specific forms (the decision between the legal and the illegal) and, finally, fulfilling a specific function (the congruent generalization of normative expectations). Law fulfills its specific function by operating internally on the basis of a distinction: legal/ illegal – this is the specific code of the legal system. This form or distinction is the final, crucial difference that takes place in the medium of validity. But the decision for one side – the licit or the illicit, the valid or the invalid – can only be operationalized by the legal system's own criteria: such criteria are the programs (statutes, contracts, case law), which can be conditional (if-then formulations) or finalistic programs (that sets some aim without pre-defining the means to achieve it).

But does systems theory embody the legal pluralism advocated by Ehrlich (and Romano)? Monism (in Kelsen's case, an internationalist monism) does not represent the idea that there is only state law, but precisely that the state legal order establishes the limits within which law produced outside the institutional structure of the state can be recognized as law. Thus, within the same domain of validity (personal, temporal, spatial, material), there is only one dominant order, which sets the limits for the others, which are subordinate to it. For Kelsen (2010a [1915]: 37, original emphases): "The *State*, in its most intimate essence, is nothing

other than the highest *legal community*, the supreme legal community, the social unit thought of in the legal order; in short, the organization of law". It is within the limits of the state, of state law, that the law produced by the smaller groups of society is law – this is an imperative of social unity. Only with this subordination to state law does all the law produced in a society form "a unitary system of norms, a unitary legal order" (Kelsen 2010a [1915]: 38, see also Kelsen 2000b [1911]: 61-63).

Legal pluralism is a structural concept of law – an internal operational segmentation (therefore, without reference to society, and so not functional). About it, Luhmann does not pronounce himself so directly. But if Luhmann does not adopt a hierarchical view on the reproduction of law, there would be no reason to assume the prevalence of the state order over the others (even if Luhmannian descriptions are bounded mainly to examples of national/ domestic law). In any case, the recognition of legal pluralism would never imply in systems theory a plurality of legal systems (in the Luhmannian sense) – there is only one (social) legal system (worldwide) and its unity is defined by code and function (see Campilongo 2011: 140-148). Nevertheless, the distinction between code and program can help to re-describe the problem of the unity of law, represented by the contraposition between Kelsen's monism and Ehrlich's pluralism.

In a heterodox appropriation of Luhmannian theory, the unity of the legal system, represented by the code, integrates a diversity of programs and – here the heterodoxy – such diversity could be described in terms of legal orders (Neves 2003 [1993]). Therefore, in a pluralist systemic perspective such as Teubner's (1993, 1997) one, the differentiation of legal orders occurs by the formation of units with different degrees of autonomy self-constituted by their own norms, procedures, doctrines and legal acts. Luhmann, however, does not adopt this model of gradual autonomy of the legal system – law is a single system because it controls the production of its own elements (communications) and, especially, of its own structures (expectations).

5. Center and periphery: the institutional morphology of the legal system

The distinction between center and periphery can have several readings (see Cotterrell 2009). On the one hand, it is allegorical of the biographical situation of Kelsen and Ehrlich: one, a world-renowned jurist from Vienna, a cosmopolitan center; the other, although he studied in Vienna, was almost all his life a professor at the University of Czernowitz, an inland region of Romania. On the other hand, in the panorama of legal thought of the 20th century, Kelsen had an incomparable centrality. But in systems theory, the 'center/ periphery' distinction takes on another meaning: no longer geographical, but representative of the programs by which the legal system reproduces itself and the relation of these programs to organized decision making.

Let us think about a classic example of Ehrlich's (1936 [1913]: 370) 'living law'. Bukovina (today a locality between Ukraine and Romania) was a peripheral region of the Austro-Hungarian Empire, but the Austrian civil code was also in force there. However, this code would be ineffective in governing family relations in Bukovina. The code provided that the son who remained living with the family retained the right to form and dispose of his own estate. In Bukovina practice, however, the working son was obliged to hand over his wages to his father and mother every month. This was the 'living law' of Bukovina. Although there, as in Vienna, the center of the Empire, the same civil code was in force, there was an effective law of local traditions that undermined state law in that region. Kelsen's (2010a [1915]: 47-48) response to this example is to point to the following: on the 'periphery' of the legal system (we would say in Luhmannian terms), rules can be followed unchallenged, and diffuse social practices can prevail over positive law. The 'law' of social groups may be contrary to state law. But if the son in Ehrlich's example went to a court, the 'center' of the legal system (even the court in Bukovina!), his subjective right would be recognized on the basis of the civil code, not of the 'living law' of his parents. By the way, if the son did not want to sue his parents in court and continued to give his earnings to the family, there would be nothing unlawful: he would only be giving up a right that

the law gives him – to form his own estate. It would not even necessarily be a *contra legem* custom, since the Austrian civil code did not impose an obligation, but only established an option.

Here also the contrast between Kelsen (focused on describing the law that is recognized and operationalized in state courts) and Ehrlich (concerned with the living law, from the periphery of the legal system) may find useful terms for a re-description. As he announced in the preface to his major work, Ehrlich (1936 [1913]: xv) understood that "the center of gravity of legal development lies not in legislation, nor in legal science, nor in judicial decision, but in society itself". Kelsen (2010a [1915]: 20, note 4) judged that courts, "especially for the sociology of law, represent a relevant part of human society"; therefore, it seemed absurd to disregard the decision norms, the rules according to which courts "not only must act, but in fact regularly act". However, "for Ehrlich the sociologically relevant regularity actually ceases before the courts. The rules that the courts apply, with the very imposing coercive apparatus, do not in this case represent for Ehrlich a living reality!"

After all: 'where' is the law? 'Who' produces it? For Luhmann (2004 [1993]: 291-296), the legal system can be internally differentiated between center and periphery. The courts occupy the center of the system because they are the ultimate decision making instance of the assignment of the code 'legal/ illegal'; but just as important as the courts are the statutes, contracts, doctrines, programs that constitute the periphery of the legal system. At the periphery, citizens and officials may decide on law for other reasons – they may decide on a contract for economic reasons, deliberate on a statute for political reasons, produce a regulation and interpret it for administrative reasons. In the periphery, therefore, the legal system is much more cognitively opened to the irritations of its environment. Moreover, decisions can be unfolded into other decisions, can be postponed or delegated. But at the center of the system, in the courts, only legal reasons count for the legal decision – and the decision has to be made (prohibition of denial of justice, *non liquet*). The techniques of interpretation and argumentation, the acts of procedure, and the requirement of justification are

controls for ensuring that in the courts only 'legality' is reason for the definition of the legal or illegal – only law can reproduce law.

Economic, political, moral, religious reasons are radically filtered and structured by the legal programs – this formulation and formalization, by the way, authorizes some sort of 'formalism' in legal (judicial) interpretation, *i.e.* a level of determinacy (although not the certainty required by classical legal formalism, centered around the conception of a legal system as a complete and coherent set of rules, whose content would be concretized through simple and univocal deductive reasoning, a conception that Kelsen himself had attacked). This is why decisions at the center of the legal system are 'programed', not 'programming' decisions.

On the other hand, as an institutionalized form of production of law, as organization and procedure, courts and judicial claims count on a prior legitimation, which guarantees obedience, whatever the content of the decision taken. Courts have a 'right' (or rather, a duty-power) – which prevails over any other – to decide what the law is, to give a definitive attribution (at least for a concrete case) of the 'legal/ illegal' code. The significance of this organized center for the operational closure of the system is clear. It is not questioned whether it is lawful to decide about the lawful and the unlawful.

But what about 'living law'? Are all those who 'live the law' interpreters of the law, in the strict sense of official interpretation for dispute settlement? Ehrlich did not make this postulation. In fact, he indicated that the law of the codes was not a direct product of society, but rather a direction for the courts, a material proper to the *métier* of legislators and jurists. It is not interpretation that makes the passage from the legal text to social reality, it is the legal institutions that function as 'intermediary links' between norms (or legal propositions) and society (Ehrlich 1916: 584). Ehrlich, like other authors (Gierke, Romano, Pound, among others), had an inescapable importance in treating as juridical even what is on the periphery of law (see Tamanaha 2010: 24-29). This periphery is also made up of organizations, be they non-state organizations, such as economic organizations, or – contrary to what Ehrlich thought – state organizations or

organs, such as the Legislative, which is on the periphery of the legal system, but in a central position in the political system.

Ehrlich shed light on that law that exists 'at peace', as opposed to the 'at war' law of the courts, the center of the system – expectations, after all, unlike official sanctions, reside throughout society (see Nelsen 2009: 254). Ehrlich (1922: 130) asked: "Is there such a thing as a world law? Or are there laws, different in the various states, among the various peoples?" Luhmann's answer is that there is only one legal system in world society. Ehrlich's answer was also along the same lines: there is such a thing as law. But his justification was a structural one: while the diversity of (objective) laws was mirrored in the sets of legal provisions, unity was manifested in the 'social order', in the fact that social institutions such as marriage, family, tenure, contract, and succession are common to all objective laws, found in different societies (Ehrlich 1922: 131).

It is true that law spreads as a structure throughout society, but such a finding does not help us to observe the differentiation of law in face of morality, economy, or religion, which also produce something like 'social rules'. The concern with the differentiation of law, in the Luhmannian approach, can only be addressed through a functional definition: only the legal system has procedures, organizations, and social roles capable of ensuring that everyone – regardless of consensus, preference, or individual belief – can be bound to expectations that resist frustration. In the economy, binding is mainly through expectations that accommodate to situations, cognitive expectations. In morality or religion, normative expectations certainly predominate, but sharing them has become, in modern times, a matter of habits, customs, or individual preferences. In law, regardless of whether or not one agrees with or believes in the content of expectations institutionalized by the system, everyone knows that they are bound by them, can be judged and punished by them, and can take legal suits against those who frustrate them.

Ehrlich's sociology of law, therefore, is not naïve. It does not deny that the passage from text to rule is an activity controlled by competent authorities, specialized professionals, and due process. In Luhmannian terms, this passage

from text to rule – *i.e.* legal interpretation – is a mechanism of law's evolution compatible with its operational autonomy and that relies on this specialization to produce variations, selections, and restabilizations of legal meanings (Luhmann 2004 [1993]: 243-262).

Every communication using (explicitly or tacitly) the distinction between legal and illegal is a legal communication. But the attribution of validity, insofar as it is structured around specific organizations (especially the courts) and social roles (the legal professions), reduces the interpretation of law to a competent, specialized activity that filters the normative expectations that will be recognized by the system. The centrality of the courts has an explanation (Luhmann 2004 [1993]: 156-162): in complex societies, which keep stockpiled normative expectations the most divergent among them, law cannot continue to exist simply by the daily orientation of expectations on expectations. There is no broad social consensus, but rather conflict and an immense demand for decisions that limit, even if only temporarily and partially, divergences in orientation. The nucleus of this selective pressure is the courts, the judicial decision. If in everyday life people can follow rules in an almost automatic way, relying on shared expectations, when a conflict of orientations arises, when the frustration of an expectation is verbalized and contested, there is a need for interpretation of the law to select which expectation should prevail (Luhmann 2004 [1993]: 245-246). It is a specialized, authoritative interpretation that is needed. The center of the legal system is then mobilized to produce a rule that again can simply be followed, without the need to interpret it in a demanding sense[21].

Ehrlich (1936 [1913]: 13) attributed to traditional legal science the error of limiting law to "the rule directed to the conduct of the courts", while the sociology of law would scientifically capture the totality of the legal phenomenon, as "a rule of human conduct in general." But such a sociology

[21] Problematizing interpretations of the practice of 'following a rule' in Wittgenstein, Hershovitz (2002: 639-640) argues that there is a practice of following legal rules that suffices for the everyday orientation of conflicts, which exceptionally reach the courts: here a proper interpretation of the rules is required (and this has been the focus of legal theory). Courts interpret the problematized rules to provide – by the judicial ruling – a rule that again can be followed without being interpreted.

could not specify what its own object consisted of. It did not recognize that the 'living law' at some point arrives at the fatality of being included or excluded by a binding decision – the judicial ruling. This selection of valid law, which makes the medium of law (validity) act in the last instance (*res judicata*), is necessarily the product of what courts will understand as legal (as in Hart's theory of the rule of recognition as a social rule, since courts have something like a monopoly of legitimate interpretation enforceable on everyone under their jurisdiction).

In view of the differentiation between the center and the periphery of the legal system, the contrast between state law and non-state law, heteronomous law (produced by the state and imposed on the individual) and autonomous law (produced by the social group, regardless of state recognition) loses much of its meaning. On the periphery of law there are both private legal acts and laws. One could not accuse the model of 'legicentrism'. Nor does the centrality of the judiciary imply a hierarchy of values or the idea that law exists only in court. The 'living law' exists, it guides the interactions of people, the formation of procedures and organizations, but it can always be submitted to the fatal test of a judgment.

6. Beyond the 20th century debate: or systems theory, a user's guide

Would we be constrained to admit that a sociology of law does not describe law *per se*, but is a knowledge radically external to it, which only records regularities? Would we have to extend Kelsen's judgment of Ehrlich to all proposals for a sociology of law? What was this judgment, after all? It was that "[t]he sociological concept of law of which Ehrlich speaks, and with him many recent authors, seems as admissible as the mathematical concept of a biological process or the ethical concept of the fall of bodies" (Kelsen 2010a [1915]: 49).

Luhmann's sociological proposal fundamentally distances itself from characters espoused by Ehrlich and attributed to him by Kelsen. Instead of experimental observation methods, analogous to those of the natural sciences, Luhmann places meaning as the starting point, in parallel with the way Kelsen

saw the science of law – as a 'science of the spirit'. But Luhmann substitutes Kantian transcendental constructivism, based on the philosophy of consciousness, for a radical constructivism applied to social theory. Instead of defining causalities, systems theory emphasizes the complexity of the structures that constitute law, which make it more contingent than predictable. Instead of focusing on the state or civil society, Luhmann rejects the simple contraposition, emphasizes the structure and the semantics of functional differentiation. This differentiation means that the production of legal meaning is spread throughout society, alongside the production of economic, political, moral, etc. meanings. But it means also that it is law itself that promotes its rooted self-production in society, for the ultimate control of legal meaning –
the selection of the valid and the invalid – demands criteria that only the legal system itself can provide and recognize.

This does not mean that a sociology such as that constructed by Ehrlich was historically irrelevant and that none of it persists in a much later proposal such as Luhmann's. Ehrlich emphasized law as a fact, just as Luhmann envisions congruently generalized normative expectations as facts. Ehrlich emphasized the law also present outside the courts, whereby society structures expectations that resist frustration, even if these expectations do not reach the fatal moment of being recognized as valid by the central organizations and programs (judicial rulings). However, in seeking a structural definition of law, both Ehrlich and Kelsen failed and provided partial visions – the 'living law' of the periphery without the law selected by the center; the law of statutes and judicial rulings, binding on all, without the law of interactions and organizations that does not come from or do not reach the state instances of adjudication.

A sociological description of law by systems theory can encompass the self-descriptions of the legal system (both in the levels of doctrine and jurisprudence) as much as its basic operations (the production of law at the center and at the periphery, the self-reference of normative expectations to normative expectations). It presents itself as a scientific description, as opposed to self-descriptions of the system (which would be legal operations of reflection).

Similarly, Ehrlich pointed out the prescriptive character of traditional (normative) legal science, contrasting it with the (descriptive) sociology of law.

Between these extremes, the field that has become enshrined as 'jurisprudence' has specialized in providing reflections on the unity of the legal system. This unity, however, can be described in different modalities. From a Luhmann's (2004 [1993]: ch. 11) point of view, one may say: when the sociology of law is willing to recognize the normativity reproduced by the legal system, taking as a central theme the decidability of conflicts of expectations, it approaches legal theory, whose point of view is generally that of the court. But sociology deals with decidability more to problematize it than to guide it. When reflection is willing to recognize the constitutive paradoxes of law and visualize its reproduction by linking the semantics of validity to the underlying social structure (the roles, organizations, and specialized procedures of law), it constitutes itself as sociology of law.

Indeed, Luhmann himself produced a sociological theory of law as a specialized subsystem of his theory of society (therefore, as an operation of the scientific social system). From now on, however, the conceptual apparatus of systems theory is available for jurists, sociologists and philosophers even for uses not envisaged originally by its original author. As so as Luhmann redefined the ambitions and tools of Parsons' structural functionalism (which was built mainly as a synthesis of Weber and Durkheim classical but contrasting formulations), we may be creative in using the dense Luhmannian toolbox of concepts and explanations.

A possibility is to relate the inner operations of the legal system not only to the dynamics of functional differentiation but also to other forms of social differentiation (national, gender and ethnic, geographical, hierarchical cleavages) that are reproduced even within a functionally differentiated society. In order to produce a better sociological accuracy, one would need to observe how the legal system is both constrained in its self-reference by these other (nonfunctional) criteria but also continues to reproduce them. This would be an interesting way of innovating systems theory as a social theory (see Amato 2018a, 2020).

Besides refining its descriptive accuracy, one could mobilize systems theory in the direction of social criticism. Functional differentiation is based on the 'disintegration' (Luhmann 2013: 25) among systems, which drives a dynamics of *a priori* universal inclusion – everyone is virtually a subject of law, an elector or a producer and consumer. However, functional differentiation is empirically challenged by structural trends of integration and de-differentiation. These may be related to colonial and postcolonial dynamics, to the politicization of society (as exemplified by the 'real socialism' or, in a lesser degree, by the welfare state) or to the economicization of society through neoliberal institutions and policies. We could then observe the *longue durée* trend towards functional differentiation also in its setbacks and backlashes, and within more precisely defined contexts.

Descending from the degree of abstraction of social theory and coming to its articulation with law, one may use systems theory – the institutional morphology that it presents for the legal system, *e.g.* with the distinction between central and peripheral decisional programs and organizations (see Amato 2021a) – to map the regulatory dynamics of new topics, describing how the political, legal and other functional systems are 'coupled' in order to 'process' emerging legal challenges and problems (*e.g.* Saba *et al.* 2021).

The same map of semantic and institutional structures of the legal system may be useful for 'constructive' purposes (Amato 2017b, 2018a, 2018b, 2021b), which aim at observing specific legal fields and institutions, not in order to inform their doctrinal-dogmatic discourse, but in order to provide insight for an 'anti-dogmatic' legal doctrine, *i.e.* a kind of legal discourse concerned with the mapping of institutional alternatives in relation to different setups of legal procedures and organizations, of attributions of rights and duties, liabilities and powers, and of architectures of structural couplings (alternative regimes and designs for constitution, property and contract, taxation and public policies etc.).

If the systemic re-description of the debate between Kelsen and Ehrlich shows how Luhmann provided some theoretical answers useful for both analytical and sociological-empirical theories of law, these final indicative references help to justify how systems theory can be appropriated also for many

other theoretical purposes, ranging from social theory/ philosophy and criticism to possible articulations with legal doctrines or discourses for legal reform. It should be, therefore, a living theory.

References

Amato, LF (2017a) 'Institucionalismo, pluralismo, corporativismo: 100 anos de *O ordenamento jurídico*, de Santi Romano' 10 *Quaestio Iuris* 2656-2677,

Amato, LF (2017b) *Construtivismo jurídico: teoria no direito* (Curitiba, Juruá).

Amato, LF (2018a) 'Luhmann e Mangabeira Unger: da crítica social ao construtivismo jurídico' in LF Amato and MALL Barros (eds), *Teoria crítica dos sistemas? Crítica, teoria social e direito* (Porto Alegre, Fi), 243-277.

Amato, LF (2018b) *Inovações constitucionais: direitos e poderes* (Belo Horizonte, Casa do Direito).

Amato, LF (2020) 'Still a European anomaly? Theses on Luhmann, functional differentiation, world society and the legal system' in MALL Barros, LF Amato and GF Fonseca (eds), *World Society's Law: rethinking systems theory and socio-legal studies* (Porto Alegre, Fi), 71-118.

Amato, LF (2021a) 'Law and economy without 'law and economics'? From new institutional economics to social systems theory' in CF Campilongo, LF Amato and MALL Barros (eds), Luhmann and Socio-Legal Research: An Empirical Agenda for Social Systems Theory (Abingdon, Routledge), 110-138.

Amato, LF (2021b) *Propriedade Desagregada: capital, empreendedorismo e mercado de um ponto de vista democrático* (forthcoming).

Bohannan, P (1968 [1957]) *Justice and judgement among Tiv* (London, Oxford University Press).

Bourdieu, P (1986) 'La force du droit: éléments pour une sociologie du champ juridique' 64(1) *Actes de la recherche en sciences sociales* 3-19.

Calvo García, M (2014) 'Positivismo jurídico y teoría sociológica del derecho' 6(1) *Sortuz, Oñati Journal of Emergent Socio-legal Studies* 46-66.

Campilongo, CF (2012) *Interpretação do direito e movimentos sociais* (Rio de Janeiro, Campus Elsevier).

Campilongo, CF (2011) 'Teoria do direito e globalização econômica' in CF Campilongo, *O direito na sociedade complexa* 2nd ed. (São Paulo, Saraiva), 137-151.

Cotterrell, R (2009) 'Ehrlich at the edge of empires: centres and peripheries in legal studies' in M Hertogh (ed), *Living law: reconsidering Eugen Ehrlich* (Oxford, Hart), 75-94.

De Giorgi, R (2017 [1979]) *Ciência do direito e legitimação: crítica da epistemologia jurídica alemã de Kelsen a Luhmann* (Curitiba, Juruá).

Durkheim, E (1982 [1895]) *The rules of the sociological method* (New York, Free Press).

Ehrlich, E (2010a [1916]) 'Rettifica' in A Febbrajo (ed), *Verso un concetto sociologico di diritto* (Milano, Giuffrè), 51-58.

Ehrlich, E (2010b [1916-1917]) 'Replica' in A Febbrajo (ed), *Verso un concetto sociologico di diritto* (Milano, Giuffrè), 65-66.

Ehrlich, E (1916) 'Montesquieu and sociological jurisprudence' 29(6) *Harvard Law Review* 582-600.

Ehrlich, E (1917 [1903]) 'Judicial freedom of decision: its principles and objects' in *Science of legal method* (Boston, The Boston Book Company), 48-84.

Ehrlich, E (1922) 'The sociology of law' 36(2) *Harvard Law Review* 130-145.

Ehrlich, E (1936 [1913]) *Fundamental principles of the sociology of law* (Cambridge, MA, Harvard University Press).

Gluckman, M (1964) 'Natural justice in Africa' 9 *Natural Law Forum* 25-44.

Hart, HLA (1994 [1961]) *The concept of law* 2nd ed. (Oxford, Clarendon).

Hershovitz, S (2002) 'Wittgenstein on rules: the phantom menace' 22(4) *Oxford Journal of Legal Studies* 619-640.

Hesse, MB (1966) *Models and analogies in science* (Notre Dame, University of Notre Dame Press).

Holmes, Jr., OW (1897) 'The path of the law' 10(8) *Harvard Law Review* 457-478.

Gonçalves, GL (2013) *Direito entre certeza e incerteza: horizontes críticos para a teoria dos sistemas* (São Paulo, Saraiva).

Kelsen, H (1949 [1945]) *General theory of law and State* (Cambridge, MA, Harvard University Press).

Kelsen, H (2000a [1929]) 'Legal formalism and the pure theory of law' in AJ Jacobson and B Schlink (eds), *Weimar: a jurisprudence of crisis* (Berkeley, University of California Press), 76-83.

Kelsen, H (2000b [1911]). 'On the borders between legal and sociological method' in AJ Jacobson and B Schlink (eds), *Weimar: a jurisprudence of crisis* (Berkeley, University of California Press), 57-63.

Kelsen, H (2005 [1960]) *Pure theory of law* (Clark, Lawbook Exchange).

Kelsen, H (2010a [1915]) 'Una «fondazione» della sociologia del diritto' in A Febbrajo (ed), *Verso un concetto sociologico di diritto* (Milano, Giuffrè), 3-63.

Kelsen, H (2010b [1916]) 'Replica' in A Febbrajo (ed), *Verso un concetto sociologico di diritto* (Milano, Giuffrè), 59-63.

Luhmann, N (1990) *Essays on self-reference* (New York, Columbia University Press).

Luhmann, N (1995 [1984]) *Social systems* (Palo Alto, Stanford University).

Luhmann, N (2001 [2000]) 'La restitution du douzième chameau: du sens d'une analyse sociologique du droit' 1(47) *Droit et Société* 15-73.

Luhmann, N (2004 [1993]) *Law as a social system* (Oxford, Oxford University Press).

Luhmann, N (2005 [1967]) 'Iluminismo sociológico' in JM Santos (ed), *O pensamento de Niklas Luhmann* (Covilhã, Universidade da Beira Interior), 19-70.

Luhmann, N (2010 [1965]) *Los derechos fundamentales como institución: aportación a la sociología política* (Mexico, Universidad Iberoamericana).

Luhmann, N (2012 [1997]) *Theory of society I* (Stanford, Stanford University Press).

Luhmann, N (2013 [1997]) *Theory of society II* (Stanford, Stanford University Press).

Luhmann, N (2014 [1972]) *A sociological theory of law* (New York, Routledge).

Merton, RK (1968 [1949]) *Social theory and social structure* 3rd ed. (New York, Free Press).

Nelsen, D (2009) 'Ehrlich's legacies: back to the future in the sociology of law?' in M Hertogh (ed), *Living law: reconsidering Eugen Ehrlich* (Oxford, Hart), 237-272.

Neves, M (2003 [1993]) 'From legal pluralism to social miscellany: the problem of the lack of identity of the legal sphere(s) in peripheral modernity and its implications for Latin America' 26 *Beyond Law* 125-154.

Romano, S (1917) *L'ordinamento giuridico* (Pisa, Mariotti).

Saba, D, Amato, LF, Barros, MALL and Ponce, PP (2021) *Fake News e Eleições: estudo sociojurídico sobre comunicação digital, política e regulação no Brasil* (Porto Alegre, Fi).

Tamanaha, BZ (2010) 'A vision of social-legal change: recuing Ehrlich from "living law"' 10-10-05 *Legal Studies Research Paper Series Washington University School of Law*.

Teubner, G (1993) *Law as an autopoietic system* (London, Blackwell).

Teubner, G (1997) 'Global Bucowina: legal pluralism in the world society' in G Teubner (ed), *Global law without a State* (Dartmouth, Aldershot), 3-28.

Treves, R (1992) 'Sociologia del diritto e sociologia dell'idea di giustizia nel pensiero di Kelsen' in SL Paulson (ed), *Formalismo giuridico e realtà sociale* (Napoli, Edizioni Scientifiche Italiane), 161-177.

Weber, M (1978 [1922]) *Economy and society: an outline of interpretive sociology* (Berkeley, University of California Press).

6. Law, function and society: Luhmannian distinctions for a research agenda in Sociology of Law[22]

Guilherme de Azevedo

1. Introduction

The proposal of a functionalist methodology in sociology of law, especially when focused on themes such as the relation between law and inequality, may at first seem counterintuitive, or even downright contradictory as an analytical construction. Such a reaction might be explained by an apparent discrepancy between the topic and the theoretical matrix chosen to observe it. In other words, the subject of exclusion/inclusion in social systems seems inextricably linked to a critical reference. In light of traditional semantics and the consolidated notion opposing (systemic) functionalism and critical thinking, approaching such an issue with systemic lenses would indeed trigger a sense of bewilderment.

Part of this view is justified by the reading of Parsons' work carried out in Brazil, especially in the 1950s and 1960s, and also by the perceived polarization in social theory during the Cold War between American sociology, led by Parsons, and Frankfurtian Marxism. In the Cold War context, Parsons' work was presented as *the* American anti-Marxist theoretical undertaking. In addition to this twentieth-century geopolitical aspect, the very idea of a systemic approach has always been considered conservative, perhaps based on the false premise that the concept of a system prioritizes the pursuit of stability.

This division between two major sociological currents in the twentieth century was a result of the distinct appropriation and interpretation of the so-

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called classics of social theory. In the field of social sciences, the need to signal a belonging to, or a dialogue with, some classical sociological line and, therefore, to impose the assumption of certain classical premises when proposing contemporary theorizations can, in fact, be easily explained in functional terms. As Jeffrey C. Alexander puts it, in a functional framework with a strong Luhmannian foundation:

> The functional need for classics arises from the need to integrate the field of theoretical discourse. By integration, I do not mean cooperation and equilibrium, but rather maintenance of the boundaries, or compartmentalization, that enable systems to exist (Luhmann, 1984). It is this functional requirement that explains the formation of disciplinary boundaries, so seemingly arbitrary from an intellectual point of view. It is the social science disciplines, as well as the schools and traditions that make up these disciplines, that have classic authors. The consensual recognition of a classic work implies a common reference point. The classic author reduces complexity (cf. Luhmann, 1979). It is a symbol that condenses – 'represents' – a series of different commitments. (Alexander 1996: 46)

Boundaries that have been constituted over time between several groups can be explained, according to Alexander and Luhmann, in terms of their function. The condensation provided by the classics entails at least four functional advantages. The first one concerns the ease of simplifying theoretical discussions in the sociological field. In a discussion, referring to classics in their most important details, even if stereotypically, allows a small set of works to replace a wide analysis of several works. In a confrontation of central issues, often present in the theoretical debate, referencing a classic work makes it unnecessary to debate theoretical subtleties generated by the plurality of interpreters.

Referring to the classic author can thus ensure that our interlocutors will understand what we are talking about, even though we may not recognize their interpretation of the classic in our communication.[23]

The second functional advantage that Alexander identifies in the use of the classics is that they allow issues of a more general nature to be discussed without explicitly requiring consensus. Forming a consensus on what is being debated in terms of the foundations of a given topic is often unattainable, at least in social theory. Therefore, the reference to the classics functionally materializes this definition.

Another advantage of using the classics is their ironic character. Alexander states that once classics are accepted as a tool in common, they help to circumvent generalist analyses and discourses. As the relevance of the classics often goes unchallenged, the researchers can refer to studies in which their premises are not being questioned, as illustrated by an example given by Alexander himself: a social scientist carrying out an empirical study in the field of industrial sociology could inquire into Marx's treatment of labor in his early texts. While he would not be entitled to claim that non-empirical reflections on human nature, let alone utopian speculations on human possibilities, form the basis of industrial sociology, that is precisely what he would implicitly be acknowledging by referencing Marx (ALEXANDER, 1996, p. 47).

A fourth and last functional advantage in referencing the classics is the strategic and clearly instrumental role of their citation. Notoriously, any social theorist with claims to recognition, or any school with lofty educational and institutional aims, whether genuine or not, will seek to validate their theories and discussions with the seal of approval of some classic author found among the founders of the social sciences. And so the classics are read, reread and critiqued

[23] Substantiating this functional gain from the classics, Alexander (1996: 46) exemplifies: 'It is for this reason that we will probably have to resort to Marx's work if we want to develop a critical analysis of capitalism. Similarly, if we intend to evaluate the multiplicity of critical analyses of capitalism available today, we will undoubtedly have to typify them by comparing them to Marx's original analysis. Only then will we be relatively assured that others will follow our ideological and cognitive arguments, or even be persuaded by them.'

as a form of affirmation and legitimation of new theoretical constructs on social issues.

2. Niklas Luhmann and the function of critical theory

The dominant semantics that oppose systems theory and critical theory might stem from such functional gains involving the adoption and rejection of the classics. Studies on social theory and Latin America, for example, in a contemporary theoretical perspective focused on a resumption of decolonial thinking, have seen a revival of arguments for the epistemological autonomy/independence of the "South" in relation to European thought.[24]

More precisely, this line of decolonial critical theory presents a strong critique against the hegemony of colonial doctrines and ideologies, which are said to have rendered invisible (or continue to do so) the construction of an idea of Latin American thought (Mignolo 2009, 2012). Given this, positioning a reflection on inequality and exclusion in Latin America methodologically within a "foreign" theoretical framework, especially in order to observe the role of law on that issue, would supposedly reinforce such hegemony. Moreover, in light of the dominance attributed to Luhmann's thought within sociological theories, the accusation of conservative theory is bound to be heard. Thus, not only would we have opted for a European theoretical framework, but we would also readily be accused of favoring a conservative perspective.

However, in Luhmann's work there is no room for categorizations that lead to separations of society based on territories, borders or cultures. For Luhmann, society is communication and there are no communicational spaces outside the idea of society. Yet this does not signal that Luhmannian sociology ignores such distinctions. Discussing colonial processes, Luhmann states:

[24] For a reference on this discussion, see Walter Mignolo (2008). For the discussion in the Brazilian legal context, see Fernanda Frizzo Bragato (2014) and Rita Laura Segato (2012).

> The widespread criticism concerning post-colonial exploitation of peripheral countries by industrialized nations – under such keywords as dependency and marginality – is no evidence against global society, whatever one may think of it in terms of content. The global interconnectedness of all functional systems can hardly be denied. (Luhmann 2016: 575)

In this sense, we will take the risk of positioning ourselves among those who actually identify good possibilities for dialogue between decolonial studies and systems theory.[25] In fact, we understand that systems theory provides a sufficiently complex theoretical framework to observe society, taking into account precisely differentiation types and forms of organizational contingency.

Nonetheless, because of the hegemonic Habermasian reception of Niklas Luhmann's thinking in Brazil, his work ended up being distanced from a critical potential. The condition of critical project has been reserved to Habermas and, consequently, to conform into the debate format, Luhmann has had his position interpreted as a conservative element, for allegedly not presenting any element of social emancipation in his theory.[26]

Seeking precisely to break with the tradition that sustains these arguments in sociological legal theory and, at the same time, to affirm not only the theoretical viability, but also the full suitability of the functionalist theoretical matrix to reflect on the inclusion/exclusion debate in terms of functional differentiation in the Latin American context, we have sought to adopt a position that defends the suitability of Niklas Luhmann's social systems theory as an observation tool for a research agenda on inequality, though not going as far as affirming its status as a direct legacy of the Frankfurt school of critical theory. This claim is strongly defended by Andreas Fischer-Lescano (2010), who identifies a critical systems

[25] However, decolonial studies and systems theory do seem to have interesting talking points in common. See: Guilherme Leite Gonçalves (2012: 69-98) .
[26] For a current reconstruction of the Luhmann/Habermas debate, see Poul Fritz Kjaer (2015).

theory within the first generation of the Frankfurt school of critical theory that focused on understanding the links between systemic norms and the problem of subjectivity, discussed by Adorno as trans-subjective reification (Fischer-Lescano 2010: 164).

However, Andreas Fischer-Lescano's view of systems theory is justified especially by his reading of Gunther Teubner's work.[27] For him, it is Teubner who restores central aspects of systems theory to conditions of reflective/normative dialog, i.e., as part of the critical theory tradition, going beyond a shared skepticism of reason or universalist moralism.

In addition to the points highlighted by Fischer-Lescano, the main feature that sets systems theory, especially as argued by Gunther Teubner, in line with the contemporary critical agenda, is the Luhmannian premise of emptying out ontology, of seeing the observation of society from a post-ontological theorization as an inexorable task for contemporary social theories (CLAM, 2006). We understand this is the point that represents the main characteristic of an agenda for contemporary critical theory, as it is from this deconstruction that the problem of contingency is recognized, which we understand as the origin, a significant marker of a contemporary project to radicalize democracy.[28]

Within this macro premise for a sufficiently complex project of social theory, Luhmann did not neglect to point out, however, his difficulties in accepting certain aspects of the so-called critical theory:

> Whatever the origin or theoretical background of 'critical rationalism', 'critical theory', etc., they have always had to take on the attitude of superior knowledge. The representatives of these currents would present themselves

[27] We understand that Gunther Teubner, even though deeply connected to Luhmann's thought, already presents elements that warrant treating him as an independent theoretical thinker. Indeed, he has differing views on the idea of autopoiesis developed by Luhmann. Exactly because of the specificities of his thought, Teubner will not be treated in depth in this article, but only quoted as a parallel with Luhmann, as a possible dialog with critical theory. See this question in (Teubner 1993).

[28] In this sense, Lefort (1988) and Rocha (1992).

> as competent descriptors with a morally impeccable impulse and an unsurpassed perspective of vision. But no matter how carefully they formulated themselves, no matter how well they met the requirements of a scientific approach, their perspective was that of a first order observer. They would offer a very competent description of society and then set about the task of explaining why others experiencing the same dimension of the world did not (or did not yet) share this view. They would then resort to saying that [the others] had not read Popper carefully enough and were therefore not up to the theoretical standards of the sciences, or that the context of obsession into which their interests had led them prevented them from understanding social conditions. However, it became increasingly difficult to exempt the starting point itself from criticism. (Luhmann 1992: 2)

In discussing "critical rationalism" and "critical theory", Luhmann observed that both ideas ended up falling into an inconsistent sociological premise, notwithstanding their success in forming groups and followers.[29] For him, these currents, instead of betting on "better knowledge", aimed at producing what he calls a "better procedure". They effected a "proceduralization of their position", but without altering in any way the fact that they were no more than theoretical proposals limited to the condition of a first order observer of the world (Luhmann 1992: 2-3).

Seeking to escape this context, other strategies of critical theory formation have developed, such as the one represented by Jürgen Habermas's thought, in

[29] Within a proposal to update the sociology of law, one interesting field of dialog between systems theory and critical theory, but which cannot be developed in the article due to the functionalist options favored herein, is presented in the work initiated by José Rodrigo Rodriguez, regarding the work of Franz Neumann. See: Rodriguez (2009), and for a summarized presentation of the argument, see Rodriguez (2016).

which, as Luhmann points out, sociopolitical positions are openly taken. Here, the descriptions of those who think society from a conformist perspective, with a conservative position, would fall into the problem of stagnation of their own development as a theoretical perspective. As the Marxist tradition accurately points out, critique from the notion of ideology becomes a central point of critical thinking itself, and thus the self-description of society becomes an increasingly complex endeavor, given the challenge of also addressing the contributions of other theoretical traditions, and thereby explaining why certain social conditions make it impossible for others to observe society in the way that critics consider appropriate. In this sense, Marx's theoretical legacy is unsurpassed.

However, with the constantly expanding complexity of the social context, and as attitudes perceived as "conservative" (Luhmann 2015: 3) lose their ability to convince, the fascination with a critical analysis apparently still seeks to maintain its relevance, resulting in clearly paradoxical problemsal. Luhmann points to the fact that in face of the changing context, and in order not to lose their critical stance / status, some sociological endeavors will develop new forms of labeling divergent currents, such as using the completely paradoxical label of "neoconservative". In this manner, they insist on the maintenance of a theoretical scenario where their status as critical voices, vis-à-vis their opponents, would be maintained (Luhmann 2015: 3).

The "critical" argument that Luhmann makes about the consistency of certain sociological developments of critical theory is, in fact, the result of a second-order observation process. In other words, it means placing critical theory in the condition of a first-order observer, one who relies on the critical/non-critical form to construct their observation of the world, and pointing out the blind spot, the limits of sticking to this perspective in terms of a totalizing sociology. Luhmann's provocation is to question what the consequences would be of transitioning from critical sociology to a second-order observation. This movement depends on understanding the role that radicalization of differentiation theory plays in the observation of society.

3. The radicalization of differentiation as a social theory

Luhmann did not indicate in this reflection on critique and sociology an idea of a "paradigm shift," *i.e.*, he did not posit anything beyond a debate between sociological theories. The point that the Bielefeld's sociologist makes with the idea of second-order observation on critical theories aims, in fact, to reposition the terms in which sociology and society present themselves. In other words, what Luhmann refers to here is the need for sociology to abandon the distinction between subject and object, which, he argued, underpinned the condition of a judgemental theory, based on a cognizing subject capable of judging something (object) without personally being affected by this judgment. In second-order observation, "sociology exists socially" (Luhmann 2015: 8).

Acknowledging the high level of abstraction that Luhmann's theory of society presupposes, which often deters a more thorough reading and development of his work, we believe it is fundamental, before going into the systemic formalization of the function of Law, to connect Luhmann's proposal to a classic starting point, a theorem long sedimented in the social sciences: the idea that societies are differentiated, that is, the fact that there is a division of labor in these societies.

Regarded as one of the pillars of the very emergence of sociology, the theory of the division of social labor is as old as social sciences, having appeared in the mid-eighteenth century, when societies started to be conceived as complex sets that are maintained through interdependence. The "parts" of society are held together by forces of mutual dependence, that is, one part needs the other. This is the basis of the division of social labor, a fundamental theorem of modern sociology that can be identified, with varying characteristics, in several sociology authors, such as Durkheim (1956, 1978), Weber (1987, 1994) and Simmel (2002). In each of these authors we can recognize ways of addressing differentiation within a society.

However, it is Luhmann who will, in turn, radicalize the idea of differentiation, seeing it as a functional differentiation. Luhmann's observation is not restricted to the idea of a division of social labor, to the very idea that society is a set, a whole, in which the parts need each other. Luhmann's sense of function goes far beyond this idea of interdependence. To better understand the role played by the functional concept, we have to follow the evolutionary framework of social complexity.

Society has been changing its form as it grows in complexity. In a first moment, segmental differentiation ruled the social organization. This meant that society was divided into segments, characterized by a homomorphy of its parts (segments), which were very similar. Regarding the identification of this type of societal formatting, the work of Lévi-Strauss (1973), focused on the observation of indigenous communities in the Amazon, demonstrated how the division, such as the structuring of social segments, can reflect a certain symbolic order, reflected in face ornamentation, hairstyles, etc. (Lévi-Strauss 1957: 189-195).

However, the fact that each segment alone constitutes a significant potential for complexity cannot be ignored. The segmental form of society refers to the organization between the parts, their form of distribution and constitution in relations. They are maintained primarily by the idea of similarity, their parts resemble each other, and from this similarity results a cohesion with the whole. This form of social organization was studied by Durkheim as a mechanical solidarity.[30]

As complexity increases, the organization of society changes. A second type of differentiation presents itself, based on the difference between center/periphery. In this form of social organization, a dynamic is accentuated between a center, which is strongly structured, and its parts. The center acts as an attractor in relation to the parts, which are subject to a powerful influence by the center. The center/periphery structure is the first passage to a structural cohesion, such as the traditional example of pastoral societies in Mesopotamia,

[30] See Durkheim (1978: 51-66). For a contemporary debate on the potential application of this category, see Ferreira (2013).

which become attracted to the religious and political center. Religion and politics come to be concentrated in a locus, which becomes a dense centralizing influence.[31] The attraction of this center becomes greater and greater, and what is known as closure takes place, that is, nomadic groups on the periphery of this center become enclosed therein.

In the wake of increased complexity in society, a third form of social organization arises, the stratified or hierarchical form. This form of social organization can be see as a pyramid. It is strongly centralized and made up of strata (layers) with a top, which is the vertical and horizontal center of society. The whole society is observed from this center. All layers project their perceptions of themselves toward the center and see themselves from this top.

This is a very familiar social form, one that is still very widespread, common and found in many societies. From this point on, societies will take on a unifying, centralizing and enclosing form of organization. The center and the top are effective, so it is there that the form of organization that generates the state emerges more clearly,[32] that is, it is from here that what we recognize as societies with a state begin to emerge.[33] When we represent society in the shape of a pyramid, we are actually not making a very precise, very exact representation, because we are in fact hiding the way in which that the society imagines itself.

The Luhmannian observation turns this image on its head, and by inverting it, allows for a differentiated understanding of society. The powerful influence of hierarchical differentiation is inescapable, producing a perception of society based on a scheme that, in fact, is coherent with a ternary logic, which is the logic of common sense, of common intuition. This observation scheme

[31] For a reflection on the category center/periphery in terms of scientific production, see Neves (2009: 241).
[32] For a construction of this process as an evolving form of political autonomy, see Thornhill (2009).
[33] The center/periphery distinction is the subject of intense debate in the systemic law literature, particularly in light of the consequences that Marcelo Neves (2015) draws from this process in thinking about the state and modernization in Brazil.

generates the impression that things can be directed, piloted, from a center, from the top, and that merely wanting change is enough to set it in motion.

When Luhmann (1998: 71-79) radicalizes the idea of functional differentiation, the spatial representation of society becomes impossible. We cannot simply think of distinct spheres, placed one next to the other, because this would give the impression that these functions can be juxtaposed, and that these functions would correspond to sets of individuals. But Luhmann's functional differentiation does not fit this representation. All previous forms of representation of society are easily assimilated, precisely by the familiar spatial-visual construction. More precisely, in modern societies, functional differentiation is the gathering of grouped operations of social communication. These operations tend to concentrate in fields that Luhmann calls social systems, that is, functional systems.[34] This will lead to a structuring of processes, which are simply operations that tend to condense and confine themselves in order to constitute structures, or rather, to constitute systems, for example: the legal system, the political system, the economic system, the educational system, the artistic system, the scientific system, etc.

These systems are no more than the condensation of communication operations, communications that have reached a high degree of proficiency and specificity of meaning, which thus come to constitute functionally differentiated systems, whose difference is neither spatial nor visual.

Social systems are constituted by communication, therefore, they constitute boundaries of meaning, and delimit themselves as autopoietic systems that are capable of constituting themselves as structured communicational complexity, self-reproducing themselves from the system/environment distinction. This distinction, when reintroduced, organizes sets of

[34] According to Luhmann (1998: 78-79): 'Functional differentiation organizes communication processes around special functions, which must be addressed at the level of society. Since all necessary functions have to be performed and are interdependent, society cannot grant absolute primacy to any of them. It has to use a second level of subsystem formation to institute a primacy of specific functions limited to a special subset of system/environment relations. Examples are the political function of producing collectively binding decisions, the economic function of ensuring the satisfaction of future needs within extended time horizons, and the religious function of interpreting the incomprehensible.'

communicative operations, guided by this game between self-reference (system) and heteroreference (environment). The maintenance of limits and boundaries of meaning is the maintenance of the system, of conserving the difference between system and environment, and therefore, the production of autopoiesis.[35]

By highlighting the idea of function in Luhmann, we attain sufficient abstraction in the theory of society to meet the demands of increasing complexity of society, as there is nothing but operations in society. Thus, the exhaustion of methodological individualism, of deterministic scientific paradigm, is accelerated, and we need only pay attention to the fact that, throughout the construction of the Luhmannian model of the functional differentiation of society, there is no reference to individuals, to group of human beings, or to any other dependence on an individualistic epistemology, or on a theory of action.[36]

Because social systems are seen as communication systems, we cannot represent them in juxtaposition, by overlapping, for example, law and politics. One and the same communication operation can be networked in different systems, that is, it can constitute a contribution to different systems. Under one aspect it can be a legal operation, while under another aspect, and at the same time, a contribution to a political process.[37]

Within this new reference framework, systems should not be represented simply as juxtaposed. These systems are structurally coupled,[38] that is, the very operative act belonging to a given system can equally contribute to another system.

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[35] Therefore: 'The starting point of any system-theoretical analysis must be the difference between system and environment. Today, there is certainly a specific consensus in this regard. Systems are structurally oriented to the environment, without which they could not exist: therefore, it is not a matter of occasional contact or mere adaptation. Systems are constituted and maintained through the creation and conservation of difference with the environment, and use their boundaries to regulate this difference. Without difference with respect to the environment there would be no self-reference, inasmuch as difference is the premise for the function of all self-referential operations. In this sense, boundary maintenance is the conservation of the system' (Luhmann 1998: 40).

[36] The definitive break with the theory of action, from the notion of autopoiesis, is justified and analyzed in Luhmann (2005).

[37] For a presentation of the political system in Luhmann, see Nafarrate (2004). In the same vein, deepening the theme of power and the formation of the political system, see Simioni (2008).

[38] The operational closure and the role of structural couplings in the autopoiesis of the system of law have been set out in detail in Luhmann (1991).

This systemic-functional operationalization of society directly affects representations and claims of hierarchical contexts. A decline of hierarchical structuring occurs in this kind of configuration, because there is no function that predominates over the others in society, that is, economy over law, law over politics, ethics over science, science over religion, etc. Given this starting point, it is necessary to specify how Niklas Luhmann defines the function of the legal system.

4. The function of law in society

We understand that the function of the legal system should be situated within this point of reference, taking it as a starting point to analyze the relationship between law and the dynamics of inclusion/exclusion, integration/disintegration, and equality/inequality in social differentiation. Our task is now to differentiate and designate this process in terms of a second-order observation, to point out the blind spots of the first-order observations of the legal system that have formed its self-observation in the making of this process. To this end, one of the first points we need to work on is the process of functional differentiation, in Luhmannian terms, especially for its systemic role in resignifying the dynamics of exclusion in society.

From a Luhmannian sociological interpretation, the starting point to observe the function of law in society, in a systemic approach, is evidently not the central position, the locus of normative social control, often presupposed in various theories of law.

Within an evolutionary stage of complexity, wherein the process of functional differentiation is completed, it is also no longer possible to sustain the tradition where, especially in the idea of societies hierarchically structured in states, politics would constitute the peak of social association. In such a stratified model, politics or law would also be responsible for controlling and

administrating (Brans and Rossbach 1997) the whole society.[39] In a functionally differentiated society, this reference to control no longer represents the complex operation of social communications and, therefore, the function that these social systems effectively perform in society.

Luhmann forcefully refutes such claims,[40] because based on the logic provided by the theory of social systems (made up of communications), the notion of a system as a limiting concept is required. The social system encompasses and includes all communications, reproduces all communications and constitutes a meaningful horizon for any and all subsequent communications (Luhmann 1999: 187).

Adopting the systemic-Luhmannian theoretical framework of societal observation, we proceed to construct society as a set of functionally differentiated communications, therefore, there is no hierarchy in this "social communication". Each function will constitute an order of meaning, with its own laws, its own syntax, its own semantics. It is thus a society that does not exist in a single context, but one that is multi-contextual (Günther 2004). There are several contexts of meaning and these will self-reproduce in an autopoietic manner, in order to constitute a closure that generates its own order of meaning.

Sociologically, the functionality of law in society must be observed from this perspective. Consequently, the question about the function of the legal system is framed in terms of its relationship with (or within) the system of

[39] In the Luhmannian theoretical universe the debate about the concept of postmodernity has diminished relevance: 'A sociological description of modern society will not start from the "project of modernity", nor from the "postmodern condition". These are self-descriptions of our object, more or less convincing, two among many others (such as capitalist society, risk society, information society). Our object includes its own self-descriptions (including this one); for observations and descriptions exist only within the recursive context of communication that is and reproduces the societal system. But sociology can talk with its own voice" (Luhmann 2000: 40-41).

[40] As we can see in the following passage: 'The logic of a theory of self-referential communicative systems requires the notion of a comprehensive system as its limit. Social systems theory, by its own logic, leads to a theory of society. We do not need political, economic, "civil" or "capitalist" reference points to define the concept of society. This should not, of course, lead us to neglect the significance of the modern nation-state or the capitalist economy. On the contrary, it gives us an independent conceptual scheme to evaluate these facts, their historical conditions, and their more remote consequences. We thus avoid prejudice with respect to certain facts; we avoid an objection on principle' (Luhmann 1999: 188).

society. This involves observing which societal problem is solved by the process of differentiating specifically legal norms with the construction of a special legal system. Society, here, is understood as a unitary system, which can be empirically observed, since it presents itself in a concrete way in ordinary communications, and is internally differentiated into social systems that represent communicational specificities, specialized according to a function (Luhmann 2016: 165).

The function of law is linked to the handling of expectations. The starting point is society and not individuals, that is, the function of law here is not understood in individualistic terms.[41] The function is related to the possibility of communicating expectations, of shaping and acknowledging them in communication. In Luhmannian terms, by expectation we must understand the temporal aspect of meaning in communication, and not only the eventual state of consciousness of a specific subject.

In this sense, emphasizing the temporal dimension as the basis of the function of law, Luhmann's proposal opposes traditional doctrinal lines of the sociology of law, which have always emphasized the function of law using concepts such as *social control* or *integration*.[42] This connection between the function of law and integration is sharply questioned, especially in its more contemporary formulation:

> In present times, Jürgen Habermas in particular must be mentioned as a representative of a socio-integrative function of law (See: *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt, 1992). His systematic treatment of this concept shows paradigmatically the difficulties resulting from having to define the operations that actually bring about

[41] For a classical perspective on the tradition of methodological individualism in law, see Postema (1986: 159 ff.)

[42] For a classic representation of this tradition, see: Bredemeier (1962: 73-90); Pound (1942, 1943, 1912).

> integration. Is it a mere exchange of assumptions by which one might arrive at a communicative understanding? If so, how? Or is it simply a matter of "communicative circles, of forums and with units, practically without subjects" (op. cit., p. 170)? Or is it a matter of eloquent empathy on the part of those who, at every opportunity, put their concern above the concern of those affected? Or, taking a concrete case, how can we settle on a regulation of immigration problems that is "of interest to current and prospective members of the community alike" (p.158) if we first have to work out which regulation could be acceptable to all parties concerned? (Luhmann 2016: 167)

The relevance of law as a social system is unquestionable. However, Luhmannian criticism is made against theoretical contributions, such as those by Habermas, which tend to associate the function of law to the notion of integration, without explaining this role consistently. Such a perspective, linking law to the condition of an integrating structure of society, can easily be called into question in sociological terms. The recognition of the social significance of law is due precisely to the fact that as a system it can stabilize temporal expectations, i.e., that is precisely its function, not social control or integration.

Legal communication produces time. This fixation of meaning to the legal system takes place as a formation of a semantics, a storage of meaning intended for repeated use by the operations of the system, leading to consolidations that generate time (see Rocha 2003). On the one hand, the meaning must be condensed so as to ensure that it is recognized as being the same in a different context, that is, in order to form its sociological consistency, the meaning that is reused must be confirmed communicationally in a diverse context. It is precisely the repetitions that make these condensations possible, as well as the confirmations that accompany them, thus reducing the spectrum of arbitrariness within the relation between sign and signifier.

As an example of this process, we can point to the very process of constructing norms about the correct way of speaking, or norms about the appropriate handling of language.[43] As Luhmann indicates, these norms are accepted and enforced, even though other ways of speaking would be possible. Sanctions arise, therefore, as ethnomethodological research has pointed out, in the self-correction of communication. Norms reduce the contingency of the limitation of contingency, i.e. they fix an already demonstrated "limitedness" of the arbitrary use of signs.

Of course, when dealing with the function of law, with its role in the normatization of expectations, there is more to it than the communicative valuation of communication. However, on the basis of this communication, the legal system affects the communication of all modes of behavior that it addresses by means of legal norms. Here, legal norms constitute a network of symbolically generalized expectations and, based on this definition, the temporal reference of law is found in the function of the norms, in the intention to structure, in terms of expectations, the management of an uncertain future. Hence, norms vary to the extent that society produces a future accompanied by insecurity.

Leonel Severo Rocha (1994: 1) follows the same line of thought when he states that:

> Democracy means the ability to rationalize the operations of the system – the choices – under conditions of uncertainty. That is, in conditions in which it is not possible

[43] In the chapter on the function of law, Luhmann comments on meaning: 'The repeated use of communicated meaning satisfies a double requirement, as its ultimate results reside in a meaning fixed through language and in socially differentiated communication. On the one hand, these repeated uses have to condense the defined understanding of use and thus ensure that it is maintained even in a context recognizable as being the same. In this manner, re-identifiable invariances emerge. On the other hand, such uses need to confirm the reused meaning by applying it appropriately in another context as well. Thus surplus references emerge, which make any concrete fixation of meaning undefinable, and every future use of these references is under the pressure of being selected for appropriate application. Thus we describe, in extremely abstract form, the genesis of meaning. Only those who share this logic of condensation and confirmation can take part in linguistic communication and couple consciousness to social operations' (Luhmann 2016: 169).

> to foresee the consequences. But it is possible to foresee that unforeseen consequences may occur.

Thus, the function of law in Luhmann is a form of relating the problem of generalizing social expectations by affirming the tension between the temporal and the social dimensions, added to the constant process of evolutionary increment in social complexity. This form of law will define itself, therefore, in the combination of two distinctions operated by the system: normative expectations/cognitive expectations and the distinction of the legal system code as lawful/unlawful.

All operations of law take place within this framework and present their variation within the objective meaning, which is given in the content of legal norms and programs. The programs of the legal system are those that regulate, in each case, the designation of the values of the lawful/unlawful code. It should therefore be observed that, from a Luhmannian sociological perspective, no objective definition of law is possible. Once this starting point is outlined, any reflection on the function of law will take the form of a stabilization of normative expectations, by means of regulating the temporal, objective and social generalization of these expectations.

It should be emphasized at the outset that the functional observation of law, methodologically, ultimately affects the way in which the concept of norm is constructed. Unlike the traditional definition in the classical bibliography of legal theory, the concept of norm, in functional terms, is not presented by resorting to the essential characteristics of the norm, but rather, through a distinction. A differentiation that connects the norm to the possibilities of behavior in case of frustrated expectations. More accurately, the norm is constructed in the differentiation between cognitive/normative expectations, that is, norms are forms to counterfactually structure expectations (Luhmann 2016: 177).

Cognitive expectations are not maintained in the face of frustration, they must be abandoned and adjusted if they do not correspond to what was expected.

Normative expectations, on the other hand, are those that are maintained in spite of frustration; they are counterfactual. What was rejected is that which did not correspond to the expectation, while expectation itself is maintained regardless of frustration. Normative expectations thus allow the observation of time to be guided, and it is in this function that the definition of norm will be constituted.[44]

On the basis of a functional conception of norm, which understands it as an expectation that is maintained regardless of facts that thwart it, it becomes irrelevant to consider in advance the motivations that lead someone to comply or not with whatever is provided for in the norms. The function of the norm is not to guide and orient motivations. As Luhmann points out, if motivations were primarily the central point in the observation of norms, we would get into a game with an excess of causalities and functional equivalents. The norm does not have the function of ensuring a behavior in accordance with its prescription, in other words, the norm does not have the function of ensuring the behaviors foreseen in the norm itself. However, its function is to protect those who have this expectation (Luhmann 2016: 180).

Law is traditionally understood as a set of norms that limits the possibilities of behavior. However, in functional terms, the legal system is actually much closer to playing the role of enabling behavior, of being the condition that makes certain behaviors possible, rather than limiting them. We need only think of legal figures such as property, contracts, liability. Particularly in the field of private law, law acts as an enabler of expectations (Luhmann 2016: 181).

The formation of a system of functions such as law consists in selecting from within the complexity of social life only those expectations that present a certain level of problems. This issue is, in fact, a reaction to the unlikelihood of communicative processes. Social systems seek, throughout their differentiation, to act as structures of reinforcement, of confrontation of complexity and

[44] The pioneer in this definition, as Luhmann recognizes, was Johann Galtung (1958, 1959, 1964).

contingency. It is in the face of this dynamic that law, as a functional system, seeks to select the expectations that it will counterfactually reinforce.

The demand for law takes place within a complex range of moral claims, allegations of customary practices and habits, all of which are competing to form normative expectations (Luhmann 2016: 182). It is precisely within this excess of possibilities that law performs the function of bringing normative stabilty to some of these expectations, selecting which of them will be converted into a norm.[45] This function of law, as a mechanism to stabilize expectations through norms, clearly transcends an understanding of law that defines it as a regulator of conflict.

By normalizing expectations, law affirms itself in the process. As a system, it differentiates itself from its environment. This differentiation is accomplished by distinguishing and stating norms that indicate in which cases it is legitimate to have (or not to have) an expectation. Law thus states what is law, it indicates what is system and what is environment. That is, law states what is law and what is not law. The ability to convert an apparently dead-end tautology into reflexivity is achieved by law when the increment of complexity leads it to convert the difference between normative expectation and cognitive expectation into the object of a normative expectation. At that moment, in Luhmannian terms, the system begins to operate at a second-order, reflexive level of observation, and it is this capacity for operation that characterizes the operational closure of functional systems.

Within functional systems, more specifically within organizations, here understood as a type of system focused on the decision making process,[46] a distinction is generated that binds the members of these organizations to produce decisions that are guided by the system's programs. These programs are internal variables, from the organization itself, which recognizes them as legal norms. In

[45] Without necessarily adopting the same theoretical framework that we did, but also recognizing as central a need to analyze the process social agendas in the formation/selection of rights, we highlight the analysis of José Rodrigo Rodriguez (2014: 125-156).
[46] For a more systematic discussion of the topic of organizations and their role in the decision making process, see our analysis (Rocha and Azevedo 2012).

the legal system, this decision-making system, or these organizations, would be the courts (Luhmann 1990), which organize their own sphere of operation in a circular arrangement.

This circularity occurs because law takes into account the decisions of the courts to affirm, case by case, the so-called prevailing law, which, in turn, provides the conditions for law itself to be observed and modified. In other words, law controls the change in law itself, that is, paradoxically, the system changes to confirm its identity.

What Luhmann highlights is that the function of law is cause and effect of the system's limits, which operates reflexively. The limits are confirmed in the organization (courts), based on decisions that previously act as delimitations, indicating what belongs to the internal and the external part of the legal system, that is, selecting the communication that will be recognized as conforming and as not conforming to law. Law is made available to the individual user through this reflexive operationalization, abstracting itself from the social content of its motivation (origin), or the social pressures that supposedly condition it.

In this manner, a functional sociological analysis of law becomes a way to observe the legal system. It is by operating in this way that law functionally succeeds in fulfilling its role of congruently generalizing expectations. And based on this analysis, we can differentiate legal dogmatics from sociology of law. As Luhmann stated,

> While legal theory and legal dogmatics are committed to the reproduction of the legal system and, therefore, must collaborate in the annulment of its paradox and in its codification, sociology can observe and describe the system based on its constitutive paradox. This does not bring it closer to superior knowledge. On the contrary, sociology learns precisely from this form of observation, since if it were itself a theory of law, it would have to accept an annulment of the paradox of the system. The observation of

> the paradox leads sociology to the problem of how, as a science, it could de-paradoxalize its own paradox: the paradox that some theses are false because they are true. A system cannot have a self-referential structure without running into such problems. Precisely for this reason, extra observation offers the advantage of being able to describe another system that is not hermetically self-referential. (Luhmann 1994: 9)

5. Law and Politics: distinguishing without separating

Within this process, one of the most relevant points raised by Luhmannian functionalism is the differentiation between law and politics. The point is to distinguish between them, but not to separate them. Law, for its fulfillment, to achieve its application, depends on the political system, given that without the perspective of this political imposition, no normative stability can be generalized or convincingly attributed to all. In the political system, in turn, law is used to fragment the politically concentrated lines to access power. However, it is precisely to make possible the observation of this relationship between them, that their differentiation as systems is presupposed.

What Luhmann tried to consolidate with his reading of functionalism is, in fact, a strong critique of the sociological observation concerning the imposition of law, which is made by some theoretical currents. To this end, he reframed the terms under which the politics/law relation takes place. Politics, as a system, operates through the medium of power. Political power articulates itself in a superordinate indicative power, which threatens with the character of obligation. The function of law, on the other hand, makes the claim of introducing order, but this order, so as not to sound like Comtean positivism, comes about because the system of law structures our expectations, thereby informing what can justifiably be expected from others. In other words, within social complexity, law allows us

to know what can be expected from others without representing that expectation as something ridiculous.

Thus, Luhmann's systems theory problematizes the issue of legal imposition. The prevailing sociology of law has traditionally relied on this reflection, mainly based on the idea of sanction from the classic eighteenth-century model that undersood law as an external obligation and morality as an internal obligation. However, as Luhmann points out, if the function of law consisted in assuring the performance or non-performance of a given action, the legal institution would always be responsible for its inefficiency. Considering this premise in the law/politics relation, law would forfeit its functional distinction, and it would be possible to attribute to law the responsibility for the realization of political projects.[47]

By doing so, Luhmannian sociology proposes to change the perspective from which the problem of legal imposition is observed, shifting the focus away from behavior and toward social expectation. With this change, the difference between law and politics is recast as an effective enforcement of decisions that are binding for the community. The function of law, in this perspective, consists merely in providing the assurance of an expectation in view of probable frustrations.

Obviously, the link between the political and the legal spheres is intense, and there is a tendency to see certain social issues as belonging to a synthesis, as a natural locus for the functions of law and politics. This synthesis, however, is premised on distinct functions: the system of law and the system of politics. What can be concluded from the Luhmannian logic of observing the law/politics relation is that, if politics were to really achieve its goal of effectively imposing binding decisions on the community, with no exceptions, the legal system would find itself in a paradoxical situation: the complete loss of its function. If politics

[47] Within contemporary Luhmannian scholarship, Chris Thornhill has been a more critical voice of orthodox Luhmannian interpretations on the distinction or non-distinction between the systems of law and politics. For him, the legal system has been turning into the code of the political system, as a result of the specificities of functional differentiation, that is, the modernization process of state development in this context. See this debate in King and Thornhill (2003).

were fully successful in producing binding decisions, we would not have to count with expectations that could be frustrated, and therefore society would no longer need the functionality of law.

The topic of lost function is not rare in sociological literature; on the contrary, surveys commonly point to the diminishing role of family, religion, prison sentences, etc. However, much of this analysis works with very broad notions of function, trivializing this analytical category, often linking functionality to a prescriptive moralizing teleology.

In this line, two visions of the function of law have become consolidated. The first understands that the legal system guarantees control over society and, by means of norms that establish equality, promotes inclusion of individuals in society.[48] The other recognizes the function of law as guiding society.

6. On the performance of law: final considerations

Letting go of these perspectives on the function of law is not a comfortable methodological task, because even for a sociological approach, which tends to be, in a certain sense, less committed to normativist reasoning, stripping law of its role as a social conductor, as the guiding system of society, can easily be understood as a "formalist-nihilist" stance. Luhmann's contribution is precisely to call for a greater sociological specification of the concept of function, without at the same time making room for accusations of a certain "theoretical hermeticism". From this perspective, although the concept of function is very restricted, it does not shy away from addressing issues such as social control, values, consensus, time, contingency, equality, and inclusion.

However, each analysis of such issues, in each context of functional differentiation, insofar as significant for the function of the legal system, is in fact a consequence of the functional dynamics of law. To this end, Luhmannian systems theory proposes a further distinction in order to tackle the discussion

[48] This proposal, along Parsonsian lines, can be seen in the works of Leon H. Mayhew (1968, 1971, 1975, 1984).

regarding societal conduction by law: the difference between function and performance.

In addition to the function of law, a distinction is also sought between the performances that the legal system provides to its intra-social environment, that is, the performances that law provides to other social systems. With this distinction, the concept of function is restricted to referencing what the system of law does for the system of society, considered as a whole.

According to this more specific scope of function, the legal system must have a specialty, which for Luhmannian systems theory, as we have already said, is to select certain expectations as normative expectations, that is, expectations that are maintained even when exposed to frustration. Based on this analysis of the function of law, and as we advance in its own differentiation process, we begin to identify as performances of law two points that have traditionally been considered its function: the orientation of conducts and the resolution of conflicts.

In order to understand conduct orientation as a performance of law, this must be defined as a sort of service that law renders to other functional systems. Here we do not consider the Hobbesian theoretical tradition of seeing this as a limitation of natural liberties. Quite the opposite. The great performance of law is to produce artificial liberties, which can be conditioned and adapted by other social systems, that is, the other social systems can limit these liberties. As Luhmann notes:

> In order to understand how this behavior is to be directed as a performance of law with respect to other functional systems, it is important to keep in mind that we are not dealing with a delimitation of "natural liberties," as Hobbes believed. Rather, the point is that law creates artificial freedoms that can be conditioned by other social systems, i.e., that can be restricted in the manner of other systems. For example: the freedom to refuse to pay welfare and taxes and instead accumulate capital; the freedom to become a

> member of an organization or to forgo membership if conditions are unfavorable; the freedom to reject a spouse who is convenient to the family and instead marry "out of love"; the freedom to express uncomfortable opinions and expose them to criticism (which is only possible afterwards). In many ways, the "means" that other systems use to constitute their own forms are based on the possibility of evading pressures exerted in the name of morality or reason. It is no coincidence that in the eighteenth and nineteenth centuries, when this was already evident, the idea prevailed that the function of law was to guarantee freedom. (Luhmann 2016: 211)

The performance of law to resolve conflicts operates in a similar way. In this respect, it is inexorable that society is directly dependent on social systems. When conflicts arise, it must be able to turn to the system of law. This is especially true in cases where expectations are unjustifiably violated, and those who insist on frustrating these expectations must be notified that legal steps will be taken.

However, Luhmann understands this performance to mean that law does not only resolve social conflicts originally communicated in society, but, rather, that these conflicts are only dealt with legally because law itself was able to construct them.

Thus, the difference between the concept of function and performance is the scope of action of their functional equivalents. In support of normative, and thus not evident expectations, there is practically no other alternative in society than the system of law.[49] Even if a desired behavior can often be generated by other social stimuli, only in legal communication can a relevance be attained for exceptional cases, where intense deviations from normative expectations are presented.

[49] Research into law and the social sciences in the United States investigate this field of inquiry further. See Lampert and Sanders (1990)

Therefore, as a performance, law is only one among many possibilities. But the differentiation between function and performance is nothing but a consequence of the differentiation of the system of law itself. If we wish to evaluate both the function and the performance of the legal system as a whole, Luhmann's final reference is the image of an immune system. In other words, Luhmannian sociology positions law as a system that would be able to immunize society.

It is within this theoretical framework that we understand the "immunizing" function of law must be observed. Based on this imagery, we can outline an interpretive framework for a broad research agenda on law in society, and, therefore, on all matter of subjects pertaining to the analysis of law in the complex dynamics of social differentiation.

References

Alexander, JC (1996) 'A importância dos clássicos', in A Giddens and J Turner (eds), *Teoria social hoje* (São Paulo, Editora Unesp).

Bragato, FF (2014) 'Para além do discurso eurocêntrico dos direitos humanos: contribuições da descolonialidade'. 19(1) *Novos Estudos Jurídicos* 201-230.

Brans, M and Rossbach, S (1997) 'The autopoiesis of administrative systems: Niklas Luhmann on public administration and public policy'. 75(3) *Public Administration* 417-439.

Bredemeier, H (1962) 'Law as an Integrative Mechanism' in WM Evan (ed), *Law and sociology* (New York, The Free Press), 73-90

Clam, J (2006) *Questões fundamentais de uma teoria da sociedade: contingência, paradoxo, só efetuação* (São Leopoldo, Editora Unisinos).

Durkheim, É (1978) 'A transição da solidariedade mecânica à orgânica' in E Durkheim, *Teoria de estratificação social* (São Paulo, Companhia Editora Nacional).

Durkheim, É (1978) *Da divisão do trabalho social* (São Paulo, Abril Cultural).

Durkheim, É (1956) *Les règles de la méthode sociologique* 13 ed. (Paris, Presses Universitaires de France).

Ferreira, ADD (2013) 'Processos e sentidos sociais do rural na contemporaneidade: indagações sobre algumas especificidades brasileiras' 1 *Estudos Sociedade e Agricultura*.

Fischer-Lescano, A (2010) 'A teoria crítica dos sistemas da escola de Frankfurt'. 86 *Novos Estudos CEBRAP*.

Galtung, J (1964) 'A structural theory of aggression'. *Journal of Peace Research* 95-119.

Galtung, J (1959) 'Expectations and interaction processes'. 2(1-4) *Inquiry* 213-234.

Galtung, J (1958) 'The social functions of a prison'. 6(2) *Social Proble ms*127-140.

Gonçalves, GL (2012) 'El postcolonialismo y la teoría de sistemas: apuntes para una agenda de investigación sobre el derecho en los países periféricos' in ME Saavedra and R Millán (eds), *La teoría de los sistemas de Niklas Luhmann a prueba: horizontes de aplicación en la investigacíon social en América Latina* (México, El Colegio de México, Universidad Nacional Autónoma de México), 69-98.

Günther, G (2004) *Life as polycontexturality*. Available at: https://www.vordenker.de/ggphilosophy/gg_life_as_polycontexturality.pdf . Accessed on: May 20th, 2014.

King, M and Thornhill, CJ (2003) *Niklas Luhmann's theory of politics and law* (Basingstoke, Palgrave Macmillan).

Kjaer, PF 'Systems in context: on the outcome of the Habermas/Luhmann-Debate'. 66-77 *Ancilla Iuris*. Available at: http://ssrn.com/abstract=1489908 . Accessed on: March 10th, 2015.

Lampert, R and Sanders, J (1990) *An invitation to law and social science*: *desert, disputes, and distribution* (Philadelphia, University of Pennsylvania).

Lefort, C (1988) *Democracy and political theory* (Cambridge, Polity Press).

Lévi-Strauss, C (1973) *Antropologia estrutural* (Rio de Janeiro, Tempo Brasileiro).

Lévi-Strauss, C (1957) *Tristes tropicos* (São Paulo, Anhembi).

Luhmann, N (1990) 'A posição dos tribunais no sistema jurídico'. 17(49) *Revista da Ajuris* 149-168.

Luhmann, N (1991) 'Operational closure and structural coupling: the differentiation of the legal system'. 13 *Cardozo Law Review*.

Luhmann, N (1992) 'El ocaso de la sociología crítica'. 7(20) *Sociológica*. Available at: http://www.revistasociologica.com.mx/pdf/2012.pdf . Accessed on: September 10th, 2015.

Luhmann, N (1994) 'O enfoque sociológico da teoria e prática do direito'. 15(28) *Seqüência: estudos jurídicos e políticos*.

Luhmann, N (1998) *Complejidad y modernidad: de la unidad a la diferencia* (Madrid, Trotta).

Luhmann, N (1998) *Sistemas sociales: lineamentos para una teoría general* (Barcelona, Anthropos).

Luhmann, N (1999) 'A sociedade mundial como sistema social'. 47 *Revista Lua Nova*.

Luhmann, N (2000) 'Why does society describe itself as postmodern?' in W Rash and C Wolfe (eds), *Observing complexity: systems theory and post modernity* (Minneapolis, University Minnesota Press).

Luhmann, N (2005) *Organización y decisión, autopoiesis, acción y entendimiento comunicativo* (Barcelona, Anthropos).

Luhmann, N (2016) *O direito da sociedade* (São Paulo, Martins Fontes)

Mayhew, LH (1975) 'Institutions of representation: civil justice and the public'. 9(3) *Law & Society Review* 401-429.

Mayhew, LH (1968) *Law and equal opportunity: a study of the Massachusetts Commission Against Discrimination* (Harvard, Harvard University Press).

Mayhew, LH (1971) 'Stability and change in legal systems' in LH Mayhew, *Stability and Social Change* (Boston, Little, Brown and Co).

Mayhew, LH (1984) 'In defense of modernity: Talcott Parsons and the utilitarian tradition'. 89(6) *American Journal of Sociology* 1273-1305.

Mignolo, WD (2009) *The idea of Latin America* (Hoboken, John Wiley & Sons).

Mignolo, WD (2008) 'Desobediência epistêmica: a opção descolonial e o significado de identidade em política'. 34 *Cadernos de Letras da UFF–Dossiê: literatura, língua e identidade* 287-324.

Mignolo, WD (2012) *Local histories/global designs: coloniality, subaltern knowledges, and border thinking* (Princeton, Princeton University Press).

Nafarrate, JT (2004) *Luhmann: la política como sistema* (México, Fondo de Cultura Economica).

Neves, FM (2009) 'A diferenciação centro-periferia como estratégia teórica básica para observar a produção científica'. 17(34) *Revista de Sociologia e Política*.

Neves, M (2015) 'Os Estados no centro e os Estados na periferia: alguns problemas com a concepção de Estados da sociedade mundial em Niklas Luhmann'. 52(206) *Revista de Informação Legislativa* 111-136.

Postema, GJ (1986) *Bentham and the common law tradition* (Oxford, Oxford University Press).

Pound, R (1942) *Social control through law* (New Haven, CT, Yale University Press).

Pound, R (1927) 'Sociology and law' in WF Ogburn and A Goldenweiser (eds), *The social sciences and their interrelations* (Boston, Houghton Mufflin Company), 319-328.

Pound, R (1943) 'Sociology of law and sociological jurisprudence'. 5(1) *The University of Toronto Law Journal* 1-20.

Pound, R (1912) 'The scope and purpose of sociological jurisprudence, III: sociological jurisprudence'. 25(6) *Harvard Law Review* 489-516.

Rocha, LS (1992) 'Matrizes teórico-políticas da teoria jurídica contemporânea'. 13(24) *Seqüência: estudos jurídicos e políticos* 10-24.

Rocha, LS (1994) 'Direito, complexidade e risco'. 15(28) *Sequência: estudos jurídicos e políticos*.

Rocha, LS (2003) 'A construção do tempo pelo direito' in LS Rocha and LL Streck (eds), *Anuário do Programa de Pós-Graduação em Direito: Mestrado e Doutorado* (São Leopoldo, Unisinos), 309-320.

Rocha, LS and Azevedo, G (2012) 'Notas para uma teoria da organização da decisão jurídica autopoiética'. 4(2) *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* 193-213.

Rodriguez, JR (2004) 'Franz Neumann, o direito e a teoria crítica'. 61 *Lua Nova* 53-73.

Rodriguez, JR (2009) *Fuga do direito*: *um estudo sobre o direito contemporâneo a partir de Franz Neumann* (São Paulo, Saraiva).

Rodriguez, JR (2014) 'Luta por direitos, rebeliões e democracia no século XXI: algumas tarefas para a pesquisa em direito' in LL Streck, LS Rocha and W Engelmann (eds), *Constituição, sistemas sociais e hermenêutica*: *anuário do Programa de Pós-graduação em Direito da UNISINOS: mestrado e doutorado*, n. 11 (Porto Alegre, Livraria do Advogado; São Leopoldo, UNISINOS), 125-156.

Segato, RL (2012) 'Gênero e colonialidade: em busca de chaves de leitura e de um vocabulário estratégico descolonial'. 18 *e-Cadernos CES*.

Simioni, RL (2008) 'Poder e autopoiese da política em Niklas Luhmann'. 27 *Revista da Faculdade de Direito do Sul de Minas Pouso Alegre* 119-129.

Simmel, G (2002) *Cuestiones fundamentales de sociología* (Barcelona, Gedisa)

Teubner, G (1993) *Law as an autopoietic system* (Cambridge, Blackwell).

Thonhill, C (2009) 'The autonomy of the political: a socio-theoretical response'. 35(6) *Philosophy & Social Criticism* 705–735.

Weber, M (1987) *Conceitos básicos de sociologia* (São Paulo, Moraes).

Weber, M (1994) *Economia e sociedade: fundamentos da sociologia compreensiva.* 3 ed. (Brasília, Universidade de Brasília).

7. Empirical research on ecological analysis of law

Wálber Araujo Carneiro

1. Introduction

However distant from empirical research, the relationship between law and experience is far from new. In the *Nicomachean Ethics*, for example, Aristotle had already warned us that an "intellectual virtue in the main owes both its birth and its growth to teaching (for which reason it requires experience and time), while moral virtue comes about as a result of habit, whence also its name (*ethiké*) is one that is formed by a slight variation from the word ethos (habit)" (Aristotle 2016: 52). The ethical nature of what is just and what is legal would therefore demand life experience and learning as conditions for a prudent *praxis*. Modernity, in turn, has meant to remove the empirical content from the horizon of epistemic reflections (Descartes 1996). As a result, knowledge would require precisely the opposite attitude: transcendence. The truth would no longer be related to what has been experienced by us, but to what we can confirm by methodical calculation.

Nevertheless, it would be far too simplistic to believe that modern rationalism could have completely driven away the legal substance of empirical questions, reducing its foundations to the metaphysical plane and its theoretical constructions to an abstract systemization. Why, then, could a resistance to empirical research gain strength on the theoretical horizon of law in modern society? How did law in modern society become disengaged from empirical matters? Did the law really cut itself loose from such questions, or did it find an avenue for the resignification of empirical matters in its own normative communication? In the unveiling of such enigma, what could be the place of empirical enquiry in the operating of the legal system? Would it be possible to conceive of this without falling into the naturalist fallacy that transforms Is into

Ought (Hume 1988)? Finally, how can such research dialogue with an eco-logical observation of law? This text plans to confront such questions.

2. The law of modern world society and empiricism

Untainted by the existence of other local normative orders and (moreover and above all) never losing sight of the harm done by the forceful and racist character of colonial expansion (Balibar and Wallerstein 2021), modern law transformed itself into a system of world communication that congregates, under a single code, heterarchical relationships between differing constitutionalized national subsystems (Neves 2009), embracing a seemingly infinite number of transnational regimes (Teubner 2016). In this sense, it is possible to establish generalized observations on models of their functioning, thereby coming to conclusions on their reflexive theories.

As such, and in consideration of the proposed topic, initially we should evaluate the hegemonic presumption of modern rationalism before its own law. Such a hegemony would explain the reasons why law and its theory would have resisted the implications originating in empirical "reality". Yet, on this particular point, we cannot ignore that modern rationalism possessed an opposition in the English empiricism inaugurated by Bacon (2019), being able to count on relevant authors for the justification of Law, for example Hobbes and Locke (Losano 2008: 134-135). On the side of the French Enlightenment, authors like Condillac, Senebier, Voltaire and La Mettrie criticized the abstract character of the idea of a system, whose deductive procedure distanced us from reality (Losano 2008: 205). That is to say, transcendental justifications and abstract deductions were not the only possibility for the reflection between law and its scientific observation.

A second element refers to the philosophical contrast inherent in the discourse of the justification of law (rationalism vs. empiricism) - or of theoretical standards for the systematization of observed legal phenomenon (abstract vs. empirical) – faced with the way in which law reproduces itself, in the way it is truly immersed in social reality. In other words, there is a difference between

legal know-how, duplicated between theory and dogmatism (Bobbio 1980: 175), and an operative semantics which, according to Warat, we could call the "theoretical common sense of Law" (Warat 2004: 31, Luz 2020: 218). As much as authors of the political-legal philosophical tradition of the XVI, XVII and XVIII Centuries would justify the law under a legal-rationalist perspective, the strong presence of Roman Law in practice preserved traces of the former rhetoric of topical jurisprudence (Luz 2010: 221).

On the horizon of this syncretic configuration assumed by the theoretical common sense of the jurists (Luz 2010: 218), Giambattista Vico (1998), upon describing the jurisprudence of his time, highlighted its advantages and disadvantages in opposition to the jurisprudence of the Greeks and Romans. At the beginning of the XVIII Century, Vico pointed out the preoccupation with equity as an advantage of contemporaneous jurisprudence, permitting better treatment of particulars in concrete situations. Judging by the reading of Viehweg (1993), this approximation would be impossible without topical reasoning and, as a consequence, without the experimental resource of prudence.

Resistance to abstract systematization is not exclusive to Romano-Germanic civil law. Even more explicit resistance is visible in common law. The *Complete body of law* (*Pannomium*), a set of codes proposed by Bentham (1995) in the XVIII Century, for example, did not find space in the middle of statutory law, even though it is founded on the utilitarianism of his work on *censorial jurisprudence*. In turn, even though Max Weber (2004: 151) admitted that the precedents of *common law* completed a function equivalent to logical-formal rationality as to the "calculability" of law, he considered that the judges of this type of system would be a type of "living oracle", their decisions having an integrative role similar to that performed by the oracle in primitive law (Weber 1960: 188).

In this way, in spite of the relevance of rationalist and systematic writings during law's evolution between the XVI and XVIII Centuries, visible in authors such as Leibniz, Christian Wolf and Kant, it seems that the rupture of modern law with an empirical horizon is, in reality, a conquest by the systematic jurisprudence of the XIX Century, represented in France by the Exegesis School

and, in Germany, by the so-called jurisprudence of concepts in the work of authors like Puchta, Windscheid and, until a certain moment, Jhering (Larenz 1997: 28-29). This movement is directly related to the monopoly of the State over law, marked as much by emblematic encoding, for example the French Civil Code of 1804, as it is by the colonization of Roman Law under new rational foundations (Larenz 1997: 30). On this period, Hespanha (2012: 370) comments that the doctrine could now be strictly "juridical" ("pure") and "base its constructions only on legislative data".

> Legal doctrine is now a positive science. "Positive" because it is based on the objective data of the law of the State (and not on metaphysical abstractions like "social contract" or "original individual rights"); "science" because it generalizes these data under the form of concepts ("jurisprudence of concepts", *Begrijfsjurisprudenz*). (Hespanha 2012: 370).

If the Law had maintained, until that point, some type of relationship with empiricism, the primitive positivism of the XIX Century would have been the first to produce, at the heart of theoretical common sense, a semantics of isolation. Empiricism would find itself, however, reduced to what is presented as law. Experience would happen as the norm itself. Even in the environment of the common law of the United States, authors like Langdell, the Dean of Harvard Law School from 1870 to 1895, upheld the "*common law* as a conceptually ordered scientific system in which rigorous logical reasoning trumped concerns about the just resolution of particular cases" (Grossman 2007).

Nevertheless, the demand for isolation that was to be present in the legal operations of modern society, at least on the theoretical plane, barely lasted through the XIX Century itself. For social complexity was to be amplified by the following changes: the acceleration of communication and consolidation of its global reach; the use of new technologies, involving electricity, transport and communication; a crisis internal to atomistic capitalism itself, to eventually call

upon the State to perform a role distinct from that foreseen in the bourgeois revolutions; the consolidation of the working class, alongside the asymmetries that typify capitalism, followed by the waves of revolutionary movements which took hold of Europe and other regions. Consequently, they put into check both the law restricted to legislative semantics and the science still tied to syntactic relations.

However, the crisis of law and its science in the XIX Century is an ecological crisis (Carneiro 2020). It had not yet become the crisis that discusses the relationship between the economic system and nature, but an equivalent crisis where the law confronted difficulties in adaptation to its new social environment. The loss of the relationship with the empirical dimension revealed that in the background there was a deep misunderstanding about the environment and implied, consequently, difficulties of adaptation and resilience. However, from 1880, alternatives would begin to pan themselves out. The advent of scientific investigation took the case beyond the syntactic inter-weavings of the system (Geny 2016); there occurred freer exploration of semantic plurality in the norm and, when necessary, resoluteness for concrete decisions (Kantorowicz 1906); Law's return to the political domain was another hallmark (Schimitt 1985) and, most relevant for the objectives of this work, the objectivity of facts or social concerns comes to the fore, opening paths for sociological reflection to enter (Jhering 1986, Ehrlich 2002). For Ehrlich (2002), law would be the fruit of the "internal order of social organizations", in a way that legal norms cannot be confused with legal mechanisms. Legal sociology should reflect a "living law" that represents the concrete reality of its society. Still in 1864, Jhering already said that "to believe in the inalterability of roman legal concepts is a perfectly immature position, which derives itself from a completely acritical study of History", since "life is not concept", he would say, "concepts exist because of life" (Larenz 1997:58). He would go on to defend a social clockwork that, substituting the relationships of causality by concern – "the indispensable condition for all human action" (Jhering 2002) – he would look for the meaning of law in the "will of society" found in the relationship between the norm and its specific finality

(Larenz 1997: 62). According to Larenz (1997: 62), Jhering would have thus been the first of the modern legal thinkers to completely relativize the guidelines of the Law.

However, it is precisely around the new sociological relationship with the empirical that resistance will grow. In the evolutionary line of normative jurisprudence, legal neo-positivism (Kelsen 1960) accepts the presence of social reality as a determining variable for the will that produces the norm, but considers it unviable for it to be implicated in the cognitive domain of the science of law. It accepts that a norm without a minimum of social effectiveness can be considered valid, but grants a logical explanation for this. The science of law would not be a science of facts but only of the norm, in the critical limits of its cognitive possibilities. At another point, a jurisprudence of interests (Heck 1914, Pound 1943) would attempt to normatively assimilate the most different array of variables present in the environment of the legal system. Heck resisted a sociological model of interpretation, where the judge would be granted "the faculty of choosing between various possible interpretations, the one that produces better results, without in any way implying the intention of the legislator". Pound, in turn, considered that legal institutions result from the complex harmonization of many interests and, this being the case, in the place of deductions jurisprudence should elaborate an inventory of these interests and verify how "they are adjusted, harmonized or compromised" (Pound 1943: 17). One way or the other, the reality that would prevail is that of law, and not the "facts" that are presented around it.

According to Larenz (1997: 82), among the possibilities available to law at the beginning of the XX Century, legal practice would have followed, in a prevailing way, the jurisprudence of interests. In United States common law, under the strong influence of pragmatism, the balancing of interests became decisive for a new posture taken by the Supreme Court in the wake of the New Deal, leading the Roosevelt Court (1937 – 1949) to overcome the so-called Lochner Era (1897 – 1937). Still, a critical look at the balance, its representativity in theoretical common sense and its social impacts can reveal that, in the

background, these "non-formal" or "pragmatic" models would be giving proportion to good exculpations for discretionary decisions, not different at all from the decisionist practice denounced by neo positivism (Kelsen 1960). Theoretical common sense would, once again, fall to syncretism that covers over and, despite the strong presence of the "realistic" interpretations in legal practice, would continue resistant to sociologically observable empiricism.

> And today the hiatus is deepening. Empirical legal sociologists are giving in to the temptation of trying economic models and theories for their data with the predictable result that they are losing their sociological identity. Meanwhile, legal theorists are tempted to follow the famous "linguistic turn" in sociology and thus to question the validity of systematic data collection and patient data analysis. (Paterson and Teubner 2021: 34).

However, if we consider that the history of modern Law is predominantly marked by some type of relationship with the empirical dimension, and that the attempts to isolate Law did not resist the pressure of a flow of meaning originating in the environment, the resistance and practical and theoretical difficulties in the face of empirical research are not related to a rejection of "reality". The resistance is not to the empiricism that, in the philosophical roots of modern thinking, opposed transcendental rationalism. The resistance is, in truth, the breaking away of normative autonomy from the legal system. The resistance is, therefore, to any and every self-description of legal system that considers, explicitly, the loss of normative autonomy of a form of communication that is as "real" and "social" as any other (political, economic, religious, etc.) (De Giorgi 2021). As such, the resistance to empirical research conducted by sociology is a consequence of the fact of its being associated with sociologistic models that would not recognize the normative autonomy of the legal system.

3. Ecological analysis of law

In that which concerns *AEcoD* analysis[50], law is a system of communication for modern world society that has differentiated itself from political communication because of its functional possibilities in the face of demands upon provisions (Luhmann 2008). In this sense, modern law has assumed the function of generalizing and making society's normative expectations congruent (Luhmann 2008), providing recipients with a desirable level of safety in the economic and bureaucratic affairs (Weber 2019) of the context. Nonetheless, an evolutionary and historical understanding about how the legal system responds functionally in relation to its environment will show that the "ecological" equilibrium of this relationship, originating between the function of the system and its environmental provision (or performance), will be undermined from the second half of the XIX Century. An analysis that articulates a comprehensive phenomenology of the conscience to a theory of systemic communication reveals that world society law, in accelerating its world presence in an ever more complex environment, fails when it attempts to control its own contingency through logical-formal adjustments in coherence, therefore becoming incapable of providing the desired security (Carneiro 2020).

The first evolutionary acquisition directed towards the control of the internal contingency of the legal system would be marked by the displacement of demands of logical-formal coherence for consistency between different decisions in similar concrete cases (Luhmann 2008), producing, from then on, an approximation of *civil law* to the auto control mechanisms already present in *common law*. Law responds to the environment by counting on temporal control of its own contingency, since the reflexive structure of jurisprudence (precedents) would show itself as more apt to orient a function that reveals itself as coherent from its consistency (Carneiro 2011).

Still, as in any social system, legal communication will be subject to variation in meaning in its three phenomenological dimensions: temporal

[50] *Análise Ecológica de Direito*, the ecological analysis of law.

(before/after), spatial-objective (inside/outside) and social (consensus/dissent) (Luhmann 2012). In theory, it would be up to the political system to respond to variations in meaning in the spatial-objective (inside/outside) and social (consensus/dissent) dimensions, keeping in mind that the national character of law produced in politics would establish variation in the spatial-objective dimension and the legitimacy of political procedures would take care of the social dimension. The deficits of legitimation of the political majority and intensification of globalization of world society prevented the political system from monopolizing the control of spatial-objective and social variations, in a way that such variations came to be summoned directly by law. The legal system of modern world society would adapt internal structures to better respond to normative expectations that, generally speaking, should be administered by politics.

It is possible to observe many structural transformations related to this adaptation, an adaptation that approaches procedures, organizations and even the scientific observation we have treated. Here we will deal with a specific structural transformation related to the way in which the legal system and its principles operate before the flow of meaning in the environment. Structures previously related to logical coherence, justification by natural law and patterns observed by inductive means in the system will come to perform new functions, a fact made possible by the semantic opening. Taken as principle-based norms, their capacity for structuring normative expectations would be confused with the possibility of closing the system through the performance of a logical trick that would convert them into conditional rules.

In this sense, *AEcoD* sheds new light with distinctions in relation to a phenomenon based on logical principles: distinguishing different types of principles and illuminating the function for each one of these structures in terms of the auto- and hetero-referencing of the legal system. Along these lines, it will differentiate three types of principle: a) functional principles, directly linked to the autology of the legal system and that, once becoming sacred to all of the operations of the system, can be called upon to function as a rule; b) the pragmatic

principles, located in the periphery of the system and responsible for structuring the widest range of normative expectations originating in the environment and, finally, c) the epistemological principles, resulting from a second order observation to identify the "rule" of legislative politics, therefore not capable of distancing equally present exceptions. The problem of the relationship of law with empiricism requires special attention in relation to the first two types.

In relation to functional principles, we saw that the temporal control of self-contingency would not be capable of eliminating environmental pressures caused by variation in meaning in the spatial-objective dimension (Carneiro 2020). The binding character of the law and judicial decisions were not sufficient enough to block normative expectations related to the invalidity of choices based on social exclusion by local legislators. Illuminist ideas in the communication of modern world society opened new expectations for the urban worker class and enslaved people, surpassing the functional possibilities of consistency in juridical operations. Consequently, modern society revealed the brutal asymmetry between those included/ excluded (Neves 2006) that had been produced by the colonizing and enslaving character of the growth of this same society throughout the world. Responding to the demand for inclusion, structures directed towards consistency reveal themselves to be apt for amplifying or surpassing the egalitarian function between cases. The congruent generalization of normative expectations would also come to depend upon equality between people (Carneiro 2020). A second evolutionary acquisition came to mark the functions of the legal system.

Formalized egalitarian inclusion in an amplified sphere of citizenship would not, however, be capable of transforming the due process to make it synonymous with social consensus (Schwartz 1979). The segregationist and excluding inheritance demanded inclusion in differing social spheres that, in turn, obeyed differing kinds of equality (Walzer 1983). The demand for universal inclusion of individuals into different social systems, now impelled by the greater presence of excluded individuals in the public space, demanded a differentiated juridical treatment (Neves 2006). The equality would reveal itself, paradoxically,

in juridical inequality of access for different social spheres. This complex set of measures for equality had already been reflected upon in constitutional documents from the middle of the XIX Century (De Luna 2004). Once they had been combined with the new possibilities of constitutional jurisdiction[51], they showed themselves to be adequate for structuring the expectations of sustainability for individuals before a variety of social systems (Luhmann 1965). The law responded to such claims with self-observation of such norms as fundamental rights, a functional equivalent to social consensus existing in traditional societies coupled with categorical limits demanded by procedural modern ethics (Carneiro 2018). Therefore, the presence of a third functional principle appeared – that which, considering the internal fragmentation of law that would operate under differing kinds of equality, requires the integrity of these spaces, offering the environment contributions of sustainability and autonomy for forms of life and communication present in the environment (Carneiro 2020).

FUNCTIONAL PRINCIPLES OF LAW		
VARIATION IN MEANING	EXTERNAL CONTRIBUTION	INTERNAL FUNCTION
Temporal (before/after)	Safety	Consistency
Objective (inside/outside)	Inclusion	Equality (complex)
Social (consensus/dissent)	Sustainability	Integrity

Source: the author

As for the pragmatic principles, it is possible to observe them in an intimate relationship with fundamental rights. Although fundamental rights were self-observed by the legal system as "social consensus" over limits of intervention by the State, done so even by private agents, the plural environment always took advantage of such normative structures to demand the most diverse and plural claims for sustainability. Paradoxically, these fundamental rights as principles

[51] In the US Supreme Court, see "the Stone doctrine" in United States v. Carolene Products Co. 304 U.S. 144, 155 (1938). In the *Bundesverfassungsgericht* of German, see Lüth-Urteil,. BVerfGE 7, 198, 15 of January of 1958.

came to be responsible as much for the structuring of external dissent as for the internal act of presupposing consensus (Carneiro 2018). In the opposite direction of functional principles, they operate as pragmatic principles, a differentiation that, under the perspective of *AEcoD* analysis, is fundamental. Pragmatic principles depend on recursive operations in the system to demarcate frontiers of integrity (categorical limits), lose their relativity and, consequently, serve as rule of decision (Carneiro 2020). Functional principles are capable of directly operating the "logical trick" (Luhmann 2008) of the conversion into rules. The complexity of constitutional adjudication reveals different frames that include categorical and balancing logics (Greene 2018).

Functional and pragmatic principles, even as structures of the legal system, assume meanings directly related to the environment and, consequently, depend on external references (hetero-references) to construct the meaning of finalistic and conditional programs. In fact, the semantic limits of normativity of these principles will depend on organizational decisions that program and recognize recursive concatenations of these principles, but this does not mean that such decisions should be random choices on the part of integrated subjects of such organizations. It is common for these references to be covered over by the resource of "social values" emulated as "values of values of principles". However, such references to values will only presume a determined "state" of the environment, and normally ignore other "states" equally relevant to the meaning of pragmatic or functional principles. Be it to give foundation to postulations in the name of principles, to justify the taking of decisions or to maintain a critical observation of the system, the reality observed by empirical research will be of fundamental relevance for the opening of the legal system and, under some hypotheses, for the mediation of principles in the closure of the system itself.

4. The use of empirical research in law

Having said this, it would be possible to identify possible uses of empirical research in law from the relationship between the information it produces and its structuring of principles, according to what is observed by *AEcoD*. "For autopoiesis, theoretical explanation of empirical results means that the theory reformulates these artefacts of perception in new contexts in order to analyze – let us repeat the central formula – the transformational dynamics of recursive meaning processes" (Paterson and Teubner 2021: 34). Two preoccupations emerge from this. The first is related to "how" to produce or treat data and information on the legal system environment, especially when we consider its complexity and the logical difficulties of observation over the *unmarked space* highlighted by the environment of law (*marked space*). The second is related to how the learning obtained from the observation of the environment will become structured, taking into account the impossibility of treating it as a series of immediate contingencies that impose themselves on normative positions.

4.1. Environmental observation

The complexity involved in eco-logical observation depends on conditions found on the systemic-functional and organizational levels. It would not be possible to reduce such conditions of possibilities to a determined methodological stance for individual agency, since the performance of this analysis depends as much on the communication that already circulates in the scientific system as it does on predisposition by organizational agencies. Thus, it is not a matter of an epistemology of the conscience where the problem of knowledge is reduced to the way the subject will acquire conscience of the object. Leaving aside the problematics of artificial intelligence, this does not mean there could be knowledge without subjects. It just means that no methodology of conscience will be capable of dominating and operating all variables of a complex know-how that includes its own judgement on the scientific character of

knowledge. The knowledge of complex phenomena therefore depends on the horizon of communication already present in the scientific system of world society, as well as organizations capable of administrating the network of information and deciding on what it will communicate.

From the systemic point of view, the challenge is to observe scientific communication empirically produced in the environment of the legal system from distinctions that organize the chaos. It will therefore be necessary to remark the space (previously left unmarked) upon re-entry, before the observation of law, in order to unleash the creative forces of law (Fischer-Lescano 2017: 22). From the organizational point of view, the challenge, once integrated, is to obtain, from the scientific organization, the structure, budget and team, which can be facilitated if the organizational configuration abandons the hierarchical concentration and adopts a model of heterarchical networks to share information.

The challenge on the systemic level is that the eco-logical observation of law (or of any other functional system) needs to employ distinctions to maintain observation in the sphere of the coupling of the system with its environment. The communication present in the couplings does not reduce to what we observe as binary operational simultaneousness between two systems, however it can also be observed as such (Luhmann 2007: 72). As pointed out by Marcelo Neves, "it is absolutely essential that there be structural links to make it possible for there to be interinfluences between diverse autonomous spheres of communication" (Neves 2009: 35).

The existence of disordered communication in the environment of a receiving system creates the conditions of possibilities for a "transversal rationality" (Welsch, 1996) "between autonomous spheres of communication in world society" capable of promoting, in partial contexts of communication, their own reciprocal mechanisms of learning and influence (Neves 2009: 42). However, between the over generalized claims of Welsch's rationality and the structural particularities proposed by Neves, the so-called socio-ecological systems (Urquiza Gomes and Cadenas 2015) would be good candidates to explain the

transitional dynamic between incommensurable communications, included here the scientific communication produced by empirical research and normative communication.

> […] a socio-ecological system is a unit of a higher order that is spatially delimited with recurring interactions at its base […]. More simply said, a socio-ecological system describes the regular interaction between a social system and its surroundings, that is to say, a domain of recurring interactions that characterizes a specific and delimited praxis (Urquiza Gomes and Cadenas 2015)

Sociologically controlled empirical research observes the environment of communication systems and produces information that, once translated as indicative of the state of this system and with the help of eco-logical theory (Carneiro 2020), will be able to be structured into the ecologically observed system.

In terms of organizational challenge, research networks that link together different groups promoting vertical knowledge in different spheres of the society will be capable of processing complex communication material that involves ecological knowledge. In technological language, *networks* demand the existence of hubs, switches or routers, capable, with differing levels of intelligence, of coordinating this flow of information. Along the same lines, what we have named the "Observatory of Ecological Analysis of Law", or OBAEDi[52], linked to the Post-graduate Law Program at the UFBA, is worthy of being a manageable switch that makes the formation of a *network* viable and, at the same time, analogically manages and selects the flow of information coming from a series of research centers, directing it towards vertical operations of scientific knowledge on law by way of "ecological theories of law" (Carneiro 2020).

[52] *Observatório de Análise Ecológica do Direito,* Federal University of Bahia *(UFBA).*

4.2. Structuring cognitive achievement

Denying one of the myths of social constructivism, the alert is more important than ever: "*the environment exists!*" (Paterson and Teubner 2021: 60). Nevertheless, the "matter" and "energy" empirically observed in the environment of the legal system will need to take on a new meaning in the form of legal communication. If the critical observation of social systems waits for its functions to "work", it is fundamental that the expectations about this "work" be functional. And, as Aldo Mascareño warns us, "the sin of criticism is always lack of autology" (Ocampo and Brasil Jr 2020).

In this sense and in consideration of, in the first place, functional principles, empirical research can indicate the state of law setting out from absence or asymmetry in associated contributions. In the United States, a study investigated racial and ethnic disparity across various punishment domains using data on misdemeanors and felonies submitted for filing decisions to New York County's DA Office (DANY). This study revealed, for example, that in comparison with white defendants in a similar situation (across all offences) Black and Latino defendants were more likely to be detained, face a custodial plea offer, or be incarcerated. Evaluating discretionary points in the system, strong evidence emerged for racial disparity in pre-trial detention, plea offers, and the use of incarceration. Black and Latino defendants were significantly disadvantaged for each of these outcomes (Kutateladze and Andiloro 2014). These data revealed how moments of discretionary decision on the part of prosecutors and other State agents represent, besides questions related to equality, a strong lack of security for the system.

In Brazil, research would find that the jurisprudence on Binding Precedent n. 11 – according to which "the use of handcuffs is only lawful in case of resistance, well-founded fear of escape or danger to one's own physical integrity or that of others" – reveals considerable consistency. It would be hard to find decisions where the use of handcuffs was upheld for cases of resisting arrest, well-founded fear of flight or danger to physical integrity. However, consistency

does not only depend on the recursive confirmation of meaning, but also for the security it provides. There is no doubt that different individuals facing a similar situation would have very different perceptions surrounding the possibility of being, or not being, handcuffed by a police authority.

Studies like this one are relevant to recent debates in Brazilian Tribunals - for example, the possibility of police authorities celebrating guilty plea agreements or when one discusses the possibility of such outcomes involving collaborators in prison. Information (Luhmann 2007: 22) about empirical reality emerges in the example of organizational culture and the expectations of agents who interact in a judicial trial, communicating directly with material structured by principles.

In an identical way, empirical research also communicates with the complexity for issues of equality observed in different spheres of law. The functional demand of isonomy leaves open to questioning which of its different formulas should be observed in each one of the spheres that reproduce, internally, the fragmentation observed in the environment of the legal system. Empirical studies aid in the identification of these formulas of equality and, above all, in the verification of their generalization. The health system operates under the logic of isonomic distribution of resources "according to the necessity of each individual". Jurisprudential research in Brazilian law would reveal the assimilation of this isonomic version and, generally, the consequent transformation of this ruling principle as long as the state allows (for example) the concession of necessary medicine.

Empirical research reveals, still, that access to such medicine is not conceded in a general way (Medeiros, Diniz and Schwartz 2013). Many of those considered to be in need depend on the judiciary, and as a consequence such benefits end up being badly distributed. These conclusions can be a guide for the generalization of procedures for such decisions, or even lead to a dogmatic reformulation (Fonseca and Barros 2020) so that judicial involvement in the area of health does not eventuate in merely symbolic outcomes. However, inclusive generalization through determined equality formulas can be unsustainable for

other forms of life, for communication present in the environment of the legal system, and towards those who direct themselves towards isonomic demands. A health system that in a general way includes everyone in everything and any type of service could prove to be unsustainable for funds made available to the public, affecting other services. An education system that generalizes its criteria by merit could be unsustainable for students with special needs. An economy that generalizes its formula through the contribution for each individual could be unsustainable for the vital necessities of individual workers.

This demand for sustainability stimulated, as we have seen, the assimilation of integrity as a functional principle. In these cases, there will be limitations in budget for health services, systems of special evaluation in education for the disabled and minimum guarantees for work conditions. The legal system delineates these boundary limits in consideration of the recursive link of its communication, but this does not discredit the eco-logical observation of evaluating and demanding adjustments for integrity resulting from the unsustainability of forms of life and communication present in the environment of functional systems. Empirical studies are decisive in denouncing unsustainability and, consequently, for justifying such adjustments. Once again, it is not about deducing an imposition of what ought to be from the supposed reality of what is, but of obtaining information about the reality, already measured by scientific communication, and articulating it with autological mechanisms of juridical communication.

Moreover, it is worth observing that expectations involving substantial specific versions of formulas for equality and the wide range of demands for protecting sustainability will be able to be structured in the legal system by means of pragmatic principles. Differing semantics that circulate in social communication find in these principles a juridical meaning and, from there on, open the system to operations that will provide semantic density and conditional form for such normative programs. In this context, empirical research can, therefore, indicate the presence of such semantics in social communication, that which today can be made viable for research in big data (Mascareño et al 2021)

and justify the protective demands. These possibilities, as always, will not be able to implicate an immediate juridical non-conformity. In any case, besides highlighting the political system, we will be able to see, from the parameters of consistency, isonomy and integrity, the maintenance of normative influences.

These are some of the possibilities for the use of empirical-scientific information applied to dogmatic issues and measured to a theory of complexity adequate for such a project. Also, there still remains the classical applications of legal sociology, including those that are guided by systems theory (Campilongo, Amato and Barros 2021 and Magalhães Costa 2018). Even though the relationship between systems theory and empirical research is not totally resolved, it is worthwhile remembering that the autonomy of a system owes itself to the "self-organizing processes in the social world", revealing itself as an empirical question and not simply analytic (Paterson and Teubner 2021). Moreover, in opposition to *a priori* claims of analytical theories, the description of the empirical does not remain dependent on the clear evidence of reality or of its explicit communication, since meanings deduced from a society that continues to be silent can be translated into a first *poiese*, possibilities already found at the center of phenomenological-hermeneutic reflections (Cossio, 1964; Streck, 2014). Besides theoretical translations, inside the decision processes we will find attributions of meaning dependent on comprehensive empirical experience, yet devoid of consolidated communication links, such as in the weighing up of proof, in the presuppositions sustained by the experience of judges, in the anticipated and presupposed reconstruction of facts and in the redundancy of moral justification of decisions. These are blind spots that should not be left to discretionary violence, but illuminated by an aesthetic reflection capable of promoting reflexive gains for the law itself (Fischer-Lescano 2017: 103).

Finally, one observes that the system self-observes its own experience while observant of deadlines and statistics involved in its operation. In Brazil, the National Council of Justice, an organ exercising control of the Judiciary, reveals, on a yearly basis, relevant data for conscientiousness over the reality of its own system. As with any empirical information there may be normative

repercussions, for example information about the time taken for processing debates and their consequences for establishing goals and, furthermore, for trial consistency and isonomy, functional principles which could easily be converted into rules.

5. Conclusion

Law has never distanced itself from empiricism. The maintenance of its autonomy, all the same, was for a long time confused with the necessity of distancing, since consistency was subordinated to a systemic logical-formal perspective and its immediate foundation would be limited to the decision of the legislator. Once established the semantics of the legislative order, and guaranteed the systematic nature of the process, reality would come into place or it would be a case for politics to promote the necessary adjustments to preserve the autonomy of the system. A myth. Theoretical common sense has never accompanied these logical-formal intentions in an integral way, nor has such an intention represented a hegemonic reading in the history of juridical thought. Still, the opening where such a logical-formal autonomy became most representative is the same as the one that grants the autonomy of the system and, from that point on, the two questions come to be confused.

This central question is accompanied by a type of question that theoretical observation of law confers on logical-formal models. Amongst them have been models that observed autonomy, opening towards the judicial discretion of "judges that decided according to their conscience" (Streck 2013), or to the sociologically observed normative reality. In this context, studies that today would be called interdisciplinary and empirical studies that revealed "real" law are naturally to blame and stay outside of the dialectic synthesis of the tension between abstraction and juridical realism. The path would come to be dominated by operations that transform the experience in the wake of juridically protected concerns, ignoring the impossibilities of this reduction. On the plane of theoretical observation, jurisprudence of interests that sell or that cannot deliver

divide the space of the mainstream with positivist theories that do not buy what they are not going to receive. In the background, self-observation of the system and its theoretical control do not contribute to the cognitive learning transparent to the legal system.

Therefore, the openness of the system of information from empirical studies that are explicitly present in the scientific system of communication - for example, studies in sociology, political science, economy, anthropology, psychology or in interdisciplinary fields - can aid in the cognitive opening of the system. They can be observed as "matter" and "energy" of a socio-ecological system by organizations of the scientific system through the formation of manageable networks, and, following this, in the sequence structured by legal communication with the aid of ecologically oriented theories, provoking controlled variations and pressuring the system to adopt new stabilizing selections. Even though the environment really exists and in a relevant way, we cannot ignore the fact that it will always acquire new meanings in the forms pertaining to systems. This includes as much the scientific reconstruction of reality as it does the juridical reconstruction of normative expectations. Therefore, we defend that Eco-logical Analysis of Law could mediate this flow of meaning between the environment and the legal system, since we understand that the characteristics of such an observation contribute to an empirically oriented *critique* without which one would lose autological characteristics of the autonomous and differentiated operation of the system.

References

Aristotle (2016) *Nicomachean Ethics* (Indianapolis, Focus).

Bacon, F (2019) *The advancement of learning* (Binker North).

Balibar, É and Wallerstein, I (2021) *Raça, nação e classe* (São Paulo, Boitempo).

Bentham, J. (1995) *Colonies, Commerce, and Constitutional Law: Rid Yourselves of Ultramaria and other writings on Spain and Spanish America.* Ed. Philip Schofield (Oxford, Clarendon Press).

Bobbio, N (1980) *Contribución a la teoría del derecho* (Valencia, Fernando Torres).

Carneiro, WA (2020a) 'Os princípios do direito: entre Hermes e Hades' in JPA Teixeira and L Liziero (orgs), *Direito e Sociedade* (Andradina: Meraki).

Carneiro, WA (2020b) Teorias ecológicas do direito: por uma reconstrução crítica das teorias jurídicas. R. do Instituto de Hermenêutica Jur. – RIHJ, no 18 - n. 28, julho/dezembro, Belo Horizonte.

Carneiro, WA (2018) 'Os direitos fundamentais da constituição e os fundamentos da constituição de direitos: reformulações paradigmáticas na sociedade complexa e global' 12(1) *Revista Direito Mackenzie*, 129-165.

Carneiro, WA (2011) *Hermenêutica jurídica heterorreflexiva: uma teoria dialógica do direito* (Porto Alegre, Livraria do Advogado)

Cossio, C (1964) *La teoría egologica del derecho e el concepto jurídico de libertad* (Buenos Aires, Abeledo-Perrot).

Magalhães Costa, F (2018) *Educação Jurídica, entre inclusão e exclusão discente: um estudo de caso da Faculdade de Direito da UFBA* (Salvador, UFBA).

De Giorgi, R (2021) 'The sociological investigation of law in systems theory' in CF Campilongo, LF Amato and MALL Barros (eds), *Luhmann and Socio-Legal Research: An Empirical Agenda for Social Systems Theory* (New York, Routledge).

De Luna, FF (2004) Constitution of 1848. In *Encyclopedia of 1848 Revolutions* (Ohio, Ohio University). Available at https://www.ohio.edu/chastain/dh/frconst.htm

Descartes, R (1996) *Discourse on Method and Meditations on First Philosophy* (New Haven, Yale University Press).

Ehrlich, E (2002) *Fundamental principles of the sociology of law* (New Brunswick, Transactions Publishers).

Fischer-Lescano, A (2017) *Força de direito* (Rio de Janeiro, Lumen Juris).

Fonseca, GF and MALL Barros (2020) 'Empirical research in law: new horizons based on systems theory' in MALL Barros, LF Amato and GF Fonseca (eds), *World Society's Law: rethinking systems theory and socio-legal research* (Porto Alegre, Fi).

Geni, F (2016) *Méthode d'interprétation et sources en droit privé positif: essai critique* (Paris, L.G.D.J).

Greene, J (2018) Foreword: Rights as Trumps? 132(1) *Harvard Law Review*.

Grossman, LA (2007) 'Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification', 19 *Yale Journal of Law & Humanities*.

Heck, P (1914) *Gesetzesauslegung und Interessenjurisprudenz* (Tübingen, J. C. B. Mohr/Paul Siebeck).

Hespanha, AM (2012) *A cultura jurídica europeia: síntese de um milénio* (Coimbra, Almedina).

Hume, DA (1988) *Treatise of Human Nature*, v. III (New York, Oxford University Press).

Jhering, R (2002) *A finalidade do direito* (Campinas, Bookseller).

Kantorowicz, H (1906) *Der Kampf um die Rechtswissenschaft* (Heidelberg, Winter)

Kelsen, H (1960) *Pure Theory of Law (*Berkeley, University of California Press).

Kutateladze, BL and Andiloro, NR (2014) 'Prosecution and Racial Justice in New York County – Technical Report' in *Report Submitted to the National Institute of Justice*.

Larenz, K (1997) *Metodologia da Ciência do Direito* (Lisboa, Calouste Gulbenkian).

Luhmann, N (2012) *Theory of Society I* (Stanford, Stanford).

Luhmann, N (2008) *Law as a Social System* (Oxford, Oxford University Press).

Luhmann, N (2007) *La sociedad de la sociedad* (Ciudad de México, Universidad Iberoamericana)

Luhmann, N (1965) *Grundrechte als Institution: ein Beitrag zur politischen Soziologie* (Berlin, Duncker & Humblot).

Luz, VC (2010) A *verdade dos juristas: senso comum teórico e pré-compreensão – contribuição para uma hermenêutica crítica do (e/no) direito* (São Leopoldo, Unisinos).

Mascareño, A *et alli* (2021) 'Semánticas constitucionales: un análisis de los programas de los convencionales constituyentes' 578 *Puntos de Referencia*.

Medeiros, M, D Diniz and IVD Schwartz (2013) 'A tese da judicialização da saúde pelas elites: os medicamentos para mucopolissacaridose' 18(4) *Ciência & Saúde Coletiva*, 1079-1088.

Neves, M (2009) *Transconstitucionalismo* (São Paulo, Martins Fontes).

Neves, M (2006) *Entre Têmis e Leviatã - Uma relação difícil* (São Paulo, Martins Fontes).

Ocampo, SP A Brasil Jr. (2020) 'O Cenário "Pós-Luhmanniano" e a América Latina: entrevistas com Marcelo Neves e Aldo Mascareño' 10 (1) *Sociologia & Antropologia*, 15-72.

Paterson J. and Teubner, G. (2005) 'Changing Maps: Empirical Legal Autopoiesis' in CF Campilongo, LF Amato and MALL Barros (eds), *Luhmann and Socio-Legal Research: An Empirical Agenda for Social Systems Theory* (New York, Routledge).

Pound, R (1943) 'A survey of social interests' 57 *Harvard Law Review*.

Schmitt, C (1985) *Der Hüter der Verfassung* (Berlin, Duncker & Humblot).

Schwartz, B (1979) *Constitutional Law: a textbook* (New York, Macmillan)

Streck, L (2014) *Hermenêutica jurídica e(m) crise* (Porto Alegre, Livraria do Advogado).

Streck, L (2013) *O que é isto – decido conforme minha consciência?* (Porto Alegre, Livraria do Advogado).

Teubner, G (2016) *Fragmentos constitucionais: constitucionalismo social na globalização* (São Paulo, Saraiva).

Urquiza Gómez, A and H Cadenas (2015) Sistemas socio-ecológicos: elementos teóricos y conceptuales para la discusión en torno a vulnerabilidad hídrica. 218 *L'Ordinaire des Amériques*. Available at <http://journals.openedition.org/orda/1774>

Vico, G (1998) 'Métodos de estudios de nuestro tiempo' 401(9-10) *Cuadernos sobre Vico*.

Viehweg, T (1993) *Topics and Law: A Contribution to Basic Research in Law* (P. Lang).

Warat, L. A. (2004) 'Saber crítico e senso comum teórico dos juristas' in *Epistemologia e ensino do direito: o sonho acabou* (Florianópolis, Fundação Boiteux).

Weber, M (2019) *Economy and society* (Cambridge, MA, Harvard University Press).

Weber, M (2004) *Economia e sociedade*, v. 2 (São Paulo, USP).

Weber, M (1960) *Rechtssoziologie. Aus dem Manuskript herausgegeben und eingeleitet von Johannes Winckelmann* (Neuwied, Hermann Luchterhand Verlag).

Welsch, W (1996) *Vernunft. Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (Frankfurt, Suhrkamp).

Part II. Law, politics and economy

8. The Weimar Constitution as a Military Constitution[53]

Chris Thornhill

Introduction

It has been repeatedly observed in research concerning constitutional history and theory that the form of a national constitutional order is normally determined by experiences of war and by exigencies resulting from war. This view has even given rise to the claim that every constitution of state is originally a constitution of the army, and that laws intended to organize powers in the state are equally required to organize the military force of society (Hintze 1962: 53, Constant 1997 [1819]).

To some degree, this claim is plausible if applied to Europe in the age of feudalism. In most medieval societies, the laws and conventional arrangements determining the exercise of political authority did not form a strict corpus of constitutional law in the modern sense. Yet, such arrangements reflected a balanced apportionment of powers between different social groups, and they ensured that the use of political power was constrained by respect for mechanisms used for mobilizing military force and by regard for persons with responsibility for raising troops. The informal constitution of feudal societies was clearly dictated by the fact that regents relied on lords for military service and supply, and they could not afford to alienate persons on whom military levying depended. During the death throes of feudalism, it was often observed that the reliance of regents on the nobility for supply of troops meant that the military class was able to negotiate certain constitutional rights and privileges, usually regarding political representation and influence. Members of the nobility were

[53] This chapter is a revised version of a chapter originally published under the same title in Portuguese in (2019) in G Bercovici (ed), *Cem anos da Constituição de Weimar (1919-2019)* (São Paulo, Quartier Latin), 243-272. Sections on Poland have been added to the original text and some formulations have been changed. The author and the editors thank Gilberto Bercovici for allowing republication.

then able to insist on such arrangements as preconditions for military service and provision of personnel for the army (see for one example Fletcher 1698). This meant that a constitutional equilibrium between regents and nobility lay at the core of feudal society. In post-feudal societies, the claim that constitutional law is connected to warfare is less plausible. In fact, at key stages in the initial evolution of modern constitutional theory and practice, the public-legal norms of state were designed, not to connect, but *strategically to separate* the structure of government from pressures arising from warfare, and so to reduce the constitutional impact of war on the structure of government. This is visible, for instance, in the century prior to the period of revolutionary constitution making (1776-1795), in the twilight of the European *ancien régime* in the eighteenth century. At this time, a system of governance was established, in different countries, whose purpose was to ensure that public offices were constitutionally insulated against actors whose powers were connected to their role in the conduct and financing of war – that is, the nobility.[54] The administrative orders of European states before 1789 were strategically conceived to cement public authority in a system of office holding in which demands for taxes and personnel required for the prosecution of warfare did not create opportunities for noble estates to acquire constitutional influence on the overall direction of government. The underlying administrative structure of the modern state, in other words, can be seen as an internal system of offices whose function was to make sure that, as far as possible, the state was insulated against war.

After 1789, however, the linkage between constitutional formation and warfare became more immediate, and military impulses acquired very palpable

[54] In most parts of Europe, the basic institutional structure of the modern state was defined, first, because regents were able to create system of fiscal administration that weakened the constitutional powers of aristocratic estates, historically supported by the role of the nobility in approving taxes for war. Second, the structure of the modern state took shape because regents were able to bring military entrepreneurs, usually of aristocratic provenance, under central control, and in so doing to nationalize the foundations of military capacity. In both respects, the state took shape through the construction of administrative order in which war was internally regulated within the state and its impact on civil politics was reduced. On the second point see Redlich (1964: 46) and Burschel (1994: 318). One brilliant analysis explains how the early modern state developed through the constitutional separation of the 'civil state' and the 'military state': Leonhard (2008: 77).

force in shaping the form of government in much of Europe. Processes of constitution making after 1789 were often determined by the need to mobilize national armies and to create a regulatory structure for national military organizations. Moreover, many modern constitutions extracted legitimacy from principles that originated in military organization, and they gave expression to patterns of citizenship constructed in military conflict. Both in terms of their normative-legitimational content and their impact on institution building, the first modern constitutions are not easily separable from war and military exigence.

In their normative essence, quote generally, modern constitutions extract legitimacy from the principle that they place citizens in society at the centre of government, and they enable citizens, in the presumed exercise of popular sovereignty, to participate in legislative processes to define and protect their common freedoms. In most constitution-making situations, the citizen became the legitimational centre of government for military reasons, in a form very strongly determined by military requirements. In the context of revolutionary France from 1789-95, indicatively, one primary function of constitution-making processes was to create an institutional order in which, after the fiscal collapse of the *ancien régime* and the abolition of the standing armies deployed by the Bourbon monarchy, armed forces could be mobilized relatively rapidly and relatively cheaply. In revolutionary France, persons in society were transformed into subjects of constitutional government (citizens) because, once recognized as citizens, they were expected to assume military obligations, and their discharge of military duties was implicit dictated by their legal status. As they became citizens, social agents were also transformed into subjects willing to take up arms in defence of the revolutionary polity, which meant that the polity, legitimated by citizenship, immediately generated new reserves of military manpower. This dual transformation of the political subject at the heart of early constitutionalism was anticipated as early as December 1789. At this point, Dubois de Crancé outlined a programme of reform in the French army by declaring that 'every citizen must be ready at all times to march in defence of his country' (in 1878 1(10)

Archives Parlementaires de 1787 à 1860: 520.). Plans for military reform entailing mass conscription initially met with resistance, and they were not introduced. By 1793, however, the principle was established in revolutionary France that being a *citoyen* also meant being a *soldat*, and military service became an important sign and precondition of full citizenship and full popular sovereignty (Hippler 2006, Crépin 1998). The dual transformation of the person into a *citoyen* and a *soldat* that marked revolutionary Europe was particularly important because it occurred, in different regions, in social contexts marked either by the recent abolition of serfdom or by the fact that revolutionary constitution making was itself intended to abolish serfdom. In such settings, the rise of constitutional law, legitimated by citizenship, meant that persons acquired constitutional subjectivity, as citizens, at the same time that they were released from involuntary labour, in serfdom. In this process, however, citizens were almost immediately incorporated in new forms of involuntary labour, as, once constructed as citizens, they were forced to perform mandatory military service. Across Europe, the endeavour to construct governmental legitimacy around ideas of national citizenship and popular sovereignty was part of a wider endeavour to create cohesively integrated national societies, with populations that were both extricated from personal servitude in rural economies and able to defend themselves, and their regents, effectively in war. In Prussia, tellingly, the semi-constitutional reforms conducted after military collapse in 1806-1807 were based in a series of plans designed to eradicate serfdom ('personal slavery'), to integrate the population in government, to solidify state institutions, and to create a 'completely new constitution' for the army (*Altensteins Denkschrift* [1807]: 403, 431). The strategic linkage between constitutional subject formation and military regimentation assumed a central position in the beginnings of modern German constitutional order.

In the longer wake of 1789, most constitutional polities continued to attach their legitimational claims to constructs of citizenship integrally associated with war. Through the longer processes in which, through the nineteenth century, the patterns of representative constitutionalism initiated around 1789 were

transformed into more genuinely democratic constitutionalism, constitutions projected their legitimacy around citizens in a form that was very closely defined by warfare. By the later nineteenth century, constitutions in European states were extended to incorporate larger electoral franchises, such that national citizens became more materially implicated in the actual conduct of government. This process was propelled by international military pressures, and the widening of citizenship rights at this time was closely connected with the growth of national military conscription. In most societies, deepening democratization and deepening conscription occurred as two parts of one single overarching process, and, in most polities, the extended enfranchisement of citizens was linked to, and driven, to the compulsory integration of citizens in the army.[55] In the French Third Republic, this correlation was underlined by the fact that the enumerated political rights of citizens included the right to vote and *the right to be a soldier*, which meant that political and military roles were not fully distinct (Hauriou 1892: 676).

In key respects, overall, the construction of the citizen that underpins constitutional law in modern Europe was integrally shaped by, and in turn reinforced, the intensifying militarization of society. Both at the origins of modern constitutional practice and through the slow deepening of constitutionalism as a democratic order in the later nineteenth century, most people in Europe experienced the long process of becoming a citizen under a system of constitutional law as an occurrence that was not easily separable from the experience of becoming a soldier. In most European societies, simply, as the political system incorporated persons as voters, the military system incorporated them as soldiers (Levi 1996). The basic normative unit underpinning the structure of modern constitutional states – the sovereign citizen, as a member of a nation state in a territorially integrated society – rested on a deeply militarized process

[55] In France, paradigmatically, the deepening of democracy after 1870 was expressed directly in increasingly encompassing conscription laws, giving effect, by 1905, 'to a republican military programme', in which all men had equal voting rights and all men had equal military duties. See Challener (1965: 47-48).

of social integration, in which the sovereign people appeared in government as a people integrated by military mobilization.

In most settings, the construction of citizenship around military obligation established the basic institutional form that defines the polities of modern societies. Through the linkage between citizens and war, European states acquired more centralized form, and the infrastructural power of state institutions was greatly augmented. This linkage can be identified as the basis for the expansion of educational and welfare policies that occurred in much of Europe in the nineteenth century. In particular, the correlation between soldier and the citizen formed the premise for the establishment of strong instruments of fiscal extraction in the modern state. The fact that modern states mobilized their populations both as soldiers and as citizens meant that states were able both to extend their military capacity and to harden their extractive capacity at the same time, as, alongside military duties, citizenship also entailed general tax-paying obligations.[56] The link between citizenship and recruitment was the specific precondition for the consolidation of the fiscal apparatus that forms the nervous system of the modern state. By 1900, most states approached a position in which assumed a monopoly of power in society, and they increasingly developed systems of control and extraction able to penetrate deep in to society and to coordinate activities in different social domains. In many countries, in fact, the recruitment of citizens for military purposes was a core part of the trajectory in which societies acquired territorially unified form, and citizens from different regions in society, often only recently unified, were drawn together, primarily, through military service (see for example Boulanger 2001).

What these processes meant, in different respects, is that – both normatively and institutionally – modern constitutional states in Europe were constructed through violence. At a profound level, modern states took shape as they attached their legitimacy to the fact that they integrated agents in society, at one and the same time, both as voters and as soldiers. At one level, this was a

[56] General national income tax was introduced in France in 1914, in Russia in 1916 and in Germany in 1919-20. In the UK income tax introduced in 1842, but it was greatly extended in 1909.

straightforward process. War and preparation for war pressed societies into experiences of unified citizenship and heightened structural integrity, so that modern experiences of national citizenship flowed directly from experiences of militarization. To this degree, the dual concept of the *soldat-citoyen*, articulated in 1789, proved the core wellspring in the formation of modern political systems. At the same time, however, the construction of national states around militarized patterns of citizenship inevitably instilled high levels of violence in the modes of political interaction and integration that defined the domestic conditions of national societies – a fact which frequently unsettled experiences of citizenship. After 1789, in fact, national citizenship was shaped, not only by war with external enemies, but also, increasingly, by civil war. This was already reflected in revolutionary France, as, during the revolutionary years, the war conducted by the revolutionary government with other European powers overlapped closely with war against anti-revolutionary forces within France. Over a longer period, then, the terms of national citizenship were closely linked to increasingly entrenched class divisions in different national societies, and the militarization of citizenship was partly reflected in the militarization of social class. The deepening of enfranchisement and the intensification of conscription that underpinned most nineteenth-century polities gave rise eventually to political orders, in which established definitions of citizenship were unable to encompass all groups in society, and distinct groups mobilized with increasing intensity against each other. By the mid- to late nineteenth century, most polities were founded in the forcible exclusion of some potential citizenship groups by rival groups, and the more powerful groups in such inter-citizen hostility were often able to mobilize military forces to defend their position.[57] By the second half of the nineteenth century, therefore, the relation between the *soldat* and the *citoyen*, originally formative of national citizenship, had widely, although not invariably developed into an antinomy.[58] Overlying this antinomy was a, increasingly

[57] Examples are the suppression of the revolution in Germany in 1849; the suppression of the Paris Commune in 1870; the close interdependence of government and army in Germany after 1871.
[58] Brazil is an exception to this principle, as the military retained a formative role in the construction of national citizenship from the 1880s to the 1920s.

powerful secondary antinomy, identified by Karl Marx – that is, namely, the growing antinomy between the *citoyen* and the *bourgeois*, which had become prominent through the articulation between social militarization and social class formation. Through the late nineteenth century, military force was increasingly required to prevent the conflict between these two figures from destabilizing national societies in their entirety, and the *soldat* was widely recruited to support the *bourgeois*, against the more universalistic implications inherent in the *citoyen*. By the later nineteenth century, in most European polities, the military had acquired a functional role in which it inculcated hostility to full citizenship into the citizens that it served to integrate. The organization that first defined national citizenship thus became responsible for its limitation. By circa 1900, the constitutional figure of citizen had fragmented into three distinct elements – the *citoyen*, the *soldat* and the *bourgeois*. These elements remained interconnected, and, as evidenced in World War I (discussed below), democracy remained inseparable from military conscription. Yet, the relation between these elements clearly obstructed the formation of inclusively legitimated constitutional orders.

1. The Weimar Constitution and the dialectic of the *Soldat-Citoyen*

The deep dependency between democratic citizenship and military mobilization assumed defining importance in the societal background to the writing of the Weimar Constitution. Indeed, in key respects, the Weimar Constitution can be interpreted as a constitutional text that was linked, in consciously dialectical manner, to military processes of mobilization and citizenship construction. On one hand, the Constitution replicated some aspects of military social organization, and it was designed to solidify, in a peacetime context, the integrated modes of citizenship promoted during war. In the course of World War I, a number of deeply embedded societal dynamics, which can be traced to 1789, approached a high degree of articulation. In many ways, social processes linked to nation building, citizenship formation and social integration first initiated around 1789 approached completion, in Germany as in much of

Europe, after 1914. The Weimar Constitution marked an endeavour to build on these foundations, and it was designed to carry over constructs of citizenship resulting from war into the new Republic. In so doing, the Constitution was intended to give full and final expression to constitutional principles originating in the caesura between pre-modern and contemporary Europe, expressed in European society around 1789. At the same time, however, the Constitution attached nuanced significance to the configuration of citizenship through war. It clearly recognized the fragility of patterns of citizenship established through war, and it was projected as a legal framework to separate citizenship from war and to reduce the military emphasis of national sovereignty.

First, World War I marked the great leap forward in the development of infrastructurally robust political institutions in European society. The pathway, begun in 1789, towards the creation of states as centralized aggregates of institutions, with capacity to raise revenue through taxation, to mobilize society, and to countervail local or customary centres of authority, approached an interim completion in the period 1914-1918. In Germany, the fiscal dimension of this process of infrastructural expansion was slightly delayed, and the formation of a secure national taxation system only began after the war, marked by income tax reforms in 1920 and 1925. These reforms were partly a response to the fact that, during the war, the government had incurred enormous public debts, as, owing to the weaknesses of the national fiscal system, war financing had mainly relied on exceptional levies and loans. One recent analyst calculates that by 1920 Germany had a budgetary deficit that was as large as the entire national budget in 1913 (Hacker 2013: 200, see general background analysis in Witt 1970). Above all, the introduction of national income tax in Germany reflected the transformation of citizenship during the war. After 1918, the extractive capacity of the taxation system was progressively adapted to serve as 'an instrument of social and societal politics', allowing the government to increase public spending, to expand social policies, and to stabilize its social base in the citizenry (Sahm 2019: 8). In different ways, European states generally emerged from World War

I in a form recognizable as that of a modern state, with dramatically expanded requirements and faculties for fiscal extraction and social coordination.

Second, most national polities emerged from World War I with electoral systems marked by greatly expanded provisions for democratic enfranchisement and representation. In the course of or immediately after World War I, most belligerent polities in Europe were restructured on electoral foundations now recognizable as typical of a democracy or close to those of a democracy – or at least to those of a *male* democracy. This transformation took place in different ways. Some polities experienced democratic revolution at the end of the war; some polities underwent democratic reform during or at the end of the war; some polities were created on a democratic design *ex nihilo*, from the remnants of collapsed multi-national Empires. In most cases, however, the legitimational impulse towards full electoral inclusion, at least of male citizens, which began in 1789, was jolted towards realization before and around 1918. In most polities, this process was integrally linked to the fact that hitherto marginalized citizens, who before 1914 had not possessed full electoral rights, were seen as warranting full political inclusion because they had discharged military service. Across Europe and beyond, the war triggered a deep integrational push, in which full rights were assigned to membership groups, hitherto excluded because of socio-economic position or gender, who had reached new levels of inclusion in the course of the conflict. In some countries, this integrational push also included women, especially if women had been actively involved in mobilization for war.[59]

Third, in World War I, the propensity for the consolidation of modern society as a relatively uniform national order, which was first expressed in 1789, acquired deeply intensified expression. This was reflected, evidently, in the fact that the number of groups that were expressly excluded from the exercise of citizenship rights was reduced, and uneven access to formal rights of political

[59] For example, women were enfranchised in fully in Germany, Austria, Poland and the USA and partly in the UK at the end of the war. In Canada, female suffrage was established incrementally, and in the first suffrage laws women directly affected by the war were privileged.

participation became less widespread. However, this was also reflected in the fact that, owing to the mobilizational effort, the power of state institutions to exercise control of society, to penetrate into different societal regions, and to shape social and economic action, increased. This was also reflected in the fact that recruitment for war occurred, to a large degree, as a national process, so that military mobilization necessarily triggered an increase in the powers of governmental penetration. As a result of this, groups from different regions of society, for whom inter-regional travel had previously been rare, were incorporated for the first time in a physically encompassing system of governmental control. Naturally, this remained an incomplete process, and it is widely recorded that regional divisions and hostilities as well as class-conditioned variations remained palpable in the course of the war (see Ziemann 1997: 273, Mariot 2013). Nonetheless, the degree of regional mobility in European societies increased dramatically in the war, and the apparatus of mobilization drew manpower from regions in society that had historically only been very notionally incorporated in the framework of the nation state.

Overall, the years 1914-1918 marked a historical moment in which the basic disposition towards institutional centralization, structural integration and unified citizenship that began to define the form of modern societies in the late eighteenth century was materially elaborated. As in the revolutionary setting around 1789, this occurred in the context of war.

Against this general background, the Weimar Constitution can clearly be interpreted as a military constitution. In expressing this claim, an element of circumspection is needed. The Weimar Constitution did not acquire an overtly military character to the same degree as the new constitutions enforced in the post-Imperial states that were created in post-1918 Poland or Lithuania. For example, the Polish constitutional order that took shape from 1918 to 1921 was cemented during multi-polar wars, fought between Poland and Russian, Ukrainian, Czech, German and Lithuanian troops, in which, up to 1922-23, the territorial boundaries of Poland were progressively contested, redrawn and secured. In this context, the Polish constitutions that were implemented in 1919

and 1921 had very obvious military functions. These constitutions were required to impose citizenship duties on the population in order, simultaneously, to extract military force from male subjects, legally to solidify the regional space occupied by the Polish government, and to integrate the (ethnically highly complex) nation as a whole in the structure of governmental order (Kęsik 1998: 185). In the post-1918 Polish context, the broader link between citizenship and military mobilization acquired the most intense and paradigmatic expression. The Polish army formed the basic unit of nation building, military actors around Piłsudski were central to day-to-day government functions, and inhabitants of Polish territory were transformed into citizens of the Polish state in a process in which citizenship and military violence were identical. Importantly, the drafting of the constitutions of 1919 and 1921 was flanked by legislation providing for extraordinarily extensive military conscription.[60] Despite this comparison, however, the Weimar Constitution can also be seen, in key respects, as a military constitution. In its most general dimensions, the Weimar Constitution was intended to impose a system of public law on a society galvanized by war, and, in its basic design, it consciously extracted legitimacy from citizens shaped by the experience of war. In key respects, the Constitution founded its legitimacy on a sociological analysis of citizenship, showing deep awareness of how the primary expectations attached to citizenship had obtained material reality and experienced volatile transformation through war.

First, the authors of the Weimar Constitution were committed to reinforcing the processes of centralization and national integration intensified by World War I. Central to the Constitution was an attempt to promote an understanding of the German state as a structurally integrated whole, in which the entire polity was underpinned by unified principles of citizenship. It was built directly on the condition of accelerated national and political integration stimulated by war.

[60] Indicatively, concentration camps were created in Warsaw to house deserters trying to evade conscription during the Polish-Soviet War. See on this Kania (2019: 287-288, 299). Military recruitment was also widespread amongst Polish women, who were enfranchised in 1918.

Generally, the nation-building commitment of the authors of the Constitution was clear in the fact that, as after 1789, all variations in citizenship were abolished. For example, class-determined differences of legal status were removed, most personal privileges were legally proscribed (Art 109), and equal access to public office was guaranteed (Art 128). Proportionate to income, equal fiscal obligations were imposed (Art 134). Importantly, traditional distinctions resulting from military affiliation were also modified, and the drafters of the Constitution took pains to ensure that members of the military were bound by oath to the Constitution. For many soldiers, this involved a traumatic release from their previous oath of loyalty to the *Kaiser* (Heinemann 2018: 134). The binding of the army to the Constitution of course reflected a long-standing dream of national Republican citizenship that had been pursued by Liberal political groups through the nineteenth century, but which had always remained elusive.

In promoting a nationalized ideal of citizenship, the founders of the Constitution were motivated, more specifically, by the sense that Imperial Germany had not been formed as a fully unified nation state, a fact revealed in the loosely connected administrative structure of the Empire. By contrast, the writing of the Weimar Constitution was perceived as an opportunity to create a polity on a fully nationalized basis. This nationalizing impulse was reflected in those clauses of the Constitution, especially Art 48, which permitted the Imperial executive, in cases of legal conflict, to overrule institutions located in separate regions. This impulse was tangible in Art 47, which created a fully nationalized military system. This impulse was visible in Arts 8, 83 and 84, which cemented the fiscal sovereignty of the Empire over the particular states. Most saliently, this impulse was reflected in Art 13, which established the categorical primacy of national law over law in the individual states. In key respects, this insistence on centralization was motivated by the deep-seated hatred of Prussia amongst the progressive intelligentsia in Germany, whose representatives played a leading role in creating the Constitution. This group determined to obstruct the re-emergence of Prussia as the hegemonic state within the new democratic polity, which had been a pronounced feature of the Imperial Constitution. The Weimar

Constitution was intended to put an end to the Prussian-German question, in favour of a decisively and equally unified German Empire, based in the equally distributed sovereignty of all German citizens. In fact, Art 18 created a framework in which the territorial boundaries of Prussia could be redrawn, so that Prussia was warned about exceeding the limits of its constitutionally mandated powers (see Schmidt 1927: 211, Ehni 1975: 15). Indicatively, the Constitution contained many federal features, and it could easily have been formulated as an expressly federal constitution. Yet, it deliberately avoided any commitment to federalism or to any principle that might dilute its articulation of a sovereign national order, thereby promoting Prussian autonomy.[61] One contemporary interpreter claimed that it displayed an 'exaggeration of the unitary principle', in which the authors of the Constitution had 'rushed ahead of the course of history' (Triepel 1925: 207).

Second, the 1919 Constitution promoted a fully nationalized, fully democratic concept of citizenship, which established a very democratic franchise – a franchise that was far more democratic than those that existed in the supposedly more liberal states of Great Britain, the USA and France in the same period. Leading theorists of the Constitution strategically promoted democratic citizenship in order to reinforce the institutional ties linking the population to the political system, and the basic design of citizenship was oriented toward democratic consolidation and national consolidation as two elements in the same process. Some authors of the Constitution viewed rights of democratic citizenship guaranteed under constitutional laws as concrete integrational principles, acting to bind the national population as a whole into an experiential unity with the state, establishing a model of nationhood deeply linked to the values of constitutional democracy (Naumann 1920: 2190). This was closely linked to the typical Republican association of constitutional citizenship with education, and Art 188 made provisions for mandatory education in citizenship norms and practices. In these respects, the fathers of the Weimar Constitution

[61] One historian describes the polity created in Weimar as a 'federal state with strong unitary features [*stark unitarisierter Bundesstaat*]' (Nipperdey 1979: 526-27).

clearly reflected upon their work as an attempt to realize and stabilize the social dynamics resulting from the French Revolution, using constitutional law to consolidate nationhood and popular sovereignty at the same time.

In both respects, third, the Weimar Constitution was conceived as a constitution whose objective was to reinforce the territorial integration of German society. This was reflected in provisions discussed above for the enforcement of powers vested in the central executive and the weakening of regional centrifugalism. However, the role of the army in creating an integrated nation was clearly recognized, as the constitution of the army (*Wehrverfassung des deutschen Volkes*) was placed directly under Imperial control (Art 79(1)).

In each of these respects, the Constitution was enacted to remedy the weaknesses in the dimension of structural integration that had historically affected the German polity. In particular, the Constitution appeared as a distinctive post-bellum Constitution, which was charged with the task of translating the processes of national political integration that had been intensified through the war into premises for the formation of the German people as a decisively democratic subject. In this regard, the Constitution can be seen as enunciating a profound sociological insight into the linkage between constitution making, democratic subject formation and military mobilization. In fact, World War I was specifically observed by the authors of the Constitution as an event that effected the full *politicization* of the German people, such that, during the war, Germany emerged, for the first time, as a society of national citizens, subject immediately to a national state (Preuß 1915: 186-187). The function of the democratic constitution, thus, was to channel this experience of citizenship formation into instruments of democratic representation, and to build democratic integration onto structural foundations engendered by war.

In addition to these general characteristics, the Weimar Constitution can be seen as a military constitution in some of its more specific features, and it transposed certain quite determinate aspects of military order into constitutional norms. Some of its most distinctive characteristics resulted from the fact that it translated principles used for regulating the army into principles of national

governance and civil-political order. In these respects, too, the Constitution gave expression to ideas of citizenship galvanized through war.

Most obviously, it is now almost a truism to note that the structure of the presidential executive in the Weimar Constitution was based on the system of executive-led direction that had been consolidated in World War I. In particular, the emergency powers accorded to the President under Art 48 are widely viewed as residues of military experience, extending militarized patterns of exceptionalist government into conditions of civil order (Boldt 1980, Richter 1998). Art 48 allowed the President to avail himself of far-reaching powers and to suspend certain constraints on executive authority in cases of military threat to the government, either internal or external. Importantly, this clause made it possible for the President personally to deploy military force against individual states within the Republic that refused to comply with national legislation. This imprinted a deep executive bias in the design of the polity, and it closely linked executive functions to use of military agency. In this respect, the Weimar Constitution was not unusual, as, after 1918, belligerent polities usually developed broadened executives, built on foundations set during the war. Even polities such as those created in Poland and Lithuania after 1918 that originally had a strong parliamentary bias soon developed strong, free-standing executives, closely attached to the army.[62] Indeed, in wider general terms, the expanded functions of social planning and early welfare state construction that became widespread after 1918 necessitated the intensification of the executive components of the polity, and tendencies towards reinforcement of executive power that occurred in World War I were further strengthened in all polities (see for discussion Eisner 2000). In some polities, in fact, the transfer of wartime provisions for exceptional rule into the post-military context was more strongly

[62] The Polish constitutions of 1919 and 1921 were designed to create governments with circumscribed executives. But even when these constitutions were in force some vital powers were transferred to a special military council, the Council for the Defence of the Republic. On one account, the Council was the primary government body from July to October 1920, in which it issued roughly 90 legal acts (see Marszałek 1995: 175-176). This implies that in this period Poland was a de facto constitutional dictatorship. Later, the constitutions of Poland and Lithuania were overthrown by military coups in 1926, and both saw the emergence of long-term military regimes, with at least partial fascist features.

ingrained than in Germany. In Austria, the outbreak of war in 1914 saw the implementation of a wide array of emergency laws (Hasiba 1985: 157). Later, emergency clauses passed in 1917 remained in force under the 1920 Constitution of the First Republic, and they were used as a basis for reactionary constitutional revision in the early 1930s (Gürke 1934, Hasiba 1981: 544). However, the bones of a military state remained prominently visible beneath the Weimar Constitution. Importantly, in allowing the President to use military resources to override resistance from the individual states, provisions in Art 48 expressed the principle that the will of the German nation was concentrated in the Imperial executive, embodied by the President, and that, under specified conditions, this will could be applied by military means. In this respect, the Constitution promoted a model of citizenship, whose origins lay in the military domain, which viewed executive acts as the ultimate expression of national sovereignty. This emphasis placed on the presidential executive as an instrument of national construction was largely the result of Max Weber's role in drafting the Constitution, reflecting a predilection for plebiscitary presidentialism that he shared with constitutionalists on the far right (Trippe 1995: 70). This emphasis sat uneasily alongside the more organic, associational patterns of citizenship and national integration also included in the Constitution (Elben 1965: 134, Grassmann 1965: 11).

The provisions for a strong executive expressed in the Weimar Constitution were flanked by provisions for corporatistic models of economic representation, in which bodies representing organized labour were to be integrated in legislative procedures. In this respect, the Constitution expressed the presupposition that the existence of a delegatory apparatus for resolving economic antagonisms was a precondition of democratic rule. Initially, it was envisaged that a separate chamber, placed next to the parliamentary legislature, would be created to deliberate questions of economic policy and to introduce legislation to regulate the economy. The Constitution itself contained clauses that created a legal basis for the expropriation of large-scale enterprises and the socialization of key national industries (Arts 153, 156). These provisions were

never put into effect. However, the Constitution provided for representation of economic interests at the level of the workplace (Art 165), and it institutionalized corporatistic mechanisms for aggregating economic interests. It eventually led to the establishment, in 1923, of instruments for compulsory arbitration in industrial disputes, in which the Ministry of Labour became the final point of appeal in inter-group conflicts of an economic nature (Englberger 1995: 153, 183, Steiger 1998: 133).

Through these provisions, the Weimar Constitution created the legal framework for a very distinctive public-economic order. In this order, on one hand, directive power in economic matters was concentrated in the hands of the Imperial President. Indeed, it soon became a matter of controversy that the emergency powers accorded to the President were used, frequently, for the introduction of economic legislation, and – above all – for the passing of fiscal budgets and yearly plans, a function hardly foreseen in the conception of emergency situations in relation to which Art 48 was originally formulated (see Feldman 1997). At the same time, however, the directive authority of the President was exercised in a situation that was marked by the close articulation between government and industrial organizations, on both sides of the production process. This meant that, beneath the executive level of presidential authority, parliamentary actors were expected to share some of their legislative force with non-elected representatives of business and labour. Together, these arrangements created a constitutional system of *strong-executive corporatism*, or even *strong-executive pluralism*, in which the powers classically ascribed to the elected legislature were relativized on two fronts. Through the 1920s, aspects of this system were further consolidated. Through the course of the decade, the Presidency assumed increased power through the use of emergency legislation, and the *Reichstag* lost some of its authority in economic legislation; the *Reichstag* was partly de-legitimated after by 1923 by the fact that key economic budgets were passed under emergency laws that prorogued parliament (see Feldman 1997). At the same time, leading economic bodies, increasing those representing industrial lobbies, acquired entrenched positions at the perimeters of

government. Both components in the system of executive-led corporatism were thus reinforced, in both cases to the detriment of parliament.

In many ways, these arrangements had discernible origins in the mechanisms for politico-economic coordination established in the World War I. After 1914, most national governments in Europe pioneered informal systems of executive-led corporatism, in which, on one hand, the military leadership and the governmental executive acquired consolidated authority, and, on the other hand, organized labour was strongly co-opted into the war effort (Adler 1995). In Germany, this model of social organization was strongly developed. In 1916, the military command implemented legislation, the *Hilfsdienstgesetz*, which was designed, primarily, to increase military mobilization, yet which also underpinned its strategies for intensifying recruitment of soldiers with provisions to co-opt trade unions into the war effort, to give heightened legal recognition to trade unions, and to create arbitration panels in large firms (see Löhr 1929: 215-320, 237-240, Kocka 1973: 115, Feldmann and Steinisch 1985). Central to this law was the understanding that, in a modern society, effective mobilization for war presupposes at least partial pacification of socio-economic divisions, and wars are best prosecuted by nations with solid levels of cross-class integration. From 1916, the authority of the military command was sustained by the fact that, at sub-executive level, societal organizations were closely integrated into the planning structures of the public economy and the state acquired mediatory functions in the interactions between economic bodies. In this respect, the Weimar Constitution appears as a document that immediately transposed the legal framework for coordinating the militarized public economy created in the years 1914-1918 into the formal order of a peace-time state.

In addition to this, the transposition of war-time principles of political order into constitutional law is visible in the fact that the Weimar Constitution reflected patterns of personal attachment and inter-fractional consensualism that developed in the war. The Constitution eventually constructed a normative order that reflected strategies of cross-class collaboration and encompassing citizenship formation that first took shape under conditions of military adversity.

This is evident in the fact that the Constitution was drafted by lawyers and theorists who had assumed political importance in the war, and who had begun to collaborate after 1914, across historically obdurate party-political divisions, because of pressures of war. Notably, although primarily drafted by Hugo Preuß, the Constitution shows the clear influence of a number of theorists, attached to different political parties. The corporatistic provisions in the Constitution bear the primary hallmark of the Social Democrats (SPD), especially Hugo Sinzheimer. However, provisions for economic organization based on norms regarding collectively beneficial use of property (Arts 151, 153) display a commitment to the solidaristic ideals modern Roman Catholicism, reflecting the interventions of politicians in the Zentrum, for example Konrad Beyerle. As discussed, the clauses regarding the Presidency are usually traced to the involvement of Max Weber – attached, like Preuß, to the Left Liberals – in drafting the Constitution. Prior to 1914, collaboration between politicians from the Left Liberals, the SPD and the Zentrum was rare, and, intermittently, it was even outside the realm of ideological possibility.[63] Notably, however, representatives of these parties entered a new constellation during the war, such that co-operation between them became more commonplace. This was largely due to the fact that, during the war, representatives of these parties were invited to assume consultative roles regarding planned revisions to the Imperial Constitution and to the Prussian Constitution (Bermbach 1967). Members of these parties formed the core of the cross-party committee that assumed responsibility for planning democratic constitutional reform. Parties that had collaborated on constitutional reform in the war then, in 1919, became, for a short period, constituent members of the elected Weimar Coalition, which assumed responsibility for ushering in the new Republic. Collaboration between members of these parties thus continued under the auspices of the Constitution. As a result, the writing of the Constitution was deeply linked to the fact that, during the war, inter-fractional divisions became less unbridgeable, and political society as a

[63] For accounts of earlier difficulties in establishing cross-party reformist coalitions see Langewiesche (1988: 226-227) and Grosser (1970: 62, 67).

whole was rendered more unified owing to common exposure to external adversaries. The content of the Constitution in turn gave expression to a fusion of diverse ideological outlooks that would historically have appeared irreconcilable.

More pronouncedly, the tendency in the Constitution to reflect elements of a war-time consensus is observable in the fact that it was strategically designed to appease and mediate differences between rival social classes, reflected in different political parties. In this respect, the Constitution carried over aspects of inter-class and inter-party cooperation promoted after 1914 into the post-war era. During the war, importantly, the term *Burgfrieden*, which echoed a medieval legal term referring to the prohibition of feuding, was used to describe the relations between political parties. This term characterized the situation, beginning in August 1914, in which rival parties abandoned their historical animosities, and all parties collaborated, at least temporarily, in supporting the German war effort. Central to this process was the fact that the SPD declared willingness to sanction levying of war credits for the army (Miller 1974: 57). In some respects, the idea of *Burgfrieden* became the premise for the construction of the social agreements that underpinned the German polity after 1918.

A clear reflection of the *Burgfrieden* is discernible in the composition of the Weimar Coalition itself, whose members, from diverse party-political backgrounds, drafted the Constitution. However, the legacy of the *Burgfrieden* is most strongly apparent in the fact that Constitution as a whole was conceived, in some respects, as an inter-class contract, able to mediate ideals of citizenship endorsed by different parties and the distinct citizenship groups represented by them. In this regard, the Constitution gave sociological voice to Marx's original claim that national constitutions are typically based in imbalanced concepts of citizenship, and they can only obtain full legitimacy if material inequalities between constructs of the citizen reflecting particular class interests are factually limited, or even eradicated (Marx 1958-68 [1844]). Following Marx's vocabulary, thus, the Constitution was designed to establish a principle of democratic *citoyenneté* not reducible to the historical liberal ideals of the bourgeoisie, and it

was expected to construct governmental legitimacy around a vision of the citizen able to integrate all social groups. In this regard, the Constitution mirrored Weber's sociological vision, which was decisively shaped by experiences of war.[64] Weber understood political activities, even when framed by constitutional norms, as the incompletely pacified expression of violent social antagonisms. He advocated a model of constitutional order able to unify citizens at a level of visceral experience, placing them above their customary class positions, and limiting inter-group because of its unifying force (see Weber 1988 [1918]: 424). Central to the Weimar Constitution, ultimately, was the assumption that it must form a broad integrational compact: it could only create a legitimate state if it also created a fully nationalized, fully political citizenship, distilling principles of order and citizenship shared and internalized between otherwise hostile social groups. In this compact, different socio-economic groups, attached historically to different political parties, were expressly requested to abandon strongly entrenched ideological positions, and to commit to a constitutional order driven by trans-societal prerogatives and interests. Friedrich Naumann made this point quite clear in presenting his drafts for the catalogue of basic rights in the Constitution. He declared the intention to consolidate a series of rights that transcended individual class interests, that established social obligations for persons in more privileged economic positions, and that clearly relativized classical liberal constructions of rights as simple private entitlements.[65] On this basis, Naumann understood the Constitution as a whole as an integrational text, whose realization both foresaw and presupposed the emergence of patterns of citizenship not bound or limited by class fissures. Preuß expressed this goal in more paradigmatic terms in 1920, declaring that democracy presupposes the 'synthesis' of 'political equality and unified citizenship', which is required to counter the 'antithesis of capitalists and proletarians' (Preuß 2008: 147).

[64] On the impact of World War I on Weber's late sociology see Ferber (1970: 53).
[65] See Nipperdey's (1979: 526-527) observation on a note above: Weimar as a 'federal state with strong unitary features'.

In these respects, the experience of cross-class compromise instilled in society by the war became the moving spirit of the Constitution. As discussed, the Constitution was built on social foundations created through wartime militarization. At the same time, it reflected the impulse, also expressed during the war, that real citizenship presupposed not only outer militarization, but also the internal demilitarization of society: the Constitution as a whole was intended to promote an experience of national unity that reduced the potential for military violence in relations between social classes. Indicatively, the term *Burgfrieden* was intended to project an alternative to inter-class hostility, and it forms an implied counterpoint to the German term for class struggle (*Klassenkampf*). But, etymologically, the term *Burgfrieden* is also the counterpart to the German term for civil war: *Bürgerkrieg*. The clear objective of the main authors of the Constitution was to extend and solidify the *Burgfrieden*, after 1918, and, in so doing, to avoid civil war or conditions of unmanageable inter-class antagonism. Their purpose was to create a political constitution positioned categorically 'jenseits des Bürgerkrieges' [beyond civil war]. This was to be achieved through the allocation of constitutional roles to a range of economic organizations, on both sides of the industrial divide, who were expected to promote the relative pacification of class relations and the relative solidification of citizenship as a fully political experience (Voßkuhle 2011: 255).

The ethic of class transcendence expressed through the Weimar Constitution assumed accentuated significance after 1918, as the drafting of the Constitution coincided with the onset of the profound process of global ideological polarization that was stimulated by the Russian Revolution, in 1917. Central to the emphasis placed on class compromise in the Constitution was the assumption that some economic aspects of Marxism could be constitutionally remodelled as a pattern of radical Republican citizenship, and that the doctrine of class conflict in classical Marxism, already weakened by the revisionist controversies in the SPD around 1900, could be consigned to ideological history. The effective demilitarization of Marxism was clearly implied as a precondition for the success of the Constitution. Owing to the Russian Revolution, this plan

was articulated in circumstances defined by acute global hostility, in which Marxist doctrine moved unprecedentedly close to military doctrine (see Kondylis 1988). The Constitution was intended to establish conditions for broad socio-economic consensus in Germany at a time when class conflicts were exposed to an incubated process of global remilitarization. In this respect, the Constitution was marked by background conditions close to global ideological war, and it expressly articulated a concept of citizenship that was intended to mediate – simultaneously – between rival patterns of citizenship in the domestic domain and rival external patterns of citizenship in the global domain.

In each respect, the Weimar Constitution was distinct from earlier, more conventional liberal constitutions as it was centred on an understanding of the nation, and of the national citizen within the nation, as a subject that cannot, in simply static legal form, project legitimacy for the constitutional order. On the contrary, the Constitution reflected a construction of citizenship in which national unity required constant reinforcement, and the function of the Constitution, programmatically, was to pull together diverse, residually conflictual sectors of society into a shared system of national collaboration. The nation and the citizen, thus, appeared between the lines of the Constitution, not, in the liberal sense, as simple, normatively constructed legal persons, but as complex socio-material phenomena, which could not be simply presupposed as objective realities, and which could only form the bedrock of legitimacy for the state if conflicts inherent in them were at least partially resolved. Indicatively, Art 157 placed productive labour under national protection, such that labour was posited as an integrational substructure for society as a whole. Art 157 foresaw the eventual construction (never fully realized) of a unified code of labour law. These clauses implied a sense of national citizenship as a reality, founded in labour, which demanded intense construction and protection, to be brought into life through governmental administration of the economy.

In these features, the Weimar Constitution was formulated in essentially militarized terms. On one hand, it eschewed the thin liberal concept of the sovereign citizen as a simple norm, and it posited citizenship as the result, not as

the precondition, of a legitimate constitution. In so doing, it constitutionally committed the state to a deep labour of social mediation and pacification, which required a strong commitment to the resolution of material conflicts. On the other hand, it expressed the expectation that the state demonstrates legitimacy by avoiding civil war, and by ensuring that powerful constituencies in society were separated from the simple protection of entrenched prerogatives. Notably, the Constitution did not give recognition to political parties as organizations under constitutional law, and it clearly sought to avoid institutionalizing public-legal protection for factional interests. At the centre of these aspects of the Weimar Constitution was the fact that, unlike earlier liberal constitutions, it observed the citizens, from which its legitimacy emanated, as citizens formed through war. As discussed, it constructed citizenship as a condition that obtains its supreme expression in the unifying acts of powerful executive bodies, defined by external adversity. In this regard, it implied that the most irreducible source of legitimacy in the polity is expressed through a primal military bond between executive and citizens, in exceptional, war-like situations. However, it also reflected the perception that the formation of citizenship was always precariously linked to civil war, and unified experiences of citizenship, arising paradigmatically from war, could not paper over the fact that national society was always doubly militarized – both along lines created by external enemies and along lines between hostile social classes. The primary function of the Constitution, therefore, was, at one and the same time, to extend and solidify the lines of citizenship construction promoted in war and to prevent the dissolution of citizenship through civil war. In other words, the Constitution was expected to reinforce citizenship created through war and, in the same process, to detach citizenship from war, dialectically both separating and reintegrating the *citoyen* and the *soldat*. The form of citizenship required to obviate the constantly threatened collapse of the polity into civil war was proposed by the Constitution, expressly, as a form of active citizenship, reconciling, in Marx's terms, the *citoyen* both with the *soldat* and with the *bourgeois* at the same time. In this polity, energies of citizenship were to be focused on establishing modes of social coexistence

above material fault-lines in society and, by these means, on reducing the threat of civil war that is always at the core of the modern polity.

2. The return of the *soldat*

It is evident that the dialectical objective of the Weimar Constitution was not successful, and it did not stabilize a model of national citizenship strong enough to overarch the societal fissures in post-1918 Germany or to soften tendencies towards civil war. On the contrary, in different ways, the Constitution exposed German society to an emphatic and profoundly unsettling militarization of citizenship, which the Constitution itself was not able to control and which critically eroded its legitimacy.

At a most obvious level, the militarization of German society under the Weimar Constitution was reflected in the fact that the regular army was not brought fully under civil control, and the army was able, in part, to operate in semi-autonomous fashion. After 1920, the army was instrumental in deciding the overall direction of the Republic. This was partly because, as an actor in domestic politics, the regular army could only be selectively deployed against anti-Republican insurrection, and its own political preferences determined how, and against which opponents, the Republic could be defended. Indicatively, insurgencies led by the Communists in the early 1920s were suppressed either by or with the assistance of the army. In 1923, as one example, the military was used to remove the government of Saxony and to impose a state of emergency under Art 48. During the Kapp Putsch, by contrast, rightist insurgents found extensive military support, and, in some areas, the army shot at and killed demonstrators who mobilized to defend the Republic against the Putsch (Pryce 1977: 114). The unwillingness of the military to defend the Republic against threats from the far right naturally meant that the emergency clauses in Art 48, originally designed to harden the Republic against all acts of political sabotage, were only useful against factions on the political left. By the end of the Republic, Art 48 provided the basis for permanent rule by emergency government. In this government, the

military cooperated closely with ultra-reactionary groups, and the political system moved very close to military dictatorship, giving strategic prominence to military goals.[66] In view of the composition of the final presidential cabinets before Hitler's *Machtergreifung*, it appears highly likely that, without Hitler, the Republic would have ended in rule by military junta. Hitler's government itself was strongly supported by the *Reichswehr*, and it had some features of a military dictatorship.

At a less immediate level, the militarization of German society under the Weimar Constitution was connected to the construction of citizenship under the Constitution. In particular, the fact that the Constitution foresaw the institution of mechanisms for the mediation of economic conflicts meant that hostilities between different social groups, closely linked to distinct class memberships, were translated into overtly political form. As the Constitution was intended to moderate social conflicts, the instruments used by the state to resolve class adversity became integrally politicized, and inter-party hostilities necessarily focused on the legitimacy of the state itself, which was progressively diminished in proportion to the degree to which social conflicts escalated. In fact, the policies that were expressly designed to establish social peace – cross-class corporatism, welfare arrangements – were transformed through the 1920s into objects of extreme animosity between social groups, and mechanisms for placating conflict gave heightened articulation to rival constructs of citizenship. Indeed, the fact that corporatist provisions moved different economic organizations close to the centre of government meant that policy making was susceptible to influence by non-elected organizations, and powerful economic actors acquired influential roles at the periphery of the governmental system. Ultimately, after the beginning of the economic crisis in 1929, organizations linked to big business were able to occupy positions from which they acquired a powerful role in defining public policy, effecting a rapid reduction in the social provisions established under the corporatistic framework that first supported the Republic.

[66] See the analysis of Schleicher's policies in Schildt (1981: 61).

Eventually, therefore, the mechanisms for constructing a cross-class model of citizenship proved susceptible to manipulation by particular economic groups, and they made it possible for the political system to be directed by actors and organizations clearly hostile to inter-class collaboration. In aiming to create a broad societal basis for the political system, the Constitution softened the margins of the political system, and permitted its colonization, in quasi-patrimonial fashion, by groups that expressly rejected the material foundations of the Constitution. Overall, the attempt to craft a new model of citizenship through policies of state-led social mediation merely re-articulated social conflicts in systemically internal, politically intensified form, and it created a situation in which the state and powers within the state became the primary object and goal of social conflict. In view of the political preferences of the army, the Constitution was always tied to the defence of the more reactionary positions in the class conflicts that it politicized, and, despite its literal claim to promote trans-sectoral stability, it buttressed the Republic more strongly against the left than against the right.

In analysing this point, it is important to note that, in its promotion of inner-societal pacification, the constitutional order of the Weimar Republic was supplemented by policies for economic redistribution whose specific aim was to separate socio-economic rights from military formation. This is evident in the policies for the administration of social welfare introduced after 1918. It is widely noted that in most societies the creation of welfare states was originally driven by war. In fact, in most polities, welfare systems were first designed to provide care for persons injured in war and for the dependants of soldiers fallen in combat (Skocpol 1993, Geyer 1983). In most polities, therefore, systems of welfare administration gave privileged recognition for soldiers as a social class. Implicit in such arrangements is the principle that public order is underpinned by recognition of military duties and sacrifices. In such arrangements, elevated citizenship rights are accorded to the soldiers, and the deep dependency of the polity on the soldier is expressed: the link between the *citoyen* and the *soldat* is strongly articulated. In some European polities after 1918, the privileging of

soldiers as distinct citizenship groups extended beyond the allocation of welfare rights, and it included allocation of enhanced political and electoral rights to ex-combatants.[67] The Weimar Republic expressed this legitimational sense of military debt in unusual fashion. In the first years after 1918, the convention of ascribing elevated welfare rights to ex-combatants was continued in Germany, and early welfare laws were intended to alleviate hardships suffered by former soldiers and their families. This was reflected in the first landmark welfare law after 1918, the *Gesetz über die Versorgung der Militärpersonen und ihrer Hinterbliebenen bei Dienstbeschädigung* (1920). Increasingly, however, a more formal system of general welfare provision was created. By 1927, legislation for compulsory unemployment insurance was introduced, which provided social security and social compensation to all groups, without regard for citizenship status or the causes of material deprivation. This policy meant that the distinctions attached to the soldiering class were reduced: the legitimacy of the state was defined in relation to a simple construction of the citizen, with no emphasis on corporate status or affiliation. Most importantly, symbolically, this meant that the basic integrational structure of citizenship was transferred from the military to material aspect of society, so that citizens were unified, in essence, by affiliation, not to a military community, but to a community of persons marked by reciprocal material obligations. In this respect, the welfare system of the Weimar Republic again marked an attempt to build national citizenship onto the integrational foundations constructed by war, yet also to separate the primary unit of the citizen from its military origins.

Indicatively, the attempt to transform welfare provision into an integrational focus in German society misfired catastrophically. Ultimately, controversies over welfare provision proved resistant to consensual mediation, and a stable and generalized system of welfare support was not consolidated. In fact, the unemployment insurance law of 1927 triggered divisions in the coalition that was placed in government in 1928, and this mortally destabilized the

[67] See for one example the Representation of the People Act (1918) in the UK, which gave soldiers privileged access to the ballot box.

Republic: welfare itself became the focus of deep and extremely unsettling polarization (Alber 1986: 9, Timm, 1952: 188). By 1930, elite factions in the Republic turned against the underlying consensual principles that had first motivated the creation of a welfare state. The presidential cabinets led by Brüning and later by Schleicher und Papen were marked by the deep backlash against welfare provision and economic redistribution as a source of legitimacy (Hartwich 1967: 162), and, progressively, this led to the reinstatement of the military as a privileged political class.

In these features, the fate of the Weimar Republic was decided, at the deepest level, by the fact that the internal construction of a relatively pluralistic system of conflict mediation became interlocked, almost immediately after its institutionalization, with the acute ideological conflicts that appeared, after 1917, in the global domain. After the formation of the Weimar Republic, different groups within society, linked to political parties, internalized the lines of global ideological polarization created by the Russian Revolution, and this severely restricted the possibility of consensual collaboration between different groups. On one hand, groups on the far left attached themselves to international Bolshevism. Important in this regard is the fact that, in its mobilizational dimensions, Bolshevism was itself a doctrine of civil war (see Wirsching 1999: 27), and leading ideologues in Moscow observed civil war as a necessary prelude to the assumption of power by the proletariat. At the same time, groups on the far right, already complicit in the murder of the leading Spartakists in 1918-19, understood themselves as part of an armed international vanguard against Bolshevism. As a result, the global civil war that began in 1917 was refracted, acutely, in German domestic politics, and rival political organizations in Germany, already marked by intense hostility, were militarized by their attitudes to Russia and to the implications of the Russian Revolution for interests in German society. Carl Schmitt of course recognized this very directly, as he observed German politics *tout court* as a set of deliberations conducted *sous l'oeil des russes* (Schmitt 1932: 79). This constellation was exacerbated by the fact that, after 1918, many German soldiers had refused fully to demobilize, and rival

military units, not subject to fixed administration, proliferated in society (Keller 2014: 84, Schumann 2001: 204), especially in the territories to the east of Germany where war continued after 1918. Most political parties then either provided cover for, or openly incorporated, paramilitary units that had not disbanded after armistice. Within a short period of time, in consequence, it became apparent that the construction of civil peace that supported the Constitution of 1919 was only figurative. The capacity of the Constitution factually to reconcile armed factions, attached to different positions in the system of domestic social stratification and global ideological rivalry, was insufficiently solidified. Most German political organizations became linked to positions, tying national hostilities to global hostilities, which could not be constitutionally reconciled.

In each of these respects, the Weimar Constitution can be seen as a political compact that was designed, in a broad sense, to regulate the military dimensions of society. It was expressly conceived as an instrument to reconstruct modes of citizenship practice created though war as the premise for a durable civil-political order, implicating all groups – including the army – in the commitment to solidify an overarching construct of citizenship. In this regard, the Constitution proposed as its legitimational unit a fusion of the *citoyen*, the *soldat* and the *bourgeois*. However, the overt politicization of citizenship and the clear recognition of the fact that citizenship cannot be projected as neutral norm created conditions in which the legitimational premises of the Republic were subject to intense militarization, both normatively and factually. Central to this was the fact that, in the classical style of a military constitution, the Weimar Constitution connected domestic citizenship groups to global polarities, such that domestic conflicts, which the Constitution was expected to resolve, became inseparable from positions in a global civil war. Quite literally, the construction of citizenship through the mediation class conflicts, which was intended to insulate the polity against social conflict, became a vector in which the polity was opened to acutely unsettling conflicts, exacerbated by international hostilities.

Conclusion

The Weimar Constitution can be read, at a literal level, as a military constitution. It can also be read, at a reflexive level, as a sociological analysis of the relation between war, national integration, democracy and citizenship, drawing on the related ideas of Marx and Weber to establish fully national legitimational norms for functions of state. As such, the Weimar Constitution was designed to express the outcome of a long cognitive process, reaching back to 1789. It was intended to construct the basis of governmental legitimacy both by extending and pacifying processes of integration and subject formation expressed in war, and by distilling patterns of citizenship construction shaped by war as the foundations for a stable, pacified polity. Paradoxically, however, the result of this reflexive process was that the Constitution was immediately locked into a system of global conflict, and it transmitted this conflict, in intensified manner, into national political institutions. Conceived as a Constitution for national pacification, it was not able to operate in the conditions of global civil war in which it acquired force. Ultimately, it was not until after 1945 that the cognitive process begun in 1789 began to approach completion. At this point, national constitutions remained connected, perhaps more immediately than in the 1920s, to global lines of political-ideological polarization. However, constitutions created after 1945 tended to devise instruments to insulate domestic political interactions against pressures in the global domain: they did this by promoting patterns of citizenship, founded, not in collective mobilization, but in single rights of particular persons and universal obligations of state organs. The long path towards the pacification of inner-societal conflicts, which eventually became the precondition for democracy, depended above all on the increasing global propensity, manifest after 1945, towards the demilitarization of political legitimacy per se. This propensity depended on the global rise of human rights law, which, uniquely, created a normative system able to bring legitimacy to national polities without the articulation of deeply embedded conflicts between citizens. The second democratic constitution in Germany, drafted hastily in 1948-

49, played a pioneering role in using globally defined rights to separate legitimacy from inner-societal conflicts. To this degree, the Weimar Constitution formed a key cognitive step in a global learning process.

References

Adler, FH (1995) *Italian Industrialists from Liberalism to Fascism. The Political Development of the Industrial Bourgeoisie, 1906-1934* (Cambridge, Cambridge University Press).

Alber, J (1986) 'Germany' in P Flora (ed), *Growth to Limits. The Western European Welfare States since World War II, vol. 2: Germany, United Kingdom, Ireland, Italy* (Berlin, de Gruyter), 1-154.

Altensteins Denkschrift (1807) in G Winter (ed) (1931), *Die Reorganisation des Preussischen Staates unter Stein und Hardenberg. Erster Teil. Allgemeine Verwaltungs- und Behördenreform, vol. I: Vom Beginn des Kampfes gegen die Kabinettsregierung bis zum Wiedereintritt des Ministers von Stein* (Leipzig, Hirzel), 364-566.

Bermbach, U (1967) *Vorformen parlamentarischer Kabinettsbildung in Deutschland. Der interfraktionelle Ausschuß 1917/18 und die Parlamentarisierung der Reichsregierung* (Cologne, Westdeutscher Verlag).

Boldt, H (1980) 'Der Artikel 48 der Weimarer Reichsverfassung. Sein historischer Hintergrund und seine politische Funktion' in M Stürmer (ed), *Die Weimarer Republik. Belagerte Civitas* (Königstein, Athenäum), 288-309.

Boulanger, P (2001) *La France devant la conscription. Géographie historique d'une institution républicaine 1914-1922* (Paris, Economica et Institut de Stratégie Comparé).

Burschel, P (1994) *Söldner in Nordwestdeutschland des 16. und 17. Jahrhunderts. Sozialgeschichtliche Studien* (Göttingen, Vandenhoeck und Ruprecht).

Challener, RD (1965) *The French Theory of the Nation in Arms 1866-1939* (New York, Russell & Russell).

Constant, B (1997 [1819]) 'De la liberté des anciens comparée à celle des modernes' in B Constant, *Écrits politiques* (Paris, Gallimard), 589-619.

Crépin, A (1998) *La conscription en débat. Ou le triple apprentissage de la nation, de la citoyenneté, de la République (1798-1889)* (Arras, Artois Presses Université).

Ehni, HP (1975) *Bollwerk Preußen? Preußen-Regierung, Reich-Länder-Problem und Sozialdemokratie* (Bonn, Neue Gesellschaft).

Eisner, MA (2000) *From Warfare State to Welfare State. World War I, Compensatory State Building and the Limits of Modern Order* (University Park, PA, Pennsylvania State University Press).

Elben, W (1965) *Das Problem der Kontinuität in der deutschen Revolution. Die Politik der Staatssekretäre und der militärischen Führung von November 1918 bis Februar 1919* (Düsseldorf, Droste).

Englberger, J (1995) *Tarifautonomie im Deutschen Reich. Entwicklung des Tarifvertragswesens in Deutschland von 1870/71 bis 1945* (Berlin, Duncker und Humblot).

Feldmann, GD and Steinisch, I (1985) *Industrie und Gewerkschaften 1918-1924. Die überforderte Zentralarbeitsgemeinschaft* (Stuttgart, Deutsche Verlags-Anstalt).

Feldman, GD (1997) *The Great Disorder. Politics, Economics and Society in the German Inflation 1914-1924* (New York, Oxford University Press).

Ferber, C (1970) *Die Gewalt in der Politik. Eine Auseinandersetzung mit Max Weber* (Stuttgart, Kohlhammer).

Fletcher, A (1698) *A Discourse concerning Militias and Standing Armies, with relation to the past and present governments of Europe, and of England in particular* (Edinburgh).

Geyer, M (1983) 'Ein Vorbote des Wohlfahrtsstaates. Die Kriegsopferversorgung in Frankreich, Deutschland und Großbritannien nach dem Ersten Weltkrieg' 9(2) *Geschichte und Gesellschaft* 230-277.

Grassmann, S (1965) *Hugo Preuß und die deutsche Selbstverwaltung* (Lübeck, Matthiesen Verlag).

Grosser, D (1970) *Vom monarchischen Konstitutionalismus zur parlamentarischen Demokratie. Die Verfassungspolitik der deutschen Parteien im letzten Jahrzehnt des Kaiserreichs* (Den Haag, Martinus Nijhoff).

Gürke, N (1934) 'Die österreichische „Verfassung 1934"' 25(2) *Archiv des öffentlichen Rechts* 178-255.

Hacker, M (2013) *Gibt es "Gerechtigkeit" in der Steuerpolitik? Der politisch-philosophische Diskurs über Recht und Gerechtigkeit am Beispiel der Entstehung des modernen Einkommensteuerrechts in der Weimarer Republik* (PhD Dissertation, Freie Universität Berlin).

Hartwich, HH (1967) *Arbeitsmarkt, Verbände und Staat. Die öffentliche Bindung unternehmerischer Funktionen in der Weimarer Republik* (Berlin, de Gruyter).

Hasiba, G (1981) 'Das kriegswirtschaftliche Ermächtigungsgesetz (KWEG) von 1917. Seine Entstehung und seine Anwendung vor 1933', in Rechtswissenschaftliche Fakultät der Universität Salzburg (ed), *Aus Österreichs Rechtsleben in Geschichte und Gegenwart. Festschrift für Ernst C. Helbling* (Berlin, Duncker und Humblot), 543-565.

Hasiba, G (1985) *Das Notverordnungsrecht in Österreich (1848-1917). Notwenigkeit und Mißbrauch eines „staatserhaltenden Instrumentes"* (Vienna, Verlag der österreichischen Akademie der Wissenschaften).

Hauriou, M (1892) *Précis de droit administrative, contenant le droit public et le droit administratif* (Paris, Larose & Forcel).

Heinemann, PO (2018) *Rechtsgeschichte der Reichswehr 1918-1933* (Paderborn, Schöningh).

Hintze, O (1962) *Staat und Verfassung. Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte.* Ed. Gerhard Oestreich, 2nd ed. (Göttingen, Vandenhoeck & Ruprecht).

Hippler, T (2006) *Soldats et citoyens. Naissance du service militaire en France et en Prusse* (Paris, PUF).

Kania, L (2019) *Wyroki bez apelacji. Sądy polowe w wojsku polskim w czasie wojny z Rosją Sowiecką 1919-1921* (Zielona Góra, Uniwerstytet Zielonogórski).

Keller, P (2014) *»Die Wehrmacht der Deutschen Republik ist die Reichswehr«. Die Deutsche Armee 1918-1921* (Paderborn, Schöningh).

Kęsik, J (1998) *Naród pod bronia. Społeczeństwo w programie polskiej polityki wojskowej 1918-1939* (Wrocław, Wydawnictwo Uniwersitetu Wrocławskiego).

Kocka, J (1973) *Klassengesellschaft im Krieg. Deutsche Sozialgeschichte 1914-1918* (Göttingen, Vandenhoeck und Ruprecht).

Kondylis, P (1988) *Theorie des Krieges. Clausewitz – Marx – Engels – Lenin* (Stuttgart, Klett-Cotta).

Langewiesche, D (1988) *Liberalismus in Deutschland* (Frankfurt am Main, Suhrkamp).

Leonhard, J (2008) *Bellizismus und Nation. Kriegsdeutung und Nationsbestimmung in Europa und den Vereinigten Staaten 1750-1914* (Munich, Oldenbourg).

Levi, M (1996) 'The Institution of Conscription' 20(1) *Social Science History* 133-167.

Löhr, A (1929) 'Die Entwicklung des Schlichtungswesens' in R Hönigschmid-Grossich, E Leidig and A Löhr (eds), *Zwangsschiedsspruch und Schlichtungswesen. Drei Abhandlungen* (Jena, Fischer).

Mariot, N (2013) *Tous unis dans la tranchée? 1914-1918, les intellectuels rencontrent le peuple* (Paris, Le Seuil).

Marszałek, PK (1995) *Rada obrony państwa z 1920 roku. Studium prawnohistoryczne* (Wrocław, Wydawnictwo Uniwersytetu Wrocławskiego).

Marx, K (1958-68 [1844]) Zur Judenfrage in K Marx and F Engels, *Werke in 43 vols, v. 1* (Berlin, Dietz Karl), 347-377.

Miller, S (1974) *Burgfrieden und Klassenkampf. Die deutsche Sozialdemokratie im Ersten Weltkrieg* (Düsseldorf, Droste).

Naumann, F (1920) 'Speech in the National Assembly on constitutional rights' 329 *Verhandlungen der verfassunggebenden Nationalversammlung* (Berlin, Druck und Verlag der Norddeutschen Burchdruckerei und Verlags-Anstalt).

Nipperdey, T (1979) 'Der Föderalismus in der deutschen Geschichte' 94 *Bydragen en Medelingen Betreffende de Geschiedenis der Nederlanden* 497-547.

Preuß, H (1915) *Das deutsche Volk und die Politik* (Jena, Eugen Diederichs).

Preuß, H (2008) *Gesammelte Schriften*, vol. 4, D Lehnert ed (Tübingen, Mohr Siebeck).

Pryce, DB (1977) 'The Reich Government versus Saxony, 1923: The Decision to Intervene' 10(2) *Central European History* 112-147.

Redlich, F (1964) *The German Military Enterpriser and his Work Force. A Study in European Economic and Social Policy*, vol. 2 (Wiesbaden, Franz Steiner).

Richter, L (1998) 'Die Vorgeschichte des Art. 48 der Weimarer Verfassung' 37(1) *Der Staat* 1-26.

Sahm, R (2019) *Theorie und Ideengeschichte der Steuergerechtigkeit* (Berlin, Springer).

Schildt, A (1981) *Militärdiktatur mit Massenbasis? Die Querfrontkonzeption der Reichswehrführung um General von Schleicher am Ende der Weimarer Republik* (Frankfurt am Main, Campus).

Schmidt, R (1927) 'Der preußische Einheitsstaat und der deutsche Bundesstaat: Gedanken zur Revision des Artikels 18 der Reichsverfassung und des Gesetzes zur Ausführung der Neugliederungsbestimmungen' 16 *Zeitschrift für Politik* 201-241.

Schmitt, C (1932) *Der Begriff des Politischen* (Berlin, Duncker und Humblot).

Schumann, D (2001) *Politische Gewalt in der Weimarer Republik 1918-1933. Kampf um die Straße und Furcht vor dem Bürgerkrieg* (Essen, Klartext).

Skocpol, T (1993) 'America's First Social Security System: The Expansion of Benefits for Civil War Veterans' 108(1) *Political Science Quarterly* 85-116.

Steiger, K (1998) *Kooperation, Konfrontation, Untergang. Das Weimarer Tarif- und Schlichtungswesen während der Weltwirtschaftskrise und seine Vorbedingungen* (Stuttgart, Franz Steiner).

Timm, H (1952) *Die deutsche Sozialpolitik und der Bruch der großen Koalition im März 1930* (Düsseldorf, Droste).

Triepel, H (1925) 'Der Föderalismus und die Revision der Weimarer Reichsverfassung' 14 *Zeitschrift für Politik* 193-230.

Trippe, CF (1995) *Konservative Verfassungspolitik 1918-1923. Die DNVP als Opposition in Reich und Ländern* (Düsseldorf, Droste).

Voßkuhle, A (2011) 'Hugo Preuß als Vordenker einer Verfassungstheorie des Pluralismus' 50(2) *Der Staat* 251-267.

Weber, M (1988 [1918]) 'Parlament und Regierung im neugeordneten Deutschland' in M Weber, *Gesammelte politische Schriften* (Tübingen, J.C.B. Mohr), 306-443.

Wirsching, A (1999) *Vom Weltkrieg zum Bürgerkrieg? Politischer Extremismus in Deutschland und Frankreich 1918-1933/39. Berlin und Paris im Vergleich* (Munich, Oldenbourg).

Witt, PC (1970) *Die Finanzpolitik des deutschen Reiches von 1903 bis 1913. Eine Studie zur Innenpolitik des Wilhelminischen Deutschlands* (Lübeck, Matthiesen).

Ziemann, B (1997) *Front und Heimat. Ländliche Kriegserfahrungen im südlichen Bayern 1914-1923* (Essen, Klartext).

9. Between the existing power and the desired order: forms of world domination and horizons of law[68]

José Eduardo Faria

Introduction

The institutions of law have undergone deep structural changes in the final two decades of the 20th century and in the begginings of the 21st century. In an earlier era, they were the instrument for defining the rules of political, social and economic life of a country, of a national society bonded to a state order. Then their reach diminished, as constitutions were reformed to contexts with less state intervention, regulatory mechanisms were repealed, and markets became increasingly self-regulated.

These changes have several causes. They began with the defeat of social democracy in the United Kingdom and the United States in 1979 and 1981, leading Keynesian policies to be replaced by the neoliberal policies originally adopted by the governments of Margaret Thatcher and Ronald Reagan. Large-scale transformations in global political economy advanced with the dismantling of the Soviet Union and the entry of Eastern European countries into the market economy, thus ending the cycle of planned economies (with the notable exception of the Chinese hybrid experiment). And they culminated with the fall of the Berlin Wall in 1989. The new economic order then emerging in the final decade of the 20th century accelerated the globalization of markets for goods, services and finance, while at the same time increasing the jurisdiction of supranational entities and multilateral organizations, thus eroding the principles of sovereignty and territoriality (Faria 2001).

[68] Lecture given at the Law School of Anáhuac University, Mexico DF, on 6 September, 2022, during the International Conference on 'Derecho al Futuro: formas de domínio del mundo y horizonte de derecho', in honor of Professor Raffaele De Giorgi. Translated by Lucas Fucci Amato.

Moreover, the 20th-century model of law did not account for this new trans-territorial economic order. The notion that the national state is the holder of the monopoly on the production of legal norms, for instance, has been called into question. Financial and economic globalization has gone far beyond the pacts, covenants, treaties and conventions signed on the basis of the sovereign authority of states. From the multiplicity of decrees, ordinary laws, extraordinary laws and constitutional norms in each country, we have moved towards a differentiation of legal systems defined no longer in national and territorial terms, but now in functional and sectoral terms.

1. Twelve Points

All this added up eventually led to a new political and legal agenda, in which a few points – between a *de facto* economic power that exists today and a desired republican order – are worth highlighting. They are:

(i) The consequences of overcoming the idea of territoriality - and, consequently, of all institutions of law produced from it on the basis of the principle of absolute sovereignty of the nation-state;

(ii) The ineffectiveness of traditional representative democracies in formulating, implementing, and enforcing public policies, with the subsequent decline in the population's trust in governments, on the one hand; and the tensions caused by the crisis of representativeness expressed by presidents of the Republic who divide society between 'the defenseless people' and the 'corrupt and corrupting elites,' thereby exacerbating ideological polarization, partisan radicalization, and populist nationalism, on the other hand;

(iii) the tension between *extreme market freedom* and *democracy*. This kind of freedom is exclusionary, disseminates an individualistic culture, deepens the pattern of inequalities as a whole, makes the so-called 'vulnerables' disposable, and claims the suppression of democratic legislative controls. In the limit, it culminates in a scenario of social Darwinism, which excludes the guarantee of

rights for the poorest. Democracy is egalitarian by nature and implies a minimum list of social rights for the most disadvantaged segments;

(iv) the discussion about how much social inequality a democracy can sustain without the risk of collapsing;

(v) the tension between the redistributive effects inherent in processes of strengthening democracy and the costs they entail for elites;

(vi) the negative impact on democratic regimes caused by the economic crisis – and, consequently, the fall in the level of employment – resulting from the outbreak of the pandemic (Covid-19), thereby increasing different patterns of inequality, the emergence of populist movements and the risks of authoritarian backlash;

(vii) the danger of degradation of the constitutional order, because of the need to repeatedly modify it to adapt it to constant social and economic changes;

(viii) doubt regarding the future of constitutionalism, since at the present time many problems lie not only outside the borders of nation-states, but also outside the institutionalized political sector at the international level;

(ix) the uncertainty regarding global networks, transnational organizations, and new forms of associations, configurations, and groupings as to whether they are constitutionalizable;

(x) the attempt to implement so-called *illiberal democracies*. In these democracies, democratic rules are used by authoritarian politicians and groups with the aim of reducing institutional mediations, undermining fundamental guarantees, eroding public liberties, and liquidating minority rights. Recently, taking advantage of the pandemic, authoritarian leaders tried to limit the validity of the Constitution to situations of 'normality'; this has not only left health authorities free to arbitrarily choose the ways to fight Covid-19, but has also freed some governments from the primacy of positive law and granted more prerogatives to their leaders, justified as emergency measures that, once the crisis is over, will not be suspended;

(xi) the realization that small changes can turn into massive transformations, with cascading risks, such that several bad things can happen

simultaneously, leading to the challenge of thinking of the pandemic in terms of 'systemic complexity';

(xii) the functional exhaustion of the traditional categories and procedures of the law constituted by liberal constitutionality in the course of the 20th century and the emergence, in the 21st century, of new transversal and transdisciplinary domains of legal knowledge.

With the loss of the centrality of law in nation-states, which is one of the common denominators of the points made above, legal monism and the idea of sovereignty have given way to legal pluralism and shared sovereignties (Sueur 2012, Faria 2001). In this way, as the process of denationalization of law production became more pronounced, part of the legislative authority of national states ended up being displaced from their respective parliaments to non-legislative instances and to international, supranational and multilateral organizations. At the same time in which the legal order of the national states flowed into the area of influence of these entities, the formation of commercial blocks also triggered a wave of regional legal orders, also known, mainly in Europe, as *community law.*

From this global integration of financial and economic markets for goods and services, a multi-centric legal order has progressively emerged, based on an intricate combination of local, national, regional, international and global normativities. This model of law emerging in the transition from the 20th to the 21st century is distinguished by mechanisms ranging from contractual networks to trans-territorial normative frameworks. Designed to underpin globalized operations and new forms of governance, these contractual networks and normative private orderings are providing a new and original framework for legal theory and political science – the deterritorialization of legal regimes, the emergence of *cosmopolitan norms,* the advent of *multinational zones of sovereignty,* and the creation of so-called *stateless global laws*.

2. The new legal order

The legal order of the 21st century consists of a normativity of multiple levels, where rules of local, national, regional, international or even global validity coexist. The expansion of this new model of law, unlike what occurs in the legislative process of national states, tends to be little controlled by traditional political systems. An example of one such level is the *lex mercatoria*, which acts as a legal statute of extraterritoriality. Since it did not arise institutionally within the framework of the national state, it has no formal validity. However, it is effective, since it is respected in world trade, where agreements prevail between corporations to avoid in their globalized transactions the problematic application of their countries' commercial law.

As economic, financial and commercial globalization accelerated and global value chains were consolidated, globalized markets began to develop their own legal structures, with a much lower degree of formalization than the legal model built during the 20th century and with more flexible rules. This is a model that operates by means of normative concepts influenced not only by technical-legal notions, but also by economic notions and sociological concepts. As a result, national states are, in practice, no longer a *locus* of coordination between a territory, a community, an administration, and legitimacy. Their existence is not threatened. What changes profoundly are their functions and roles.

However, if on the one hand financial and economic globalization has forged a legal order that meets the needs of world markets for goods, services, and finance, on the other hand political power within national states has been colonized by economic power. One of the most dramatic consequences of this colonization of politics by economics is the tendency to relax or repeal social legislation. Insensitive to disparities in wealth and income distribution and influenced by an exacerbated economic liberalism (or libertarianism), the new legal order ignores poverty. Opposed to protective laws, the neoliberal model of law imposes that each citizen provide for his or her own needs.

This conception of law consecrates the *hyper-responsibility of* individuals with respect to their own decisions and their own destinies, leaving unprotected the hypossufficient, thus aggravating the problem of unemployment, inequality and misery, on the one hand, and the advancement of the dissatisfaction of part of the population, on the other. Paradoxically, while citizens are made responsible for their social and economic lives, the social role of the state is diminishing – to the point of being *unaccountable* for its traditional obligations and its historical responsibilities in terms of providing public services to society. This, like a vicious circle, further deepens inequality and, consequently, the subsequent reaction against this process.

The future of the model of law that has been built since the transition from the end of the 20th century to the first decades of the 21st century entails at least two enormous risks and a worrying question. The first risk is that the largest world corporations will use their economic weight to extract advantages in the processes of *de facto* international or transnational organizations, pressuring national states. The second risk is that of the subordination of weaker regulatory communities as a result of the political and economic weight of stronger communities.

The question is no less worrying than these two risks and will be presented here and taken up again at the end of this essay. In a world scenario in which the new legal order has been developing at different levels, far beyond the traditional legal order of the national state, meeting the imperatives of the global markets for goods, services and finance, is it still possible to submit this new law to the mechanisms of democratic legitimation?

Discussions such as these raise a wide repertoire of questions – many of which still lack the prospect of plausible answers in the short term. One such question, for example, is whether – after the Covid-19 pandemic of 2020-2022 – the transterritorization of markets for goods, services, and finance will once again be resilient, as it was during the 2008 financial crisis, during the trade wars initiated by President Donald Trump's administration, and after the British voted for Brexit. Or whether national states, in times of falling stock markets and rising

interest rates, will be able to regain some of their regulatory power lost by the aforementioned social, economic, political, legal, and institutional transformations in the transition from the 20th to the 21st century.

In other words, what we have here is a clash between globalization *versus* 'renationalization' or 'de-globalization' - a clash already seen on the occasion of the 2008 global financial crisis, which was triggered by the insolvency of major mortgage finance agencies in the United States and England (Eichengreen 2009). After the volume of international trade had risen from 18% to 33% of the total value of the world economy, with the 2008 crisis it fell to 28%. Although the global value and supply chains were put under strain, the global banking crisis mainly hit the capital markets and financial sector, affecting investment funds and pension funds (for an analysis of the impact of this crisis on the legal environment, see Ladeur 2011, and also Teubner 2012). The crisis brought down all the world's stock markets as a result of the collapse of hundreds of American and European banking institutions, among them Bear Stearns and Lehman Brothers, which was founded in 1850 and was the fifth largest investment bank in the United States at the time of that crisis. It also forced several European countries – such as Germany, France, Austria, the Netherlands, Italy, and Hungary – to launch aid programs totaling 1.17 trillion euros to help their respective financial systems.

3. Regulatory Trilemma

Both then and in the current times of pandemic and war between Russia and Ukraine, the global financial crisis of 2008, and the public health crisis that emerged in 2020 with the Covid-19 pandemic have made explicit a regulatory trilemma facing the global economy. This trilemma involves fundamental points for both the Theory and Sociology of Law and contemporary Political Science. They are (Teubner 2006, 2019, 2004, Innerarity 2015):

(i) the transterritorialization or transnationalization of markets for goods, services and finance;

(ii) the unlimited sovereignty of the nation-state, based on the ideas of territoriality and borders;

(iii) representative democracy, with free, periodic elections and secret voting.

With regard to the first point of this trilemma, when financial and economic globalization prevails, the nation-state tends to weaken, ceasing to be a *locus* of coordination or articulation between a territory, a community, a legitimacy and an administration. In the case of financial markets, for example, the decisions that define the legal mechanisms to regulate them within nation-states are increasingly taken at a global level, thus paving the way for a process of denationalization of law. This consequently means – both in the political and in the economic sphere – that the state begins to progressively lose part of its power to establish public law and private law that is applied within its territorial limits.

In other words, what we have here is the realization that the nation-state is no longer the holder of the monopoly on the production of positive law in its territory. Among other reasons because, with the phenomenon of globalization of the markets for goods, services and finance, the state is being forced to submit itself to logics, guidelines and imperatives that tend to relativize its sovereignty. More and more it tends to be subjected to anti-regulatory pressures from international organizations, supranational entities, multilateral organizations and the world markets themselves, which are becoming material sources of law.

In the limit, with the growing colonization of political power by economic power, positive law is no longer conceived in the constitutional and democratic terms inherent to the liberal constitutionalism forged during the 20th century. In other words, positive law is no longer seen as an element of a normative model in the form of a pyramid of political, economic and social regulation. It is taking

the form of a more flexible, negotiated and pragmatic conception of a legal order with an increasingly polycentric character (Thornhill 2018)[69].

Thus, as the interdependence between national states and international entities, multilateral organizations, sovereign credit rating agencies, private regulatory bodies and non-state actors increases, just as territorial boundaries become more diffuse and gain multiple and porous identities, legal production tends to move to non-legislative instances, where there are no mechanisms for political inclusion. In this way, the multiple relational space propitiates more open commitments than those of the historical period in which the territorial space had a fixed, objective and rigid dimension in the life of societies.

Common to the modern conception of the rule of law, the reductionism of law to positive law – and, from this, to constitutional law – thus gives way to a relativization of the sovereignty of the traditional legislator. And, consequently, to a legal pluralism constituted by the processes of transterritorialization of markets, by the subsequent dispersion of power centers and by a growing multiplication of distinct and dynamic regulatory poles. Resulting from the erosion of the political-economic centrality of the national state and the multiplication of non-state normative sources - such as *private* sources (involving regulatory procedures developed by business entities), *technical sources* (based on scientific expertise) and *community sources* (based on the capacity of articulation and mobilization of different sectors of society, through NGOs and social movements), this pluralism, as already mentioned, implies a combination of different local, regional, international, supranational and global normativities.

Arising from the continuous tension between homogeneous national spaces and heterogeneous trasterritorial and functional spaces, these normativities range from the form of simple networks of contractual alliances, a *lex digitalis* and a new *lex mercatoria* - the law arising from a *societas mercatorum* or a *business community,* which establishes the very contractual obligations and the very adjudication networks responsible for the management of possible

[69] On the process of reconfiguration of law institutions in scenarios of structural transformations of socioeconomic and political character, see Chevallier (2014) and Lhuilier (2016).

controversies[70] - to a set of norms of medical deontology established by medical councils and to codes of good practice or corporate ethics present in the different functionally differentiated subsystems of the economic system (financial, industrial, services, etc.).

They also involve federative or confederative experiences that result in the figure of community law (such as the law of the European Union) or, especially, that arising from the Court of Justice of the European Union. They also include indicators and standards defined by international private agencies for risk classification and granting of degrees of reliability of public debt issued by national states, technical standardization in security matters, professional self-regulation (in which the subjects to be regulated themselves determine the norms that will guide their conduct and control their compliance), case law established by international arbitration chambers, and transnational laws.

4. Multi-level normativity

In the limit, it is an intricate normativity, which is not only plural. Equally, it is a normativity of multiple levels, some of which are produced without respect for the legislative process and some of the classic principles of the democratic rule of law, such as *e.g.* transparency, predictability, and uniformity in the application of statutes and case law.

One of the main characteristics of this intricate combinatorics of normativities is the fact that they are overlapping and have no greater coherence

[70] Acting as a kind of extraterritorial legal statute, without validity, because it does not arise within the framework of the state, but is pragmatically formed by means of agreements, the *lex mercatoria* was the medieval mercantile law on which merchants based themselves to formalize their transactions in the great trading places of the Middle Ages. The new *lex mercatoria* is the business law created on the basis of the usual clauses in commercial contracts that are accepted as legal in the business world, clauses that are highly malleable and adaptable to the circumstances of each case. These contracts are prepared by multinational law firms of American and English origin, managed as service companies. These are 'contracts without law', that is, contracts that, despite often being written in the language of private law, do not presuppose a state legal system that endows them with formal validity and supplements their gaps. In the dynamics of the new *lex mercatoria*, these law firms – also known as *merchants of norms* – substitute the state, the contract, the law, and the judicial decision (substituted by private arbitration) (Dezalay and Garth 1995).

among themselves, combining rules of local validity with rules whose validity can be translocal, regional, international and supranational. Another important characteristic of this multi-level, multi-scale legal system lies in the fact that it tends not to be controlled by the political system.

> […] the state lacks the force to be the fulcrum of a challenge to transnational economic powers, unless it plays at the same level as them, by connecting to a wider network of non-state institutions. (Esposito 2022: 73)

> As a result, the functions of the global political system can only be performed in such a way that the individual states coordinate with other states and with non-state regimes, which excludes the traditional hierarchical control of social activities from the outset. (Golia and Teubner 2021: 10)

These sociologists of law place special emphasis on the growing number of *de facto* international or transnational organizations, *i.e.* organizations whose creation did not necessarily result from treaties or conventions signed between countries. This is the case, for instance, of the World Telecommunication Policy Forum (WTPF), the International Telecommunication Union (ITU), the collaboration agreement signed by the United Nations Environment Programme (UNEP) with the International Olympic Committee (IOC) and the Basel Committee for Banking Supervision (BCBS), which was originally created as a simple group composed of experts on best practices in international banking.

Acting with enormous flexibility, informality, speed, and the ability to attract and involve interested sectors, international *de facto* organizations thus end up tending to play an important role in constituting what legal theorists and sociologists today call a 'network' or 'regulatory reticular community.' This tendency, however, leads to two problems. First, the greater the number of 'nodes,' the greater the tendency for the unity of this 'regulatory community' to

weaken, especially when it is integrated by many *de facto* international organizations.

> […] the single nodes are clearly distinguishable from the network, although the collective entity constitutes them as parts of the network. Unlike in federations, in networked statehood this contradiction cannot be overcome by a hierarchical structure where the centre takes precedence. (Golia and Teubner 2021: 24)[71]

Moreover, to the extent that the traditional political rationality of the modern state implies acting in all sectors of society, which by principle presupposes that governmental decisions prevail over all other modes of problem solving, the second problem is no less important than the first. The question is whether (and, if so, how) it is possible to reconcile the competition between state regulatory bodies and the networks or 'regulatory reticular communities' that have emerged with the new patterns of global governance. How can the plurality of different partial regulatory rationalities arising from these communities or networks be effectively integrated in functional terms with state regulatory mechanisms?

To put the question in other terms: what ensures the functionality of the hybridity between the two regimes of global regulation and governance? What is the point of convergence between the internal regulatory standards of each country and the official and unofficial regulatory standards of these communities, networks or 'reticular communities'? The answers carry on the sin of pessimism, since empirical research promoted by sociologists of law and political scientists have detected some risks of considerable importance.

Three new risks – in addition to those already mentioned - are worth mentioning. All are interconnected. The first is the risk of capture of the unofficial standards of these regulatory networks by financial corporations, private

[71] See also Teubner (2011) and Willke (1986).

conglomerates, and cartelized or monopolized sectors, which use their financial and business power to extract advantages by meddling in the negotiation processes of the *de facto* international organizations with national states (Picciotto 2018). The second is the risk that, pressured by these conglomerates, corporations and cartelized sectors, many regulatory networks end up having the capacity to override the regulatory bodies and mechanisms of certain states, taking advantage of their expertise in regulatory matters in the most sophisticated sectors of the globalized economy. The third risk is that the expansion of the scope of law in globalized spaces tends to favor global interest groups in the field of international business, moving increasingly away from the spaces controlled by states and weakening the more 'localized' spaces.

The simple enumeration of these risks desecrates the idea of extreme functionality implicit in the coexistence of diverse legal systems independent of each other, and not subject to the primacy of national constitutions, developed by sociologists of law linked to systems theory, in their work on legal pluralism. In the real world, it can be observed that there is not exactly a fully functional balance between normative systems. What does exist, rather, is a wide constellation of interests in contexts that are often cartelized or monopolized, and in whose axiological universe – as the Coimbra jurist António Manuel Hespanha (2019) reminds us – there is often a predominance of legal engineering developed to promote hegemonic objectives in relation to 'less strong' interests; this legal design is based on artificialism, greed, opacity, the spirit of fiction and deceit, and disregard for collective interests and even democratic standards (see, equally, the discussion held some two decades earlier by William Twining 2000).

As a consequence of the enlargement of the field of law on a global scale, and this is the second point of the regulatory trilemma, democracy also faces enormous difficulties in concretizing on the legal institutions the political will determined by society through free elections, based on universal and secret voting and majority rule. The idea of the contemporary state has been associated with the idea of democratic legitimacy. However, since the transition from the 20th to the 21st century, the deliberative mechanisms of representative democracy

have progressively lost political force. Consequently, they have also been replaced by arbitration systems, or else by evaluation and expert mechanisms. Moreover, the legislative monopoly of parliaments has tended to shift progressively to intergovernmental systems and supranational and multilateral bodies, as well as to epistemic communities composed of experts, consultants, risk analysts, research centers, and think tanks, whose neutrality, inclusiveness and legitimacy may often be questioned.

5. Is the democratic legitimization of the new legal order possible?

Thus, in this scenario in which legal practices are developing at levels far beyond the national state, the questions that reappear again are in the sense of knowing what needs to be done to try to preserve the principle of the democratic legitimization of law, which is one of the fundamental pillars of constitutional states? What about the constitutional principle that, within a democracy, the legal system is based on society's approval, obtained through the mechanisms of periodic scrutiny and political representation? Starting from the premise that a definition of law that is sensitive to community feelings of justice is imperative in the way of democratically legitimizing power and law, how to maintain what jurists call the 'democraticity' of law in a context of extraterritorial or transterritorial legal pluralism?

Finally, with specific reference to the third point of the regulatory trilemma, the great challenge at the political level is to deepen the idea of representative democracy as a model of legitimation of the contemporary state. The problem, however, is that facing this challenge collides head-on with the process of financial and economic globalization (Rodrik 2011, Ladeur 2004). Due to increasing interdependence and the dynamics of globalization, national states are no longer able to fulfill or execute what their respective societies expect from a democratic government. Therefore, this challenge presupposes a huge effort for state strengthening and reaffirmation of national self-determination in a historical period in which traditional party-political actions face the

incongruence between the territoriality of the national political system and the globality of other systems - starting with the expansion of regulatory regimes on a global scale.

Remembering that in the clash between the iron pot and the ceramic pot the weaker one always breaks, this is not an easy challenge to overcome. After all, if on one hand it consists in making democracy compatible with the reality of transterritorialized spaces, on the other hand, in the globalized structures of the economy, power is shared among different institutions and organs, so that each one tends to end up with a certain veto power.

References

Chevallier, J (2014) *L'État post-moderne* (Paris, LGDJ).

Dezalay, Y and B Garth (1995) 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes'. 29(1) *Law & Society Review* 27-64.

Eichenfreen, B (2009) 'The crisis and the euro', 23 *Elcano Royal Institute Working Papers*. Available at: https://www.realinstitutoelcano.org/en/work-document/the-crisis-and-the-euro-wp/ Accessed on 18 Jan. 2023.

Esposito, R (2022) *Institution* (Cambridge, Polity).

Faria, JE (2001) *El derecho en la economía globalizada* (Madrid, Trotta).

Golia, A and G Teubner (2021) 'Networked statehood: no institutionalised self-contradiction in the process globalisation?' 12(1) *Transnational Legal Theory* 7-43.

Hespanha, AM (2019) *Pluralismo Jurídico e Direito Democrático: Prospectivas do Direito no Século XXI* (Coimbra, Almedina).

Innerarity, D (2015) *La Política en Tiempos de Indignación* (Barcelona, Galaxia-Gutemberg).

Ladeur, K-L (2004) 'Globalization and the Conversion of Democracy to Polycentric Networks; can democracy survive the end of the Nation State?'

in K-H Ladeur (ed), *Public Governance in the Age of Globalization* (London, Routledge).

Ladeur, K-H (2011) 'The Financial market crisis - a case of network failure?, in P Kjaer, G Teubner and A Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: the dark side of functional differentiation* (Oxford, Hart).

Lhuilier, G (2016) *Le Droit Transnational* (Paris, Dalloz).

Picciotto, S (2018) *Regulating Global Corporate Capitalism* (Cambridge, Cambridge University Press).

Rodrik, D (2011) *The globalization paradox: democracy and the future of the world economy* (New York, W. Norton).

Sueur, J-J (2012) 'Analyser le pluralisme: pour comprendre la mondialisation?', in J-Y Chérot and B Frydman (eds), *La Science du Droit dans la Mondialisation* (Bruxelles, Bruyant).

Teubner, G (2004) 'Global Private Regimes: neo-spontaneous Law and Dual Constitution of Autonomous Sector?', in K-H Ladeur (ed), *Public Governance in the Age of Globalization* (London, Routledge). Publishing.

Teubner, G (2006) 'From the national State to the global State, or the decline of democracy' 13(4) *Constelletions - International Journal of Critical and Democratic Theory*.

Teubner, G (2011) *Networks as Connected Contracts* (London, Bloomsbury).

Teubner, G (2012) *Constitutional Fragments: societal constitutionalism and globalization* (Oxford, Oxford University Press).

Teubner, G (2019) 'The project of constitution sociology', in G Teubner, *Critical theory and legal autopoiesis: the case of the societal constitutionalism* (Manchester, Manchester University Press).

Thornhill, C (2018) *The sociology of law and the global transformation of democracy* (Cambridge, Cambridge University Press).

Twining, W (2000) *Globalization and Legal Theory* (Evanston, Northwestern University Press).

Willke, H (1986) 'The tragedy of State: prolegomena to a theory of State in polycentric Society'. 72(4) *ARSP-Archiv für Rechts und Sozialphilosophie* 455-467.

10. Justice system and Brazilian democratic-constitutional crises: a systems theory approach

Nathalia Penha Cardoso de França

Introduction

Authoritarianism never ceased to exist in the interior of democratic States, it just took a different form from the classic military tank on the streets, entering the justice system and the everyday functioning of the rule of law, little by little suspending rights and defrauding legal and electoral processes, serving the interests of others. This phenomenon is analyzed in Brazil by the names of measures of exception, liquid authoritarianism or even states of exception (Serrano 2016, Pires 2021).

When the behavior of institutes belonging to the legal system, according to Luhmann, is no longer guided primarily by the legal semantics of the textual models of the Constitution, of the law, to be guided primarily by other social models of conduct. This means that the analysis of what is licit because there is something illicit is replaced by the analysis of what is licit because it is rich, or even what is licit because it is profitable.

In the logical perspective of the imposition of a neoliberal policy that imposes itself in the current Brazilian political scenario, political power is necessarily subjugated to economic power, whose system led by financial capital calls for authoritarianism and state punitivism as an instrument to guarantee the great operations of the market and to contain the violence generated by the increase in social inequality that inexorably results from this excluding economic model.

Using the hypothetical-deductive method, this study intends to find out whether it is possible to look at this relationship between economic, political and

legal systems through the lens of Luhmann's systems theory, especially regarding systemic corruption.

1. State of exception: from the tanks on the streets to liquid authoritarianism

In the end of the 2nd World War and with the emergence of legislation and international bodies for the protection of human rights, which became universal and entered the domestic legal systems through rigid constitutions, becoming true anti-fascist seeds, in the words of Luigi Ferrajoli (2014), there is no longer any way to legally support the classic mechanisms of combating the national enemy, be it the communist, the Jews, the black peoples or any type of real existence that prevents the realization of the hegemonic discourse of order, nationalism and racial supremacy, as we have sadly seen in the last century, in some countries.

With the impossibility of legally sustaining the atrocities perpetrated by the classic States of exception present in the 20th century, such as German Nazism, Italian fascism and the military dictatorships established in Latin America, among other authoritarian models that existed in the aforementioned historical period, the concentration and extermination camps – for the elimination of undesirable physical bodies – began to be replaced in the 21st century by a construction that operates in the discursive field, much more sophisticated and difficult to verify, but which assumes a highly harmful power for those who are pointed the weapon of legal manipulation: a sure shot of arbitrariness that destroys, if not physically, symbolically, the existence of the other, the declared enemy, who is denied the condition of person and the rights inherent to it by the simple condition of being one.

This phenomenon has been adopted in contemporary Brazil by the Justice System with wide media and popular support, whose main and indispensable function is to disseminate this special form of discursive construction of reality distortion. This not only legitimizes the adopted practices, but also intensifies ideological disputes in the construction of hate as a policy in the social bosom

and rescuing the binary logic of friend/enemy and the suppression or symbolic death of undesirables.

One can therefore speak of exceptional measures within democratic societies, or even of the presence of permanent exceptional governability, whose practices currently occur without the adoption of suspension of the current legal order, but as an occasional technique of government in that there are two models of State coexisting simultaneously and in parallel: a rule of law formally democratic state, foreseen in the Federal Constitution, and accessible only to the economically included and politically convenient; and a state of real exception present in the political-juridical practices adopted against the declared enemies by the holders of the power, which are chosen according to the needs of the moment to maintain the establishment.

Discussion of a historical, political and also legal nature, which presents a relevant debate involves the proposition that the contemporary democratic erosion no longer originates from actions external to the democratic regime itself, dynamics historically of a militarized character, but, currently, from the own democratic paths offered; of their own structures, under the democratic and plural guise, however.

That is to say, in a centrifugal dynamic, from the inside out, as a parasitic factor that is often imperceptible in the face of the tendency of tolerant and diverse societies, consisting of a certain difficulty in identifying the moment when the exercise of freedom of opinion and thought effectively transmutes in an attack on the same freedoms and guarantees. It means verifying that democratic prerogatives are being instrumentalized by authoritarian, Nazi-fascist, supremacist and racist movements that co-opt them in a more fluid, discreet and imperceptible way.

By pointing out the characteristics of what Pedro Estevam Serrano (2016) calls liquid authoritarianism, Luis Manuel Fonseca Pires (2022) presents the concept of states of exception – in the plural form, indeed – and makes us see the political path towards the curtailment of freedoms, as it reveals more mixed with the apparent structures aired by the democratic vision, when compared to the

models and mechanics of the recent past, typical of Nazi-fascism and the dictatorships of the Southern Cone and Eastern Europe under Soviet rule, with tanks and street troops, in clear and well-located ruptures in time and space. In this sense, says Pires (2022):

> [...] However, since the beginning of the 21st century a new form of authoritarian regime has emerged that brings together three distinctive characteristics: a) It is phantasmagoric: because authoritarianism is a process in constant construction and does not have a date that symbolizes its beginning. There are no uniforms, insignia, or greetings to the leaders. I give President Nayib Bukele of El Salvador as an example: in April 2020 he kept people whom the government suspected of having contracted COVID-19 locked up in "containment centers" and refused to comply with release orders from the Court of Justice; in February 2021 he entered the Legislative Assembly accompanied by the army with the clear purpose of intimidating legislators; in May 2021, five judges of the Supreme Court who judged the government were exonerated from their positions. On what date did authoritarianism begin in El Salvador? It cannot be specified. As Professor Pedro Serrano, from the Pontifical Catholic University of São Paulo, says, in our time we live in a "liquid authoritarianism". b) It is disguised: because it hides its authoritarian character. On the contrary, it makes frequent use of the word "democracy" and of fundamental rights such as life, liberty and equality, to harass these same values. Examples are Hungary and Poland and so many legislative measures against freedom of expression. c) It is fragmented: because it is not presented in its entirety, it does not claim to be totalitarian, but rather it weakens the various spheres of democratic life with attacks of different and intermittent intensities. There is a circularity of attacks: sometimes against the press; then to the Judiciary if it opposes; later, against education and culture; then

> the environment, etc., and then the first enemies are attacked again. At each turn the circle closes a little more. It is because of this characteristic that I suggest calling the new political-legal form of "liquid authoritarianism" states of exception. I use the plural, states, because the assaults on democracy are fragmented. Brazil is a tragic example [...].

This analysis points towards a hidden symbiosis between formal democracy and authoritarian practices that do not dispense with the omission and collaborative inertia of institutions that should exercise, through quick perception, their political powers; that would have as an obligation and function the projection of relations between powers clearly based on the idea of checks and balances, already so detailed by constitutional theory. But this is not the case, since, historically, democratic and control institutions have usually been lenient with political groups that routinely demean the values and foundations of democracy.

One can clearly see a process of internal corrosion, gradual and incessant, like the rust that gradually corrodes the metal. There is a paradoxical symbiosis between the columns that support democracy and the concealed actions by the radicalized bases that use them to weaken them. An important example, which almost constitutes a pattern followed by interlocutors in defense of authoritarian banners, involves freedom of thought and opinion, a fundamental guarantee that constitutes a premise for the consolidation of a solid and stable democratic regime.

A true criminalization of politics so that political control is carried out by economic power, and questionable techniques to contain the violence generated by the increase in social inequality, which inexorably results from this excluding economic model, determines a very effective practice of managing the undesirables.

This inequality, by the way, that looms large as an intrinsic consequence of the current stage of capitalism that no longer depends on the working-class workforce, indispensable in the phase of eminently industrial capitalism, but on

the phantasmagorical market fetish that produces wealth from the feedback of capital itself: financial and asset accumulation concentrated in the hands of half a dozen family oligarchies that hold control of these new speculative mechanisms, whether on virtual negotiation tables or in the press, for example, and the political locus to keep the gears of the power structure running perfectly to meet their own interests and generating, in this sense, a contingent of disposable and marginalized people, susceptible to all kinds of violence and denial of their citizenship condition. This is the new, more subtle but equally violent form of exception that coexists with democracy.

2. Relevant points of Luhmann's Systems Theory

The fundamental premise of systems theory establishes that "social systems operate autonomously based on functional differentiation in relation to their environment" (Scholl and Malik 2019). Based on this distinction, the system acquires its unity and functionality (Borch 2011). This contrast between system and environment is called functional differentiation and it minimizes environmental pressures by building complex internal structures to deal with such interference. In Luhmann's (1995) thought, the system is nothing more than the difference to its environment, and its function is to solve specific problems within and for societies (Görke and Scholl 2006). Luhmann's macrotheory investigates whether it is possible to establish a social order and proposes to observe it scientifically.

Based on the work of Humberto Maturana, biologist, Luhmann uses the concept of autopoiesis, that is, production and reproduction of fundamental system operations, to describe the recursive performance of self-referential systems. In other words, autopoiesis means the self-production and copying of communication in social systems and consciousness in psychic systems. In his words, autopoietic systems "not only produce and change their structures", but "everything that is used as a unity by the system is produced as a unity by the system itself" (Luhmann 1995: 3).

Thus, autopoiesis refers only to the operational level of the system, it does not involve the domain of the external environment. In short, social systems are self-referential, self-organizing, and self-reproductive. "It is possible to determine a mode of operation that is found only in that system." (Baraldi, Corsi and Esposito 2021: 38). "Also, "[t]he autopoiesis of social systems is based on its elementary component: communication" (Scholl and Malik 2019).

Social systems exist insofar as they establish limits in relation to their external environments, that is, the central premise of autonomy. However, autonomy should not be confused with autarky, which implies that social systems cannot be influenced by their environment. From another perspective, Luhmann considers that social systems are closed or hermetic in relation to their basic function and operations, but open in terms of structure. The autonomy of systems can be understood as the self-determined selection of environmental influences.

Systems, according to Gonçalves and Villas Bôas Filho, "are able to organize and change their structures from their internal references, produce their elements and determine their own operations" therefore, they create themselves (Gonçalves and Villas Bôas Filho 2013). The subsystems, such as the political, the economic, the legal, have their own logic and operational code, that Luhmann calls binary code. For the first one, it would be government/opposition (or in power/not in power), for the middle one, profitable/unprofitable, and for the latter, licit/illicit or legal/illegal (Luhmann 2016). As per Luhmann:

> Law, as well as politics, is inserted as one among other subsystems and, therefore, capable of developing its own codes to perform their reciprocal functions within society. The first, as will be seen using the right/non-law code, works to stabilize behavioral expectations, while the second, by making use of the government/opposition code, acts to condense the formation of public opinions in such a way that it is possible to make decisions that bind collectively. (Luhmann 2002: 490)

The legal system, exemplified by a criminal procedure, should be guided only by the binary code of the licit-illicit, which means, in this concrete example, analysing the possibly criminal conduct of the defendant and, when comparing his act with the law, impartially convict or acquit, according to the established criteria. On the other hand, the economic system works by the logic of profitable or unprofitable, observing whether a given choice of economic model or a given operation brings profit or not. Finally, the political system, which obeys the logic of the government-opposition, or power and not power, wanting to demonstrate the tension and strategies adopted by political decision-making.

Therefore, for Luhmann, modern positive law is conceived as a self-referential and autopoietic subsystem of the global social system. To this end, it absorbs frustrations in the temporal dimension through sanctions and generalizes expectations in the social dimension through fictitious consensus, giving them immunities in the material dimension (Gonçalves and Villas Bôas Filho 2013: 97).

For the author, inclusion and exclusion refer to the way in which human beings are indicated in the context of communication, so that one can take them as relevant or not to some given interests. Therefore, the inclusion of the human being is not the incorporation into society, in the same way that the exclusion is not the expulsion, that is, the human being can be included in the economic system, but not in the political one.

In a society structured on the basis of differentiation, inclusion occurs with insertion in a certain segment, and exclusion occurs when transferring to another one. In this sense, it is possible to reflect that not being included in a segment can make life practically impossible. As a result, inequalities are only justified in view of the internal criteria of each functional subsystem. That said, the systemic analysis related to inclusion and exclusion is larger and more complex, allowing an understanding of the relationship between inclusive semantics, correlated in modernity, and the high degree of social exclusion (Gonçalves and Villas Bôas Filho 2013: 347)

3. Corruption of systems and exceptionality in Brazil

As seen, the legal system, being guided by the binary code of legal and illegal; the economic system working according to the logic of profit or non-profit; and the political system, which obeys the logic of government-opposition, or even power and not power, are the main subsystems of analysis of this text.

When these systems, which in the reality of things coexist very closely, begin to collide, especially with the imposition of binary economic and political codes on the legal system, we have a criminal process - to keep to the above-mentioned example - decided not by the neutral analysis of conduct as being contrary to the law or not, but the transformation of this (these) process(es) into a political arena of struggle for power or of withdrawing a candidate from this struggle, of imprinting the logic of economic power of the great companies for which the most profitable result is of interest to the holders of this power.

System corruption means exactly that, that is, elements of another system, without passing through the code-difference filter of a given subsystem, enter and remain in it. When the boundaries between a subsystem and the environment are diluted, however, we are faced with the so-called allopoiesis, instead of the already explained autopoiesis.

According to Marcelo Neves, it is not, therefore, a question of eventual blocks in the autopoietic reproduction of positive law, which can be overcome through complementary immunization mechanisms of the legal system itself, this problem, when pathological, implies a generalized commitment to operational autonomy (Neves 2007: 146).

Behavior is no longer guided primarily by the legal semantics of the textual models of the Constitution, of the law, to be guided primarily by other social models of conduct. “The paradox 'licit because illicit' is de-paradoxed by the formulas 'licit because rich', 'licit because friend', etc.” (Arnaud and Lopes Jr 2004: 148). In summary, the concept of autopoiesis is the opposite of that of allopoiesis, so that the negation of one implies the presence of the other.

The separation between economic and political power that marks the rise of liberal democracy is subverted by the neoliberal rationality that advances as a globalizing phenomenon from the 1980s onwards, and particularly in Brazil, from the 1990s onwards.

Issues such as mass incarceration, selectivity of criminal punishment, disrespect for criminal and procedural rights and guarantees, media spectacle and condemnation, hypernomy and private appropriation of language by law enforcers and agents as a whole that make up the criminal justice system, are, roughly speaking, the main phenomena observed in this technique of managing undesirables within the logic of neoliberal policy.

The expansion of criminal law as an instrument of social control, easing or even subtracting the rights of the accused – or of those who are persecuted by criminal justice – occurs in various parts of the world for different reasons.

However, it is important to note that the policy of mass incarceration adopted within the scope of neoliberalism from the beginning of the 1990s in Brazil, and which led to this unbridled increase in the prison population, was not accompanied by a decrease in crimes considered violent or a decrease in of the feeling of insecurity. As per Pedro Serrano and Renata Magane:

> The supposed "solution" to combat drug trafficking and ensure greater security for society was imported by Brazil, which, from the 1990s onwards, has seen the number of prisoners in the country increase by 707%, from a contingent of 90,000 inmates to over 726,000 in a span of just 26 years. Today we have the third largest incarcerated population in the world, in absolute terms, behind only the United States and China, and the 31st in relative numbers (ratio of prisoners per 100,000 inhabitants, in countries with populations over 10 million). (Serrano and Magane 2020)

With a population of 726,000 prisoners and the third largest in the world (INFOPEN 2016), behind only the United States and China, we have not seen the

rate of violence regress, which contradicts the discourse of incarceration and punitivism as an effective public security policy against the increase in crime.

It is important to point out that these mechanisms that we have described as exception measures adopted concomitantly in the democratic routine, without suspension of the current legal order. In the countries of peripheral and unequal capitalism in Latin America, the exceptional measures are aimed at the internal enemy, which can be both the criminal (poor, mostly black and marginalized portion of society), and the corrupt (generally the politician who does a lot for the vulnerable people and does not serve the interests of big capital).

Classic examples of this described reality, of the economic and political systems corrupting the legal system, are the impeachments and coups d'état of democratically elected presidents; and the criminal prosecutions of exception and persecution of political leaders, generally progressive and who displease the powerful.

The impeachment of President Dilma Rousseff in 2016 was yet another facet of these exceptional measures that, without any plausible legal basis, illicitly, unconstitutionally and aggressively interrupts a legitimate mandate, suppressing popular sovereignty and the political right of more than 54 million people, thus hollowing out democracy (Serrano and Magane 2020).

It is important to emphasize that the Judiciary has acted in these processes as a legitimator of the institutional coups perpetrated, because although the Federal Supreme Court has determined the rules of the impeachment process, it has not yet pronounced itself on the measures that contest the process and its flagrant illegalities (Serrano 2016: 59).

There is no doubt that in the case of President Dilma's impeachment, more than an unconstitutionality, which in itself would be of such seriousness, an interpretation of the facts was used in the light of a manipulation of the legal text in order to interrupt the democratic cycle and implement a project that solely and exclusively served the interests of the dominant economic elite, which was confirmed with the implementation of the labor reform and the constitutional amendment of the public spending ceiling, particularly with regard to

investments in social areas, approved without any difficulty shortly after the President's dismissal.

Final remarks

As studied, for Luhmann, social systems are closed in relation to their basic function and operations, and it is in this topic that we can see the phenomenon of the modern exception. As seen, the legal system, being guided by the binary code of legal and illegal; the economic system working according to the logic of profit or non-profit; and the political system, which obeys the logic of government-opposition, or even power and not power, are the main subsystems of analysis of this text.

When these systems, which in the reality of things coexist very closely, begin to collide, especially with the imposition of binary economic and political codes on the legal system, we have a criminal process - to keep to the above-mentioned example - decided not by the neutral analysis of conduct as being contrary to the law or not, but the transformation of this (these) process(es) into a political arena of struggle for power or of withdrawing a candidate from this struggle, of imprinting the logic of economic power of the great companies for which the most profitable result is of interest to the holders of this power.

In Brazilian society, to confirm the hypothesis, the superimposition of economic and political codes on legal issues makes the autonomy of the legal system impossible. Therefore, there is a systemic corruption of the political and economic subsystems on top of the legal subsystem. Law becomes an instrument of politics or even the economy, either through the casuistic mutation of normative structures, mainly during authoritarian periods, or through the game of interests and particularistic profits that block the normative implementation process.

References

Arnaud, A-J and Lopes J, D (2004) (eds), Niklas *Luhmann: do sistema social à sociologia jurídica* (Rio de Janeiro, Lumem Juris).

Baraldi, C, G Corsi and E Esposito (2021) *Unlocking Luhmann: a keyword introduction to systems theory* (Bielefeld, transcript).

Borch, C (2011) *Niklas Luhmann* (Abingdon, Routledge).

Ferrajoli, L (2014) *Poderes Selvagens: a crise da democracia italiana* (São Paulo, Saraiva).

Gonçalves, GL and Villas Bôas Filho, O (2013) *Teoria dos sistemas sociais: direito e sociedade na obra de Niklas Luhmann* (São Paulo, Saraiva).

Görke, A and Scholl, A (2006) 'Niklas Luhmann's Theory of Social Systems and Journalism Research' 7(4) *Journalism Studies*.

Infopen (2016). *Relatório de Informações Penitenciárias.* Available at: http://www.justica.gov.br/noticias/ha-726-712-pessoas-presas-no-brasil/relatorio_2016_junho.pdf. Access in: 30.9.2022.

Luhmann, N (2002) *El derecho de la sociedade* (México, Universidad IberoAmericana).

Luhmann, N (2016). *O Direito da Sociedade* (São Paulo, Martins Fontes).

Luhmann, N (1995). *Social systems* (Stanford, Calif, Stanford University Press).

Neves, M (2007). *A constitucionalização simbólica* (São Paulo, Martins Fontes).

Pires, LMF (2002) 'Autoritarismo líquido: Un Nuevo Desafío Para La Justicia Transicional.' *Maastricht Blog on Transitional Justice*. Maastricht University. Available at https://transitionaljustice.net/?p=1056. Access in 28.9.2022.

Pires, LMF (2021). *Estado de Exceção: a usurpação da soberania popular* (São Paulo, Contracorrente).

Scholl, A and M Malik (2019) 'Systems theory and journalism', in A Scholl and M Malik (eds), *Oxford Research Encyclopedia of Communication* (Oxford, Oxford University Press).

Serrano, PEAP and RP Magane (2020). 'A governabilidade de exceção permanente e a política neoliberal de gestão dos indesejáveis no Brasil'. 7(2) *Revista de Investigações Constitucionais* 517-547.

Serrano, PEAP (2016). *Autoritarismo e golpe na América Latina: breve ensaio sobre jurisdição e exceção* (São Paulo, Alameda).

11. Democratic legitimation through the electoral procedure: fake news and electronic voting in contemporary Brazil

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1. Introduction

Brazil has a history of distortion of electoral competition by economic and political power and by severe asymmetries in access to the means of communication dissemination. Some historical examples regarding these distortions stand out, such as the *voto de cabresto* at the beginning of the Republic, a vote given by the voter to candidates who were pressured by a political leader, without the voter knowing exactly who he votes for or why he votes; or the *eleição a bico de pena* were the results of the counting boards were made to show certain results, which were not always confirmed by counting the votes cast in the electoral section (see Schwarcz, Starling 2015: ch. 13-14). On the other side, the press was only authorized in Brazil after the arrival of the (Portuguese) royal family in 1808, and decades earlier the circulation of Enlightenment and republican ideas had provoked rebellions that were violently repressed. In the imperial period, parliamentarianism came to be implanted in a stratified slave society and voting was stratified by income; until 1881, about 13% of the Brazilian population actually participated in the electoral process; after that, due to restrictive electoral reforms, the level was around 1%. With the proclamation of

the republic, universal suffrage for men was established, but voting rights were denied to the illiterate, what maintained the previous scenario. It was still a rural society based on oral culture, while we had a republic of bachelors, dominated by those with access to writing and to debates in the press and in parliament. Moreover, the electoral system was contaminated by the economic power of the colonels and oligarchies and by the Power Verification Commission, directed by the central government, which arbitrarily excluded candidates who had received enough votes but were of no interest to the groups in power. The Revolution of 1930 led by Getúlio Vargas had as one of its banners the guarantee of the vote and, in fact, extended suffrage to women and reinforced the secrecy of the vote. Moreover, it created the Electoral Court, which since then has combined administrative and jurisdictional functions. But during the *Estado Novo* (1937-45) the National Congress was closed. In the democratic interval from 1945 to 1964, for the first time more than 10% of the population went to the polls; radio was the great popular vehicle for entertainment and debate. During the military dictatorship, many transformations began to put pressure on an opaque and closed political system – most Brazilians began to live in cities and the ratio of voters to the total Brazilian population jumped from 18% to 50%. But only since the re-democratization of the 1980s has more than half of the Brazilian population actually been going to the polls, most notably the extension of voting to the illiterate by the 1988 Constitution (see Amato 2021a).

The 2018 elections shed light on a new social dynamic – the massive dissemination of misinformation and fake news by digital platforms – and revealed how much Brazilian law failed to learn about how to regulate the virtual public sphere. In 2020 and 2021, the Covid-19 pandemic only intensified a process of increasing digitalization of society – classes and meetings, purchases and contracts, political campaigns and artistic performances, family gatherings and scientific discussions, all events and spheres of communication became intermediated by digital applications, platforms and networks.

Meanwhile, misinformation has also overflowed the arena of electoral disputes, contaminating debates about science and public health. The 2018

elections, especially in the presidential race, displayed in new 'cyber' or 'digital' costumes the vices entrenched in our representative democracy: the abuse of economic power, clientelism and populism.

Precisely in this first elections after the prohibition of corporate campaign financing (STF, ADI 4650-DF, judged in 2015), economic power found new ways to radiate in the political dispute, with serious evidence of the assembly of an organized scheme of dissemination of misinformation and hate speech in favor of the winning presidential slate. With the inauguration of the newly elected federal government in January 2019, the legislative and judicial responses for the treatment of fake news were not long in coming. However, with the victory of Jair Bolsonaro (a low-ranking former military man, a former member of the clientelist and patrimonialist parliamentary group known as 'centrão,' now established as a Donald Trump-inspired populist-authoritarian leader) as president of the republic, disinformation went from electoral strategy to government policy (references to 'digital militias' and a 'hate cabinet' coordinated from the seat of the Executive Branch being notorious in the media). During the four years of his mandate (2019-2022), disinformation was propagated directly by the president of the republic himself, regarding vaccines and drugs to combat Covid-19. With the approach of the new electoral process (in October 2022, with elections for president, deputies, senators, and governors), the president of the republic has amplified the spread of disinformation, questioning the credibility of electronic ballot boxes, campaigning for the reinstatement of printed ballots, and demanding the presence of the Armed Forces in the supervision of the electoral procedure, which for 90 years has been run by an independent institution: the Electoral Justice.

The purpose of this chapter is to present an analysis of the problem of massive dissemination of misinformation by digital media ('fake news'), based on the history of Brazil between two federal and state elections (including, especially, the election of the president of the republic) – in 2018 and 2022. Adopting the social systems theory approach, we seek to offer a reading of the functioning of the legal and political systems in confronting such problematic.

Our hypothesis is that the institutionalization of the legal and political systems was placed under radical insecurity, which led to operations charged with reestablishing the legitimation through procedures, including the need to restore trust on the electoral process. The argumentation follows in some steps: we present the legislative and judicial initiatives covering the topic of fake news since the 2018 elections; then we present the context immediate before the 2022 elections, encompassing threats to the respect of the outcomes of the electoral process; finally, we summarize a systemic-theoretical analysis of this recent legal-political trajectory.

2. Brazilian legislation on fake news and digital communication

If the Brazilian Electoral Justice was created during a regime of exception (1932, during the provisional government of Getúlio Vargas), our current Electoral Code dates from an explicit dictatorship (1965, during the military regime). Both were designed in a mass industrial society of rapid economic growth and dominated by centralized means of communication – the media companies (press, radio and TV) selected how and what to inform, managing the news and redundancies of communication (Luhmann 2000). The current Electoral Code, although it has undergone several amendments, was designed when television was still in its infancy as a major means of mass communication. In its current form, the Code (Law 4737/65) typifies the crimes of libel, defamation, and slander (arts. 324, 325 and 326) and criminalizes the spreading of untrue facts in electoral propaganda (art. 323). Furthermore, Law 9.504/97 provides for the right of reply against the disclosure of facts 'known to be untrue or offensive' facts (art. 58) and, since 2013, criminalizes the 'direct or indirect hiring of groups of people with the specific purpose of issuing messages or comments on the Internet to offend the honor or denigrate the image of a candidate, party or coalition' (art. 57-H, §1). Law 13.834/2019 included in the Electoral Code the typification of the crime of slanderous accusation, including the conduct of 'whoever, demonstrably aware of the innocence of the accused

and for electoral purposes, disseminates or propagates, by any means or form, the act or fact falsely attributed to her' (Art. 326-A, §3).

Also in September 2019, the parliament responded to massive electoral disinformation by establishing the Mixed Parliamentary Inquiry Commission (CPMI) on Fake News, conducted by members of the Federal Senate and the House of Representatives. An arena of investigation and, above all, of political pressure, this CPMI evidenced the instrumentalization of State resources and organs in favor of communicative manipulation. The Commission was suspended in early 2020, without effectively finalizing its work. In 2021, the legislative mobilization was around the Parliamentary Inquiry Commission on Covid-19 in the Federal Senate, directed to inspect the conduct of the health policy to combat the coronavirus pandemic. The report of this Parliamentary Commission suggested that the Executive Branch should be held responsible for a strategy of misinformation and negligence regarding vaccination and treatment against the new Coronavirus. Thus, the issue of massive disinformation has moved from the focus on electoral procedure to the health policy sector.

Alongside the political pressure and impact on public opinion, axis of the activity of parliamentary commissions of inquiry, the legislative responses to disinformation as an electoral strategy and public policy have involved, on the one hand, the draft of a Brazilian Bill of Freedom, Responsibility and Transparency on the Internet. The Fake News Draft Bill (approved in the Senate in June 2020 and in slow progress in the House of Representatives) goes in the path of previous laws on digital communications, such as the Internet Bill of Rights (2014) and the General Law on Personal Data Protection (Barros *et al.* 2022, Saba *et al.* 2021, Amato, Saba and Barros 2021). The latter statute was approved in August 2018, on the eve of the elections, but with successive postponements of the beginning of effectiveness, it came into force only in September 2020, with sanctions enforceable from August 2021 on.

Not only the progress of the Fake News Draft Bill is similarly troubled, as it involves the interests of political groups and digital platforms, but the very content of the statute reveals the difficulty of state law to deal with such a new

and intricate theme as the use of technologies under the dominion of global corporations. Adopting indeterminate and merely finalistic norms (instead of clear and complete rules), including debates and definitions from experts in the field, and appealing to the media companies themselves, academics, and civil society movements is a constant in the regulation of digital communication. Article 31 of the Fake News Bill is exemplary in this regard, instituting 'regulated self-regulation', organized through an authority composed of representatives of the state and the private sector (social network providers and private messaging services). The opportunity is for state law to learn to regulate a new and highly technical subject; the risk is the capture of the public and national interest by the interests of global private companies (Amato 2021b).

On the other hand, when the House and Senate approved, on August 10, 2021, the bill that repealed the old 1983 National Security Law, they already typified the crime of 'mass misleading communication', vetoed by the president of the republic (the veto was not overturned by Congress until the 2022 elections). In September 2021, the president issued a provisional measure amending the Internet Bill of Rights to prevent the suspension and blocking of accounts on social networks because of misinformation; suffering rejection from the digital platforms themselves, the measure was suspended by the Supreme Court and was resubmitted in a bill sent by the Executive to Congress. Still in September 2021, the basic text of the new Electoral Code bill was approved in the House of Representatives, but the vote in the Senate is expected to take some time. The bill signals concern about fining disinformation and banning the use of robots in the boosting of electoral propaganda by social media. In short, the new federal and state election cycle (in October 2022) took place without the approval of the Fake News Bill or a new Electoral Code. In a government with broad support in the legislature, it proved difficult to advance any regulatory legislation for digital communications.

3. Judicial responses to fake news

The Supreme Court opened, as early as March 2019, Inquiry 4.781/DF (known as the 'fake news inquiry'), which proved to be a means of political pressure by diagnosing an organized disinformation network set up around the executive power. In July 2021, the Supreme Court shelved the inquiry into 'anti-democratic acts' (opened in April 2020) and the Federal Police began working on the 'digital militias' inquiry. In August 2021, the Superior Electoral Court decided to open an administrative inquiry to investigate several crimes involved in communication strategies to attack the legitimacy of elections and the soundness of electronic ballots. While the Supreme Court ordered the arrest of a deputy in February 2021, in the scope of the fake news investigation, the Superior Electoral Court, in October, revoked a parliamentary mandate for spreading disinformation about electronic ballot boxes. In April 2022 – one semester before the new elections, therefore – the Supreme Court sentenced to prison for eight years a federal deputy who had called on the Armed Forces to intervene in the Court; unexpectedly, the deputy was pardoned by presidential grace established by decree, and returned to work in the Chamber of Deputies. The fact is that the Supreme Court has become a favorite target of the president's supporters, who propagate the discourse of a coup d'état (they call it 'constitutional military intervention') that would include 'closing the Supreme Court'.

In short, the Supreme Court is working on five related inquiries: 4781, known as the 'fake news inquiry', investigates the dissemination of fake news and attacks against ministers of the STF; 4828, inquiry that investigated the organization of 'anti-democratic acts', was filed and gave rise to inquiry 4874, about 'digital militias' that would act to undermine the rule of law; 4879, an investigation focused on violent acts during the September 7th (national independence holiday) in 2021; 4888, an investigation opened after Bolsonaro disseminated fake news linking the vaccine against the covid-19 to AIDS. It was in this procedural environment that the search and seizure of a group of businessmen who discussed in private messaging app groups the possibility of

supporting a coup d'état was determined by the Supreme Court; the justification was that such businessmen could be the economic support behind the orchestrated operations of fake news dissemination through digital media.

From the point of view of the Electoral Justice, the highlight is the Superior Electoral Court. The actions before that Court around the 2018 elections generally received monocratic decisions, without the formation of a consistent jurisprudence on fake news. Privileging freedom of expression and the autonomy of voters to inform themselves, the court did not even touch on points such as hate speech and the protection of personal data by digital platforms. In general, it established a strong presumption in favor of free speech, against further 'policing' of false content on private messaging services and social networks (Barros *et al.* 2022, Saba *et al.* 2021, Amato, Saba and Barros 2021).

The Superior Electoral Court had the opportunity to further evaluate the abuse of economic power and the abusive use of the media by the winning presidential slate in 2018, pursuant to art. 22 of LC No. 64/90, in proceedings opened because of the mass shooting of disinformative messages, hired in favor of that slate by legal entities, including. However, in February 2021, the electoral judicial investigation actions (AIJEs 0601779-05 and 0601782-57) on the issue culminated in a paradox: understanding that it would not be within that type of procedure to determine the conduct of further investigative measures, the majority of the Court decided for the acquittal of the elected presidential plate for lack of evidence on the mass shooting of digital messages in the 2018 election (Barros *et al.* 2022, Saba *et al.* 2021, Amato, Saba and Barros 2021). In August 2021, the TSE decided to open an administrative inquiry to investigate several crimes involved in communication strategies to attack the legitimacy of elections and the soundness of electronic ballot boxes. A possible sanction – highly unlikely in that real political scenario – would be the ineligibility of the President of the Republic at that time.

It is necessary to note the precariousness of the institutionalization of the Electoral Justice as a branch that, structured with political autonomy and an independent organizational structure, would be able to effectively judge conflicts

and even annul mandates, including those of the highest authorities of the Republic. In the electoral courts (regional, but also in the Superior Electoral Court) there are judges who are not guaranteed life tenure (as if the cases they judge were not particularly serious, demanding such protection in favor of impartiality); positions are rotated, jurisprudence is volatile and, once their term of office is over, the former judges can act as lawyers before the very court where they were judges, without any quarantine (Ramos 2021).

The fact is that, besides its precarious jurisdictional function, the Electoral Justice, in its administrative function, is exemplary in organizing the electoral process and ensuring its smoothness. With the defeat in the House of Representatives of the proposal of constitutional amendment that instituted the printed vote, it was time to reinforce the legitimization of the electoral process in the current molds. Curiously, the truth is the opposite of what federal government at that time used to claim: very cautious and discreet in its jurisdictional actions (including against the elected president), the Superior Elecoral Court is highly competent in its administrative role – so that the electronic ballot boxes were able to sanction even a candidate who predatorily disallowed the procedures that legitimized his own election. If in the 2020 municipal elections the Electoral Justice has already tried some pedagogical initiatives to combat disinformation, its real endurance test was in the 2022 elections, when the Superior Electoral Court planned to coordinate with fact-checking agencies and digital platforms to determine protocols to allow the rapid removal and interruption of the circulation of disinformation in the networks. Indeed, the self-regulation of the networks had already shown sensible advances during 2021, as it happened in October, with YouTube taking down a livestream in which president Jair Bolsonaro associated AIDS with the Covid-19 vaccine – and even suspending the presidential channel for a week. There remains, however, a blind spot: those messaging apps that, in the name of absolute freedom of expression – as in a Hobbesian state of nature – are not even willing to respond institutionally to Brazilian regulatory authorities.

This is the case of observing the Permanent Program to Combat Misinformation of the Superior Electoral Court, which currently has 154 partners, such as social networks and digital platforms, public and private institutions, and professional entities, among others. Created in August 2019, the Court initially signed 48 partnerships, which have increased over the nearly three years that the program has been in force, which is intended to prevent and combat the spread of fake news and misinformation about the electoral process, especially on the internet. In August 2021, the Program to Combat Misinformation became a permanent action of the Court. The partners share with the Electoral Justice the following attributions: monitoring fake news, fighting disinformation with correct information about the issue addressed; expand the reach of true and quality information about the electoral process; and empower society to know how to identify and report deceptive content.

An important premise of the Confrontation Program is to understand the active role of civil society. Voters and representatives have a relevant resource to also contain the spread of misleading content about the electoral process over the internet. Through the tool, it is possible to communicate to the Electoral Court the receipt of false, decontextualized or manipulated news about the elections or the electronic voting system. The complaints collected are passed on to digital platforms and verification agencies that are partners of the Permanent Program to Combat Misinformation so that they can quickly contain the harmful consequences of false content. Depending on the severity, complaints can also be forwarded to the Electoral Department of Justice and other authorities for the adoption of appropriate legal measures. Thus, from a systemic point of view, it is interesting to understand also the dynamics of organizational communication presupposed in the control of fake news by electoral law, that is to say, the operation of judicial control involves different organizations.

4. The 2022 electoral scenario and threats to the recognition of the electoral outcome

Since the beginning of his mandate, despite being elected to the presidency of the republic (and successively elected over almost three decades in his terms as a federal deputy), president Jair Bolsonaro has disseminated doubts regarding the electoral procedure, questioning the inviolability of electronic ballot boxes, without ever presenting evidence to this effect, and demanding the supervision of the Armed Forces over the elections. In July 2022 – three months before the October elections – the president summoned foreign ambassadors to criticize the Supreme Court, the Superior Electoral Court, and the electronic voting system.

This episode is symbolic of a repeated conduct of discrediting the electoral system, with threats not to recognize the result of the elections if he is not victorious in his reelection attempt, and not to pass the office to whoever is elected in his place[72]. In the face of that event and the broader context of the government (including corruption scandals involving ministers and family members of the president, return of inflation and massive hunger, spread of access to weapons through presidential decrees, etc.), there was an intensified mobilization of traditional mass media and organized civil society in defense of the Constitution, democracy, and the rule of law. Bolsonaro's threats – of not recognizing the election results if he lost – continued throughout the electoral process, but a sense of defense of democracy became widespread in society. As

[72] The winner of the October 2022 elections (in a second round) was the former president of the republic Luiz Inácio Lula da Silva – who was in jail during 2018 elections, due to condemnations of corruption by the second degree of the Judiciary; these condemnations have been annulled since them by the Supreme Court, which recognized the partiality and territorial incompetence of the judge; a new judgement of Lula by the competent organ of Justice could not occur due to the prescription of the alleged crimes (Fishman et al. 2019, Schreiber 2022). Also in 2022 elections, Bolsonaro's allies had very significant results for the state Executive and Legislative branches of the 26 states and the Federal District, judge Moro and prosecutor Dallagnol (protagonists of Lula condemnation during 'Car Wash Operation') have been elected to the National Congress, and a strong Bolsonarian caucus was elected to the House of Representatives and the National Congress – including a 'fake news caucus', that is, a group of elected congressmen investigated for the use of this illegal propaganda tool (Braga 2022, Tardáguila 2022).

Luhmann (2004: 475-477) analyzes, law is a kind of immune system of society – rule of law would be then a vaccine against authoritarianism.

A milestone of this mobilization was the *Letter to Brazilians in defense of the Democratic Rule of Law*[73], read at the University of São Paulo Law School on August 11, 2022 (when this Law School turned 195 years, being the oldest of Brazil, besides the law school of the Federal University of Pernambuco). This *Letter* provoked adhesions from more than a million citizens, including, among its initial signatories, representatives of important legal and political, financial and labor, artistic and educational sectors. The reading of the letter in São Paulo was echoed in readings held in law schools across the country.

It is important to contextualize historically the meaning of this initiative: it is an update version of the *Letter to Brazilians* read in 1977 at the same University of São Paulo Law School, by Professor Goffredo da Silva Telles Júnior. At that time, Brazil was under a military dictatorship that – especially through measures authorized by the Institutional Act 5 (AI 5) – revoked politicians and public servants, censored the press, the arts, and intellectuals, tortured and murdered opponents. Nowadays, Bolsonaro, his sons (also politicians) and supporters have repeatedly praised all these measures of repression and the military regime.

The axis of that the new *Letter to Brazilians* took from its previous version was the defense of the basal institutions and concepts of liberal democracy, rule of law and popular sovereignty – a platform capable of gather different ideologies and sectors in a complex society. What the act symbolized was respect for the law in Brazil. Some elementary schools even suspended classes during the time the Letter was read, in order to teach democracy. The democratic rule of law means observance of the principle of legality – starting with the electoral legislation. It also means the principle of publicity – of the publicity of the electoral process, of confidence in the ballot box. The combination of legality and publicity leads to the third element of the tripod: the control (of legality and

[73] Available at: https://direito.usp.br/noticia/c26b69cbbd74-letter-to-brazilians-in-defence-of-thedemocratic-rule-of-law

publicity) by the competent institutions – in this case, the Superior Electoral Court. These elements underpin the legal control of the use of force.

5. Analysis: six topics of a systemic reading on electoral fake news in Brazil

From the recent history of Brazilian politics in the thematization of fake news, we propose to consider six topics of analysis from the social systems theory. The first point concerns the specificity of digital media of communication dissemination. In contrast to traditional mass media companies - newspapers, radio and television -, digital platforms have allowed an exponential increase in communication, which both opens the possibility of building messages at the margin of the dominant interests and ideas in the 'industrial' media and increases certain risks of a hyper-simplified and hyper-moralized communication. Considering that the basic component of society is communication, and that communicative operations are composed of three elements – information, message and understanding (Luhmann 2012: ch. 1) –, we can characterize the 'viral' potential of digital communication as being characterized, typically, by 'news' that present an appeal of novelty and revelation of some secret of power or of the lives of the powerful, which one would like to hide from the 'common citizen'; by a construction of the message loaded with moral appeal (repulsion or acclaim), which even charges the 'receiver' of the message to pass it on throughout their social networks or private messaging apps; and by an easy understanding of the information, which simplifies reality as much as possible in the form of images or texts of immediate understanding, without any more reflective demand (e.g. memes and tweets). Without the controls and corporate culture of professional journalism, the dissemination of messages on digital platforms overflows 'institutional' or 'systemic' commitments – and may challenge, for example, fundamental principles such as the rule of law.

Second, the scenario analyzed reveals a change in the thematization of fake news between the 2018 and 2022 elections in Brazil. In the first moment, the term fake news was a novelty; it came pointed out mainly by journalistic activity and

fact-checking agencies, which the disinformation promoters themselves aimed to discredit. In addition to the legislative and judicial mobilization that did not exist in the 2018 elections, the scenario of the 2022 elections is composed of a widespread observation in Brazilian society on the issue of "fake news". What was a novelty in 2018 has become, in the following years, an everyday theme, which has generalized a sense of caution about the veracity of information circulating in digital media as a discourse. Society itself passes to a second-order level of observation (see Minhoto, Amato and Barros 2021: 350-352): it becomes usual to ask about the source, the form, and the interests behind the diffusion of certain news. However, this 'awareness' about the 'manufactured' character of news does not fail to be appropriated by the political discourse itself as a reinforcement of disinformation: true accusations are refuted as 'fake news', just as lies are disseminated already with the preventive 'seal' that 'this is not fake news'.

Third, a systemic analysis would emphasize the issue of systemic corruption or functional dedifferentiation (Luhmann 2012: 304) between law and politics involved in the problem of fake news. As we have noted, the 2018 elections were the first held under the Supreme Court's ban on corporate financing of election campaigns. Thus, the funding of mass disinformation firings on digital platforms can plausibly be considered as an attempt to bypass this ban: not being able to directly fund their candidates and parties, the holders of economic power seek, on the one hand, to organize schools to train new politicians aligned with their mentality and, on the other, to orchestrate digital propaganda favorable or contrary to certain political-ideological spectrums.

Fourth, we note how the 2018 elections were still held without the applicability of the General Law of Personal Data Protection, approved on the eve of that election; on the other hand, the Fake News Law, which had been widely discussed in the National Congress, had not been approved by the 2022 elections. If we consider the three dimensions of meaning pointed out by systems theory (Luhmann 2012: ch. 1-2), we note, in the social dimension, that the legislative procedure is central to the fulfillment of the political function of

making collectively binding decisions; however, it was difficult to achieve consensus within a National Congress that has many parliamentarians interested in the dissemination of disinformation, particularly those aligned with the executive branch at the time. A procedural solution was to open the legislative process to consultations with the digital platforms to be disciplined, including experts in technology and digital law. The concept of 'regulated self-regulation', embraced by the Draft Bill on Fake News, moves in the same direction.

In the material dimension of meaning, even the norms proposed in the draft bills (such as the Draft Bill on Fake News) reveal the difficulties of consensus in the form of the indeterminacy of the provisions; the technical complexity of digital media also contributes to this indeterminacy, so that many of the normative provisions designed have the character of finalistic programs (policies and principles), rather than conditional programs (rules ready for judicial application).

Finally, in the temporal dimension, the electoral cycles deepened the difficulty of quickly forming consensus for the approval of laws and designing up-to-date legislation in relation to the evolution of digital technologies; at the same time, some measures (such as the Parliamentary Commissions of Inquiry on Fake News and on the governmental measures to face Covid-19) answered to the need of demonstrating mastery of the phenomenon of misinformation.

In fifth place, we should focus on the judicial branch. Courts are at the core of the legal system (Luhmann 2004: ch. 7), because they need to provide a solution to a dispute when they are provoked (the principle of prohibition of *non liquet*); the political branches of government and the private ordering are at the periphery of the legal system, since they take decisions by a calculus of opportunity and convenience. But in deciding on fake news, courts – especially the Supreme Court and the Superior Electoral Court – had only a thin bases of legislatively 'programming decisions' to take their own 'programmed decisions' (Luhmann 2014: 184-185, Campilongo 2011). On the other hand, they have been at the heart of presidential 'anti-systemic' discourses against the 'dictatorship of the judiciary'. Posited as guardians of the rule of law but politically contested by

an important political trend (that promoted fake news and personal threats against their judges), these courts had to calibrate caution and vigilance in a symbolic expression of their decisions. The Supreme Court maintained some inquiries as tools of pressure against discourses and threats against the rule of law. The Superior Electoral Court, in its administrative role, opened itself to discussions concerning the organization of the voting process (including audiences to suggestions made by the military forces, under pressure of the president of republic) and made public demonstrations about the security and regularity of electronic voting. In its jurisdictional role, the Superior Electoral Court was careful in punishing fake news, establishing a presumption in favor of freedom of expression. The rulings about the orchestration of a digital misinformation campaign led in 2018 in favor of the victorious presidential slate were inconclusive in terms of the collected proofs (Barros *et al.* 2022, Saba *et al.* 2021, Amato, Saba and Barros 2021).

From this overview, one could see how precarious was the equilibrium of forces and the absorption of risks built by the institutionalization of legislative, judicial and administrative procedures (Luhmann 1980). A last remark should focus on the electoral procedure itself, which was at the heart of threats and misinformation spread by the Bolsonaro government and its votaries. If the political branches of government – the legislative and executive powers – lie at the core of the political system, mobilizing the coding of 'government/ opposition', its periphery is structured by civil society organizations, including political parties, social movements and other professional, sectoral and non-governmental organizations (Luhmann 2009, 2004: ch. 7). Voting can be analyzed as a procedural linkage between public opinion (the translation of demands coming from social environment to the political debate) and the State, mediated by that periphery of civil society. It is noticeable, therefore, that the defense of the legitimacy and correction of the voting procedure by the Electoral Justice was supported on the eve of the official start of the 2022 electoral campaigns by a deep mobilization of civil society around a *Letter to Brazilians in defense of the Democratic Rule of Law*. Organized by jurists and presented in the more traditional Law

School of Brazil, at the University of São Paulo, it occupied covers and headlines from the main national websites, newspapers and magazines, also mobilizing international mass media. Through its website, on the other hand, the letter got the support of more than a million citizens. Concerning civil society organizations, the letter mobilized the support from industrial and labor organizations, from students, professionals and professors of law, from social movements, artists and politicians. Therefore, the meaning of this political event was to affirm functional differentiation; it was an 'episodic' or 'operational coupling' (Luhmann 2013: 8) between law and politics to reinforce the institutionalization of the 'structural coupling' built by the Constitution (Luhmann 1996) and its organizations and procedures – especially the Electoral Justice and the electoral procedure.

6. Concluding remarks: three paradoxes

A historical remark: on 8 January 2023, a week after the inauguration of Bolsonaro's successor – President Lula, to whom his predecessor refused to hand over the presidential sash – the defeated candidate's disgruntled supporters invaded the buildings of the Supreme Court, the National Congress, and the Executive Branch in Brasília, depredating and vandalizing installations, equipment, and works of art that symbolize the Brazilian State and its new capital founded in 1960. Many of these terrorist supporters came from encampments that since the October election period have been set up in front of Army commands throughout the country, calling for the intervention of the Armed Forces for a coup d'état against the electoral result.

Luhmann (1988) once recommended to observe legal history not in search of origins, but of paradoxes. Three paradoxes seem to be at the stage of the recent political-legal history in Brazil, especially in the period between 2018 and 2022 elections. The first one is the liar paradox: 'I am lying'. If this sentence is true, then it is false; if it is false, then it is true! The dynamics of misinformation in Brazil had evolved from a stage of blind spot to a stage of 'second-order

observation' (Minhoto, Amato and Barros 2021). During 2018 elections, misinformation campaigns were not yet fully detected and denounced by media, politics and law; some initiatives, such as fact-checking, were a novelty and of low impact. Now 'fake news' is a common sense expression, what led to an ambiguous scenario: from the one hand, to a generalized perception of the potential distortions of every information, considering the interests and views behind it; from the other, misinformation explorers learned to defend themselves saying, preventively, that 'it is fake news that this is fake news'!

A second paradox entangled in this context is the paradox of natural law/ positive law. Natural rights theories spread when mass media was under the revolution of press magazines and newspapers, political pamphlets and philosophical treaties gave rise to declarations of rights and to formal constitutions (Vesting 2018, Luhmann 2004: 90, 103). This led to a paradox, well recognized by Locke (1997): if you disagree with the law currently in force, you must (morally) disregard it, but also subject yourself to its sanctions; after all, the individual conscience does not revoke the general law. In more precise terms, the rule of law establishes a legitimation by procedure that implies a prior commitment to accept uncertain outcomes. Legislative, judicial, administrative, and electoral procedures conform, each with its own specificity, to this logic of generalizing trust. Trust is a means of turning radical uncertainty (insecurity) into manageable risks (Luhmann 1993, 1979). Meanwhile, fake news aims to generalize distrust.

Finally, we have at stake in the problem of electoral fake news the paradox of sovereignty (Magalhães 2016): the state asserts itself as the superior center of power in a society, the organization legitimized to impose its binding decisions on the entire collectivity; at the same time, the power of the state is referred to popular sovereignty. In representative democracy, the electoral procedure implies a second-order observation of state decisions – citizens submit to such decisions, but decide who will make them. What we see in the strategy of mass dissemination of misinformation is an attempt to undermine the congruence of

expectations that supports the acceptance of procedures and their results, especially the electoral process.

References

Amato, LF (2021a) 'Democracia, voto e representação: contextos e trajetórias, instituições e distorções' in JC Francisco and O Villas-Bôas Filho (eds), *Crise democrática e (de suas) instituições de garantia* (São Paulo, Eseni), 50-73.

Amato, LF (2021b) 'Fake News: regulação ou metarregulação?' 58(230) *Revista de Informação Legislativa*, 29-53.

Amato, LF, Saba, D and Barros, MALL (2021) 'Sociologia jurídica das fake news eleitorais: uma observação sistêmica das respostas judiciais e legislativas em torno das eleições brasileiras de 2018' 18(99) *Revista Direito Público* 539-564.

Braga, J (2022) Bancada das fake news elege parlamentares, mas expoentes ficam de fora. Folha de São Paulo, 3 October 2022. Available at: https://www1.folha.uol.com.br/colunas/painel/2022/10/bancada-das-fake-news-elege-parlamentares-mas-expoentes-ficam-de-fora.shtml Accessed on 3 Oct. 2022.

Campilongo, CF (2011) *Política, sistema jurídico e decisão* judicial 2nd ed. (São Paulo, Saraiva).

Barros, MALL, Amato, LF, Saba, DT and Ponce, PP (2022) 'Fake News in Brazil's 2018 Presidential Elections: a systems theory approach to judicial and legal responses' *Social & Legal Studies*.

Fishman, A et alli (2019) '"Their little show: Exclusive: Brazilian Judge in Car Wash Corruption Case Mocked Lula's Defense and Secretly Directed Prosecutors' Media Strategy During Trial' *The Intercept*, 17 June 2019. Available at: https://theintercept.com/2019/06/17/brazil-sergio-moro-lula-operation-car-wash/ Accessed on 3 Oct. 2022.

Locke, J (1997) 'An essay on toleration' in J Locke, *Political essays* (Cambridge, Cambridge University Press), 134-159.

Luhmann, N (1979) *Trust and power* (Chichester, Wiley&Sons).

Luhmann, N (1980) *Legitimação pelo procedimento* (Brasília, UnB).

Luhmann, N (1988) 'The third question: the creative use of paradoxes in law and legal history' 15(2) *Journal of Law and Society* 153-165.

Luhmann, N (1993) *Risk: a sociological theory* (Berlin, Gruyter).

Luhmann, N (2000) *The reality of the mass media* (Stanford, Stanford University Press).

Luhmann, N (2004) *Law as a social system* (Oxford, Oxford University Press).

Luhmann, N (1996) 'La costituzione come acquisizione evolutiva' in G Zagrebelsky, PP Portinaro and J Luther (eds), *Il futuro della costituzione* (Torino, Einaudi), 29-166.

Luhmann, N (2009) *La política como sistema* (México, Universidad Iberoamericana).

Luhmann, N (2012) *Theory of society I* (Stanford, Stanford University Press).

Luhmann, N (2013) *Theory of society II* (Stanford, Stanford University Press).

Luhmann, N (2014) *A sociological theory of law* 2nd ed (New York, Routledge).

Magalhães, JN (2016) *Formação do conceito de soberania: história de um paradoxo* (São Paulo, Saraiva).

Minhoto, LD, Amato, LF and Barros, MALL (2021) 'Observing observers in social systems theory: An interview with Hans-Georg Moeller' 33(3) *Tempo Social* 333-353.

Ramos, AC (2021) 'Posfácio' in D Saba, LF Amato, MALL Barros and PP Ponce, *Fake News e Eleições: estudo sociojurídico sobre comunicação digital, política e regulação no Brasil* (Porto Alegre, Fi), 217-222.

Saba, D, Amato, LF, Barros, MALL and Ponce, PP (2021) *Fake News e Eleições: estudo sociojurídico sobre comunicação digital, política e regulação no Brasil* (Porto Alegre, Fi). Available at: https://www.editorafi.com/203fakenews . Accessed on 22 Aug. 2022.

Schwarcz, LM and Starling, HM (2015) Brasil: uma biografia (São Paulo, Companhia das Letras

Schreiber, M (2022) 'É possível dizer que Lula foi inocentado na Lava Jato?' *BBC News Brasil*, 22 August 2022. Available at: https://www.bbc.com/portuguese/brasil-62612955 . Accessed on 22 Aug. 2022.

Tardáguila, C (2022) 'Eleição de desinformadores acende alerta sobre a checagem de fatos' *UOL*, 4 Oct. 2022 Available at: https://noticias.uol.com.br/colunas/cristina-tardaguila/2022/10/04/eleicao-de-desinformadores-acende-alerta-sobre-a-checagem-de-fatos.htm Accessed on 4 Oct. 2022.

Vesting, T (2018) *Legal theory and the media of law* (Cheltenham, Edward Elgar).

12. Legitimation by indignation and the legal sociology of scandal[74]

Pedro Henrique Ribeiro

Introduction

"*Let's have trial by combat*!" With these words, after slamming the podium and referring to his "reputation", Rudolph Giuliani called on a massive crowd to challenge the results of the 2020 U.S. presidential election. Shortly thereafter, on that now famous January 6th, 2021, about two thousand people stormed the U.S. Capitol. Giuliani's "arguments" and rhetoric, however, were supported by a much larger number of people and nurtured by long streams of communication. The ample resonance and wide reach of the "stop the steal movement" can be traced quite clearly, especially in the millions of iterations to be found in social networks.[75] It would be undeniably difficult to explain the "storming of the Capitol" without addressing the logic of social media in public communications. To blame the logic or epistemology of social networks, however, falls evidently short in each and every explanation attempt.

If one takes this episode seriously, considering its social and sociological relevance alongside its historical context, it seems less and less an issue of mere chance or folly. Actually, an argument could be made to addressing this scene as an allegory of our relation to law, truth and power, especially when *we are in public*. Moreover, many argue that this is not an isolate phenomenon and should

[74] This essay is a revised edition of the article published in Portuguese: (2020) 'Da constitucionalização simbólica ao constitucionalismo no escândalo: legitimação pelo procedimento e legitimação pela indignação como elementos conflitantes em uma crise de legitimação simbólica no constitucionalismo democrático atual' in JPA Teixeira and L Liziero (eds), *Direito e Sociedade Volume 3 – Marcelo Neves como Intérprete do Constitucionalismo Brasileiro* (Andradina, Mederaki), 2020.

[75] The numbers of messages went into the millions and were spread through many channels see *e.g.* https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/

therefore be understood in connection with similar events occurring worldwide, such as in the storming of the buildings of the three branches of government in Brazil in January 8th, 2023, or in the plethora of prior phenomena such as vaccine negationism, fake news, attacks to the judicial system and editorial press. There remains a broad consensus of contemporary (symbolic) crisis of constitutional democracy.

Nevertheless, one could go beyond these politically centered views. Far for being only an irrational play of desperate attempts of political communication, this symptomatic scene shows much more then only power relations: it unveils an underlying dispute of truth regimes and (specially) the clash of two *forms of legal validity*.

In fact, opposing "*trial by combat*" to a "*presidential election*" before a bodily present crowd and in the eyes of a (world online) audience represents of a quasi-stereotypical clash of two social-historical forms in which societies, cultures and communities *legitimize* not only political power, but also legal decisions and accepted truths. In other words, this episode is both symptomatic and representative of a collision of two different ways of dealing with normativity (*in* public – real or perceived as such) that should be of particular interest to contemporary sociology of law and media theory. Ideal-typically, a presidential election is to be conceived as a clear-cut example of the "legitimation by procedure" (Luhmann 1978). Conversely, a "trial by combat" could be easily taken as a classic example of "legitimation by indignation/acclamation".

The symptomatic element of Giuliani's mention of "trial by combat" is that it clearly manifests the antagonistic tension between these forms of legitimation. Although clearly rhetorical, far-fetched and anachronistic, Giuliani´s grotesque cries still resonate with the contemporary perception of a renewed clash of these legitimation forms, *i.e.* even in our late-modernity constitutional democracies. While it remains true that "modernity" relies primarily on the "legitimation by procedure" and its rightly so defined by it, it is becoming ever more clear to the public eye that such modus of legitimation is not unimpededly produced and reproduced. Not only is "legitimation by procedure" contingent, but it also

depends on historical, sociological, legal and epistemological practices, being necessarily embedded in culture and media. The very same applies to its counterpart "legitimation by indignation/acclamation". Even though usually relegated to a distant past and its pre-modern practices, this form of legitimation based on indignation/acclamation remains very much present in political communication, legal practices and truth acceptance nowadays.

But how can we better understand the notion of this legitimation by indignation? This essay proposes that the *sociology of scandal* could help us understand this phenomenon.

Consequentially, this essay argues that democratic constitutionalism is currently facing a crisis of symbolic legitimation in which the persuasive force (*Überzeugungskraft*) of legitimation by procedure is constantly being strained by the "legitimation by indignation".[76] To address such an argument, an approach centered on a legal sociology of scandal is proposed. "Scandal" and "scandalizations" are understood here to be one of many *communicational forms* by which such legitimation by indignation is organized and gains its "scripts". Therefore, it is argued, a legal sociology of scandal could help explain the widely perceived rise of an anti-procedural rhetoric[77] currently present in legal and political communications.

Although the study of the scandal form may seem somewhat counterintuitive or even something that would not be suitable to be an object of science or theory,[78] there is a rich, broad and interdisciplinary literature that deals with scandal, relating it to legal-political communication. Therefore, by

[76] The expression *Legitimation durch Empörung* is taken from Bredow, 1992, but is used here in a different form and context. The strong contrast with Luhmann's famous book title *Legitimation durch Verfahren* (Luhmann 1978) may indeed be implied, but is not elaborated in Bredow's text. *All translations, if not stated otherwise, are mine. All emphases are added by me.*

[77] The concepts of "communication form" and "rhetoric" are used in a very restricted and specified way as in Esposito (1999: 113 f.) and Esposito (2017). "Scripts" are here understood as in Luhmann, 1997: 640, 804 especially 854f, 1106.

[78] Neckel (1989: 55-56) argues against the suspicion that scandals would be something distant from scientific and academic discourse. Binder, 2013: 349 ff. and 196 also discusses the "scientific distance" of scandal and the lack of attention it has received from academic disciplines. As early as 1972, Luhmann stated that "unfortunately there is almost no research on scandal that is not itself scandalous." Luhmann (1972: 62).

addressing the scandal form and its effects on the relationship between legal and political systems (and understanding constitutionalism as an expression of the structural coupling between these systems in conjunction with "legitimation by procedure") this essay argues that the main effect of scandalizations is not one of "norm genesis" (as argued by Luhmann and Fischer-Lescano, for example), but rather an effect of displacing the "intrinsic symbolic persuasion" of procedures to "revealed and objective (real) truth" made *evident* and *plausible* (see Luhmann 1997: 548 f.) by a collectively self-perceived indignation of a given scandalized public. In this sense, it would not be enough just to address the communicational way in which this "symbolic displacement occurs" *i.e.* by a legal sociology of scandal that is more attentive to media issues. A theory of symbolic elements of the legal system is also needed.

There is a widespread perception of a (symbolic) legitimation crisis of democratic constitutionalism today. One should ask: what has changed? By what mechanisms has this "symbolic façade" of democratic constitutionalism been eroded? (see Habermas 1999: 229, Neves 2017: 285, and Neves 2019) By what means (and influenced by what media) is this "rhetoric" organized and structured? Therefore, the present contribution seeks to present a subsidiary explanation arguing that the erosion of the symbolic façade of democratic constitutionalism (understood as its symbolic legitimation) could be *partially* explained by the growth of the relevance of legitimation by indignation and its negative effects on legitimation by procedure. In turn, the "how" question is addressed by the argument of the increase of the "scandal" form in political and legal communication, made possible by both structural elements (*e.g.* increasing inequality and social exclusion together with a strong *structural* change of the public sphere mainly by new media) and *semantic* elements (*e.g.* emerging self-descriptions in world society that openly reject the symbolic basis of democratic constitutionalism).[79] Nevertheless, the focus here is not to explain the emergence of what are called new populisms, nationalisms, or illiberal democracies, much

[79] For the relations and interconnections between social structure and semantics in Luhmannian theory see especially, Luhmann (1980: 9 ff), alongside the arguments of Stäheli (1998).

less the growth of "fake news" and so-called post-fact or post-truth types of communication that tend to fuel such narratives.

The main objective, here, is rather that of addressing *one* form of communication common to many of these growing attacks on the symbolic legitimation of constitutionally guaranteed rights, but which also extend to the decisions and legitimacy of constitutional courts, democratic elections, procedurally based and professional institutions of representative democracy, editorial publishing-based mass media, and, as we are seeing in the Sars-CoV-2/Covid-19 pandemic and the rise of the "negationism," even directed at the professional scientific community.[80] One can see that the legitimation of such institutions is frontally opposed by a rhetoric of indignation made possible ("*scripted*") by scandalizations. The procedural legitimation (that is, the structuring by ordered "steps") of such institutions is thus confronted by another form of "persuasion" and symbolic legitimation. In this sense, by referring to the context of such a conflict, this essay additionally attempts to provide a possible theoretical framework to address how *diffusion* media (social communication media *e.g.* print, radio, social networks) can promote possible changes in *symbolic generalized* communication media (such as truth, legitimation, and legal validity) that could be relevant to the aforementioned scenario in contemporary legal and political communication.

In the first section, (I) the essay establishes what could be called the crisis of symbolic legitimation of contemporary democratic constitutionalism and relates it to some changes in the structure of the public sphere (*Öffentlichkeit*). The main argument here is to present one dimension of the contemporary "crisis" of constitutional democracy as being symbolic in nature, establishing one of its possible factors as being related to changes in the public sphere. The second section (II.) discusses the notion of the symbolic as "symbolic force" and as

[80] Many of these should be assumed to be general knowledge for our purposes. For a comprehensive study, see Loughlin (2019). For an analysis that we could perhaps approach as a case where the pressures of "legitimation by indignation" following "corruption scandals" exert destructive tendencies on the Brazilian judicial system and rule of law, with judges and prosecutors acting overtly against due process, with resources to the "media" and "material" notions of justice and evidence, see Palma Resende and Zaidan (2020).

"persuasion". In addition, the essay argues that the structure of diffusion media (*Verbreitungsmedien*) has an impact on the functioning of generalized symbolic communication media (or success media). The third section (III.) of this essay develops and explains the clash between legitimation by procedure and legitimation by indignation. The main argument here is to oppose the notion of procedure to the notion of "indignation/acclamation" and relate it to the "legitimation" of legal and political communication. The fourth section (IV.) presents some elements of a legal sociology of scandal. The main argument here is to approach this form of communication in a somewhat different way from that most prominently developed by the Luhmannian tradition of legal sociology. This involves moving scandalization away from its conception as a "normative genesis" and conceptualizing the term with more conceptual work and proximity to media theory. The elements addressed here are meant to support the claim that one of the main outcomes of scandalizations in legal-political communication is a symbolic, moral, and intense communication that can foster a specific kind of persuasion and "reality effect and revealed truth" that can be opposed to claims of procedural validity. This allows us to better understand the notion of indignation and how "scandals" push (for better or worse) a shift away from procedural validity to a symbolic realm of "real, shared, revealed truth" facing evident injustice, thereby operating in their functions as "intrinsic persuaders." The final section (V.) is reserved for concluding remarks.

1. From themes to trending topics: the symbolic legitimation crisis of democratic constitutionalism and the "great unbundling" of the public sphere

> In the face of the shitstorms, sovereignty must be redefined. According to Carl Schmitt, the sovereign is the one who decides in the state of exception. One could translate this statement about sovereignty into an acoustic metaphor. Sovereign, then, is he who is able to create absolute silence, able to eliminate all noise, able to silence everything at once. Schmitt could not experience the digital networks. This would certainly have caused him a major crisis. It is well known that Schmitt, throughout his life, was very afraid of waves. Shitstorms are also a form of waves that escape from any and all control. For fear of waves, old

> Schmitt would even have removed the radio and television from his house. Moreover, he even felt compelled to rewrite his famous phrase about sovereignty in the face of electromagnetic waves: "After the World War I said: 'sovereign is he who decides on the state of exception. After World War II, in the face of my death, I now say, 'sovereign is he who controls the waves of space". After the digital revolution, however, we would have to rewrite Schmitt's phrase about sovereignty once again: sovereign is he who controls the shitstorms of the internet. (Han 2013: 18)

Much has been said and written about a "crisis" of contemporary democracy. This can also be easily understood as a new crisis of constitutionalism itself. Much attention is drawn to the degradation of constitutional democracy around the world, something that would encompass not only the liberal-democratic institutions themselves, but also and above all their "symbolic" dimensions, that is, the very "persuasiveness" of the conjunction of representative democracy with fundamental and human rights: it is argued, therefore, that the contemporary crisis of constitutional democracy is also a crisis of its symbolic "force".[81] To some extent, one could add, perhaps exaggeratingly, that we would face a crisis of legitimation of the very notion of legitimation by the procedure itself.

While many of the debates of the 1980s through the early 2010s would circulate around themes such as "consolidation and expansion" of constitutional democracy and "deepening" of human rights in political culture,[82] the current

[81] For an overview, among many other possibilities, see Loughlin, 2019. In this regard, Loughlin puts forward the notion that the solution must encompass more than strengthening liberal (democratic) institutions and work on democratic "aspirations and beliefs," taking into account the "tension between its instrumental and symbolic dimensions." (2019: 452f). For an analysis of "force" and some of its metaphors and "orientations" in legal philosophy, see Ribeiro and Palma Resende (2017). For the notion of "symbolic force" in law, alongside some of its paradoxes and problems, see Neves (2003).

[82] This positive or optimistic picture is mainly present after the so-called "third wave of democratization" that began specially in the mid-1980s (see, the famous work Huntington 1991). Moreover, this goes beyond the famous claims of the "end of history" (as in Fukuyama). In democratic theory, constitutionalism, and human rights thinking, there was a somewhat broad agreement on the stability of such elements, with their "challenges" being much more focused on their consolidation, expansion, and deepening. For the notion of "democratic consolidation" see, for example, O'Donnell (1988, 1996). For the notion of "political culture," see the classic book Almond and Verba (1963). For human rights, among many, consider only Bobbio's statement: "The fundamental problem of human rights today is not so much to justify them as to protect them. This is not a philosophical problem, but a political problem." (Bobbio 2004: 42).

diagnosis seems to be one of decline, "corruption"[83] and degeneration of the symbolic, normative, and evaluative basis of such institutions. The heroic expansionist narrative of constitutional democracy has given place to defeatist narrative of its decline: and all this would be happening "without the need for a formal coup d'état".[84] This essay argues that one way in which this process is occurring, among others, is through a more prominent "scandalization" of constitutional democracy. The background to such an assumption lies in some transformations in the so-called public sphere.

The "crisis" diagnosis mentioned above is broad and is present both in academia and in the semantic self-descriptions of the media in contemporary society.[85] At the core of such narratives of decline one can find one of the usual suspects as being a shift in political argumentation and the public sphere, where the supposedly consensual procedural basis of fundamental rights and legal-democratic procedures of the rule of law seems to be losing ground. [86] The celebrated pluralistic (universalistic, constitutionally organized) public sphere seems to be most affected. And this especially when one takes into account its respect for procedures, reliance on intermediary institutions, and structuring by "themes" and somewhat generalized "inclusive aspirations".[87]

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[83] For the notion of "corruption" as "fall or deviation" from an Aristotelian-inspired notion of nature conceived in a teleological way, see among many Ribeiro (2019).

[84] Loughlin (2019: 436) states: "At the end of the 20th century, it appeared that there was only one game in town, and that game was constitutional democracy. As it turned out, however, the claim that the rise of constitutional democracy marked the end of constitutional history has proven premature. According to the calculations of political scientists, constitutional democracy reached its global highpoint in the period 2006–2011 and has since been in dramatic decline. (…). Constitutional democracy is not being overthrown; it is being degraded (…). In 2017, Freedom House, the US human rights organization, found indicators of democratic degradation in 71 countries and concluded that constitutional democracy was facing its most serious crisis in decades". (…) "Instead of democracy being widened and deepened, the signs are that widening economic inequalities and a deepening gulf between the political elites and those they represent are eroding the sources of legitimacy on which the viability of the regime rests" (Loughlin 2019: 437-450)

[85] Due to its relevance in the mainstream media, see the term "illiberal democracy" (in: Fareed Zakaria https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy) and post-truth. "Post-truth" was elected word of the year in 2016 by Oxford Dictionary (2016 Oxford Dictionary "Word of the Year": https://languages.oup.com/word-of-the-year/2016/)

[86] For an in-depth discussion and conceptualization of procedural consensus and content dissensus as the basis of the relationship between the constitutional state and the Public Sphere: Neves (2006: 128f and 136 f).

[87] See Neves' argument in: Neves (2006, 2009).

As developed by Neves, a "pluralistic public sphere" that could foster "procedural consensus" by allowing for "content-based dissent" (Neves 2006: 123 ff.) is a cornerstone of the democratic constitutional state and, consequently, closely linked to the notion of legitimation by procedure (133f). In this context, the public sphere is understood as an "arena of dissensus," and is thus an imperative for the constitutional State in mediating law and politics. Thus, "the expectations, values, interests, and discourses that constitute it can be *generalized* by *constitutional procedures*".

These procedures structure the public sphere by channeling its dissident claims (Neves 2006: 135). Hence, the "resonance arena" thus functions as a plethora of internal "mirrors" of political and legal communication, in which such communication is channeled, structured, and mediated, becoming relevant to the "circulation and counter-circulation of power" and providing for the formation of the "public" and generalized themes in "public opinion". [88] Neves separates himself from the notions of Habermas and Honneth in which the public sphere could imply a "rationalization" based on the material consensus of the spontaneous "lifeworld," thus implying a heavily loaded notion of "recognition" (*Anerkennung*). In a contrasting manner, Neves emphasizes the pluralistic inclusion of expectations, values, and interests by generalized themes with aspirations for inclusion that function as partial reference and guidance for constitutional procedures. He thus proceeds in a manner more related to Luhmann's systems theory. One of the main elements that Neves develops from his debate with discourse theory, however, is a notion of hetero-legitimation, that is, external legitimation, provided by the public sphere that complements (and also irritates) the self-legitimation, that is, internal legitimation provided by procedures, of the constitutional state. (Neves 2006: 148 f) .

The central functions of the public sphere for the democratic constitutional state and constitutionalism, or even for "global societal constitutionalism" (Teubner 2012: 182 f), are well known and cut across several schools of thought

[88] For these concepts and the circulation and counter circulation of power, see Luhmann (2000: 258 ff.).

and fields of study. For our purposes in this essay, one should only be aware of some of its functions and its close relationship with the diffusion media, elements that will be later related to legitimation by indignation and scandalization.

Regarding its modern "functions," along with the notion of legitimation (external or hetero-legitimation) of the rule of law, the pluralistic public sphere is usually related to functions such as representing groups, discourses, interests, and expectations; reflecting and visualizing the redundancy of institutionalized procedures; symbolizing political participation (or guaranteeing it through some form of "political inclusion"), realizing or establishing a space for the exercise of the fundamental rights that guarantee the "free flow of information"; generalizing issues, *i.e.* in the sense of making issues *public* and not private, secret or private; pre-structuring binding collective policy decision making by "issues" and influencing agenda setting by the "economy of attention"; channeling public opinion and providing a common ground for the internal observation of social systems and their performances that become relevant for the construction of expectations and semantics of society's forms of self-description (including the legal system).

Regarding its relations with the evolution of the diffusion media, it should easily be noted that this is a common, though often overlooked, element of the concept. The term public sphere is indeed abstract and polysemic (Ribeiro 2012: 2). It also cuts across diverse and sometimes incommensurable disciplines, theories, and paradigms. Moreover, there are many competing typologies of the public sphere. One such "typology" that focuses most preeminently on the "coevolution" of the public sphere and the diffusion media is that of Thomas Vesting. Put crudely, one could say that Vesting works with "medial ruptures" to form this typology. However, Vesting is interested in historical transitions, where continuities are also important. In this precise sense, diffusion media are thus understood as "pre-adaptive breakthroughs" and as a junction point of media theory and evolution. (Vesting 2007: 140-147). Furthermore, Vesting's perspective is closely guided by cultural studies (*Kulturwissenschaft*), linking legal normativity (along with implicit cultural normativity), the media, and the

structures of subjectivity. He thus centers his analyses around a "societal epistemology" that is found in the interplay of "infrastructures of subjectivity," legal forms, and societal transformations.

In detail, his approach is inspired by the triple division of modernity proposed by Karl-Heinz Ladeur: the society of individuals, the society of organizations, and the society of networks.[89] Vesting uses this division to work out his typology of liberal public sphere (of the society of individuals); pluralistic-group mass public sphere (of the society of organizations) and, finally, fragmented or disaggregated public sphere (of the society of networks). From there, he develops his arguments also in three periods or as a three-layer model (*Dreichichtenmodell*), where we can see a corresponding model of three types of the public sphere.

According to Vesting, the representative public sphere (*representative Öffentlichkeit*) of the Ancien Régime would be supported by a symbolic order and a form of the "force of law" (*Gesetzeskraft*) that linked the validity of law to tradition (2013: 83). The notion of an "embodiment of sovereignty" marked the prevalence of a "culture of representation" based on court society, royal family and nobility, so that it would be marked by traditional domination and would not rely on the notion of a far-reaching "public." (Vesting 2013: 100 f.). The corporeality of the king (*Körperlichkeit, Leibhaftigkeit*) acquires in such a context a symbolic status of representation that is bound in the fields of media, culture and language, resulting in a "culture of representation.". The absolute monarchy thus becomes "instituted" as a unitary space of perception and acquires its "form" by medial staging (*Inszenierung*), by cultural representation, and by the corporeality of the king in the various media ("by the king's portrait and its representation" - Vesting 2013: 95f).

This began to change especially with the evolutionary achievement represented in print media (*Buchdruck*). Vesting understands it as part of a change in "social epistemology" that encompassed, among other things, the rise of

[89] Vesting develops this typology in relation to his state theory in Vesting (2018).

individualism and its "subjective infrastructure", something that occurred together with the formation of a large literate public in the city environment, paving the way for a wider "space" of circulation and intensified "communication flows" and with the so-called bourgeois "high culture". Therefore, the rise of the liberal public sphere of the general public

> moves away from a determination by the court and its society ... and inclines to be determined by the free exchange of opinions in books, pamphlets and newspapers, which were addressed to a reading public in literary salons, coffee houses, taverns and theaters, that is, addressed to a public that was open to novelty beyond the 'trust and confidentiality of a pre-existing order' (Vesting 2013: 140).

In the period of the emergence of the liberal public sphere there is a corresponding shift of cultural hegemony from "court to cities," where "culture and cultivation" begins to replace "taste" in an "open modern culture," in which the old patterns of the representative public sphere begin to give way to a "neighborhood" regime of connecting citizens' opinions (Vesting 2019: 33). Alongside many cultural and structural changes, Vesting links this shift with an "excarnation" of sovereignty in the liberal public sphere, shifting the symbolic body of the king to the writing and textualization of written codes and constitutions. Understood as a "mutation of the symbolic order," this "excarnation" of sovereignty gives rise to the "imagination of the nation" and modern nationalism.[90] (Vesting 2018, 2013: 100 f.)

In turn, in the so-called "organization society" key changes begin to occur. The end of the 19th century marks the era of the rise of a new mass culture with "hitherto unknown means of communication, such as daily newspapers, photography, silent films, radio, and paperback books." (Vesting 2019: 35 f). Other elements are relevant in this context: amplifications of the tasks and responsibilities of the state in a world with more intense and amplified relations

[90] The monarchical "incarnation" of power and law was replaced in the last quarter of the eighteenth century by an "excarnate" form of legal writing, which manifested itself no less importantly in printed declarations and the constitution. (Vesting 2013: 128) Here, the "printed word appears as the true architect of nationalism" (2013: 118 f; 120 and 141).

in a world of greater industrialization, with the establishment of the "*organizational man*" (Vesting 2018: 128). This was followed by legal constructions that aimed to give vent and representation to the emerging masses as mass parties and mass unions, resulting in a mass culture and the establishment of a pluralism of groups (Vesting 2018: 156 f). In this model, called the pluralistic group model by Vesting and also inspired by Karl-Heinz Ladeur's "concentric circles" model (Vesting, 2018: 49),[91] the structure of the public sphere would be characterized by the model of representation of plural groups. Dealing mainly with the German case and the treatment of such a public sphere in constitutional theory and jurisprudence, Vesting argues that such a "leveled middle class" society (Helmut Schelsky's term) would have its corresponding public sphere model by *aggregation* by plural groups.[92] It was from such aggregation, where a "pre-formulation of political will by intermediary forces" took place, that "public opinion was determined primarily by themes and contributions from formal groups and organizations in society: by political parties, social associations, churches, trade unions, large book publishers and radio stations". This model was therefore supported through protections and guarantees of collective rights of freedom (Vesting 2019).

Today, however, such a model is beginning to lose force. In place of the pluralistic group public sphere, a "fragmented public sphere emerges in the most diverse networks, being the result of a great unbundling (*Entbündelung*) or disaggregation of social communication flows," based on much more unstable communities and "emerging collectivities," that is, on "movements and swarms,

[91] The three "concentric circles" would be: (1) opinions that are expressed and heard in a plethora of diffuse public spheres in society and which are not coordinated with each other; (2) politically relevant communications in the mass media that operate throughout the country and which are grounded in the context of partisan and associational communication. Opinions are pre-structured in parties and associations, addressed by the media, and aggregated according to views of relevance. (3) The formation of political will, highly condensed and concentrated within state organs. Opinions are aggregated by parties and associations into alternatives capable of guiding decisions and processed in the inner circle of the state as binding decisions. (see Vesting 2019)

[92] "The model of the public sphere therefore follows a grouping logic, which reshapes the culture of bourgeois individualism and presupposes a new infrastructure of subjectivity: alongside the bourgeois, and in his place, the organizational man (*Organisationsmensch*), the man in the gray flannel suit, enters the scene." (Vesting 2019)

which operate by linking themselves intensely to momentary occurrences, characterized by rapidly growing and changing opinions [...] and with the help of social networks [...] without this fluid self-coordination crystallizing in an organizational form into a collective person." (Vesting 2019: 35 f). Moreover, communication in such a disaggregated and fragmented public sphere would be more strongly marked by the intense pace of events and by a "culture of presence," related to the rise of social networks and the retreat of part of the public sphere to "forums of like-minded people, together with the reinforcement of such forums or "e*cho chambers*" by the insertion of machine learning algorithms that, in a targeted way, "reward specific contributions that trigger strong emotions and direct interactions and ultimately result in creating for the individual user his own unique world". (Vesting 2019: 35f). Such a scenario would be the propitious space for *shitstorms* and fake-news to gain relevance and possibility. Vesting, finally, relates such context to the overcoming of the culture of the bourgeois citizen and the organizational man of the previous models that, then, would give way to the establishment of the "homo digitalis", guided by a "queueing of episodes and by situational references". (Vesting 2019: 35 f) To this end, Vesting refers to Byung-Chul Han's metaphor of "swarms" to describe the functioning of this model of public sphere: "Swarms are the expression of intensive - but also rapidly temporary - aggregations of particulars/ uniques/ singulars. They are the product of an intensifying economy of attention that seems to compromise the constitutive moment of the liberal public sphere that is abstraction." (Vesting 2019).

With this, we can already see how the characterization of the fragmented and "disaggregated" public sphere could contribute to elements that are harmful to the typical procedures of public sphere formation and the aggregation of generalizable themes so dear to public sphere models such as the one formulated by Neves. In a perhaps exaggerated manner, it can be said that such a model of disaggregated communication with tendencies to polarization (and, as we will see, to indignation), due to its intrinsic immediacy and simultaneity, with its emotional appeal and strong moral binding of the "echo chambers" that

contradict the pluralist group models in their "spiral of silence",[93] presents a propitious environment to affect precisely the claims of *mediation*[94] and formation of generalized themes of the public sphere, including constitutional protections and procedures as the main elements of such mediation, as Neves points out.

In this sense, instead of generalizable "themes", episodic trending topics and swarms (or *shitstorms*) arise that resemble "waves of indignation" with low generalizability and coupling with constitutional procedures (Han 2013). In this essay, the goal is to seek to demonstrate that in addition to the structure of the public sphere that reinforces such communications, a subsequent argument can be made that such communications also present a specific form of "symbolic legitimation" and relations to "truth" that has been contrasted with so-called legitimation by procedure. The question remains, therefore, how such communications become so persuasive and so virulent in relation to the symbolic legitimation of democratic constitutionalism.

2. Legitimation by indignation vs. Legitimation by procedure

Having established what is meant by the symbolic crisis of democratic constitutionalism and how this crisis is related to the contemporary structure of the public sphere, it remains to work on the argument of this essay that the form of "indignation" propitiated in such contexts becomes so *persuasive* and, therefore,

[93] This term was made famous by Noelle-Neumann in her studies of public opinion on the "climate of opinion" and predicts the tendency that positions that appear to be a minority in given argumentative contexts tend not to be expressed, causing a "spiral of silence". On the contrary, when actors perceive (correctly or not) that their positions are shared by the majority, there is a higher probability of manifestation of such a position (see Noelle-Neumann 1996). In a model of pluralistic public sphere based on groups this would result in a tendency to the adoption of more "centralistic" positions. Reversely, Noelle-Neumann´s thesis could still remain up-to-date to explain the political polarization in the disaggregated (or unbundled) public sphere, with its "echo chambers".

[94] Mediation is understood here as a "medium" in its double sense: as a means where the emergence of "forms" is made possible and as the midpoint between extremes. Moreover, it also appears as "mediation" in the sense of mediating and providing procedures. Incidentally, this is the argument of Andreas Voßkuhle (2016), who claims that Germany has been characterized since the postwar period by a "constitution of/by the middle" (*Verfassung der Mitte*), generating a centralist stability. This, however, would be in check in a current context of greater political polarization.

can be understood as an emerging form of symbolic legitimation that competes with procedural legitimation in legal and political communications.

Starting from Niklas Luhmann's systems theory we see that there are basically two "types" of communication media.[95] First, Luhmann discusses the means of diffusion as those that deal with the reach of social redundancy. The media of diffusion determine and widen the circle of receivers of communication. The main examples offered are spoken language, written language, the press, and electronic communication. Contemporary studies extend this typology to include computational-digital communication, or even social networks and intelligent algorithms.[96] According to Luhmann, such changes in the media of communication diffusion were extremely relevant for the evolution of society - among other reasons, by changing the relationship between presents and the temporality of social communication, besides resulting in some important evolutionary trends that can be summarized in that "which goes from a hierarchical order to a heterarchical order that renounces the spatial integration of the operations of society", namely: in the functional differentiation. Since the 18th century this circumstance is celebrated as the predominance of 'public opinion' - which in terms of differentiation means the passage to differentiation by functions. Still, with this development of the means of diffusion, society would tend to rehearse new 'proper values' that promise stability under conditions of heterarchy and second-order observation.[97]

[95] For all references in this part, see Luhmann (1997: 202 ff.).

[96] Vesting works precisely on such means of dissemination and their implications for the legal system mainly in his four volumes on the media of law. (see a description of this project at the end of his book Vesting 2007). Furthermore, for Vesting, the computer and digitalization would present a relevant and peculiar structure, since they would work with all other means of dissemination and would enhance their interrelation capabilities, acting as a "meta medium". (Vesting 2015)

[97] Moreover, with the evolution of these media, the "spatial integration" is renounced, that is, for communications to take place, it is necessary that people are present in determined places with their concrete conditions. Luhmann argues: "[i]f in the eighteenth century the integration of society is surrendered to 'public opinion,' one can ultimately find there a renunciation of spatial integration - if not integration as such. This, because 'public' does not mean anything other than leaving entry free to anyone (renunciation of access control), *i.e.*, structural indeterminacy of spatial integration."

In turn, the means of attainment or success - best defined as *symbolically generalized communication media* - provide a *conditioning* and *motivational* nexus. These media have great importance for the communicative links operated in social systems. This is because symbolically generalized media cause expectations of acceptance to be "tuned in". In other words, these media make certain communications more likely to be accepted - *without the need for discussion or consensus*. Luhmann argues that it is easier to accept an exchange or a payment when money is offered, or to obey an order through state violence or the force of power. Therefore, by institutionalizing these symbolically generalized media of communication, one expands "the scope of 'non-rejection' of communication-rejection, this very likely when one pushes communication to go beyond the scope of the present". Hence Luhmann borrows the term from Parsons and defines these media as *intrinsical persuaders* (Parsons 1963). Therefore, society makes use of the formation of "special media" to reduce contingency and bind the *conditioning* of *motivation*, *i.e.*, it makes use of symbolically generalized media.

Symbolically generalized media have such relevance for Luhmann's theory of society because they answer the question of how social order is possible without reference to normative conditions such as natural law, social contract, or consensus morality, that is, without presupposing a collective consciousness (Luhmann 1978: 6). It is possible to state that they would be more dynamic and operational functional equivalents to persuasion by an integrated morality or consensus produced by a shared worldview. This is the difference between the use of the concept by Parsons, who worked with the notion of "shared symbolic values", and Luhmann, who does not see the need for such shared values. [98]

Instead of relying analytically on morality and shared values as an explanation of social cohesion, Luhmann shifts the explanation to the symbolically generalized means of communication. Their "*symbolic*" character endows communicational operations with a greater *prospect of acceptance*, transforming "in an astonishing way the probabilities of no into probabilities of

[98] For a masterful work on the notion of the symbolic, bringing together the various conceptions of the concept in addition to his own theory, see Neves (2007: especially the first chapter).

yes". These media coordinate selections and achieve a firm coupling through the specific form of the respective medium, such as "proofs of love, theories, laws, and prices".

From this explanation we can highlight two points: the first is that there is a co-evolutionary relation between the means of diffusion and the structure of society, to which Luhmann works mainly in his notion of functional differentiation. The symbolically generalized media, in consequence, are also affected. His worked on "legitimation by procedure" is precisely one of the examples brought by the author to support this theory.[99] Luhmann works this relationship within his theory of the establishment of functional differentiation, but nothing seems to prevent that this theoretical relationship of irritations and correlated evolutions can be expanded and worked in other areas and phenomena. Moreover, secondly, we see that the term "symbolic" as used by Luhmann works here with the notion of intrinsic persuasion (as previously formulated by Parsons), acceptance, and motivation of communication - albeit without the evaluative or consensualist charge. This will be a key point for the argument that follows.

In this sense, the argument of this essay works with the notion of "symbolic legitimation" precisely in this delimited context of its "intrinsic persuasiveness". Here, we use this context, in fact in a somewhat heterodox way, to think about forms of "legitimation" in its sense of "persuasion", here related to symbolically generalized media, especially "truth" and "validity". If we understand that democratic constitutionalism seems to lose its "force of persuasion"[100] in the above mentioned crisis, and its procedures (elections, representative political deliberations, decisions of constitutional courts, etc.) seem to lose acceptance and persuasiveness, the link here seems to be clear. Moreover, one of the modern ways of giving "legitimacy" to the truth, as we shall

[99] Vesting's theory of the "excarnation" of sovereignty previously embodied in the "symbolic body of the king" and shifting to the "textuality" of written norms (and printed in constitutions and codes) could also be understood within this logic concerning "legitimation by procedure." (Vesting 2013)

[100] See Luhmann (1978: 4f), where he deals with symbolically generalized media in a way close to the power of persuasion.

see, is precisely the adoption of operations that are also procedural of the truth (such as theories, methods, fact-checking editorial procedures, etc.), something that also seems to be losing its power of persuasion nowadays in the various critiques of editorial journalism and institutionalized science.

As a matter of fact, Luhmann's statement in the preface of his book "Legitimation by Procedure" is illustrative when he states that his objective in that endeavor was precisely to work on the vicissitudes of a society "that no longer legitimates its law by invariable truths, but only or mainly by participating in its procedures" (Luhmann 1978: viii).[101] Note that here Luhmann himself recognizes the evolutionary acquisition of legitimating the validity of political communications through legal procedures, in addition to the legitimation of law itself, as opposed to another social form of legitimation (of law and politics): "invariable truths." The argument here will be precisely that the "legitimation by indignation" made possible by the form of "scandal" operates precisely as a performative form that deals with the notion of invariable truth, *revealed* and therefore opposable to the procedure.

The symbolic legitimation treated here, therefore, is taken more broadly, as its "persuasion", and in no way linked to the more normatively loaded theories of legitimation. In fact, studies of the social evolution of the "modern fact" as the basis of the modern notion of truth already deal with how "fact" departs from an extremely recent procedural logic in human history. Thus, the very term "post-factual," so often used to demonstrate the functioning of critiques of

[101] The author states that, with increasing social complexity, modern law comes to be characterized by its process of "positivization" and argues that the "validity" of law is no longer drawn from external spheres (such as morality, worldview, or religion), but anchored in its own self-referential functioning. However, in order to do so, the legal system turns to legislation, a provision of the political system that gives validity to the legal system allowing it to be closed. For Luhmann, modern law in its positivity made it possible for politics to use the legal process as a way to obtain legitimacy (through legally available procedures - Luhmann 1978). Although both are autopoietic systems, roughly speaking, politics draws its procedural legitimacy with the "help" of law; while law gets its validity with the "help" of the political system. The positivity of modern law, therefore, is strictly connected with the procedural legitimation of the modern political system, in a countervailing relationship between the systems. These systems are structurally coupled through the Constitution, understood as an "evolutionary achievement of society". (Luhmann 2000: 390 ff.)

contemporary constitutional democracy, appears to need further contextualization.

For this, we can draw on a seminal study that argues for a legal origin of the modern notion of "fact", mainly by the emergence of juries as "fact knowers and fact evaluators" and by the distinction between "matters of fact" and "matters of law" in England in the Middle Ages. This is Barbara Shapiro's analysis of the development of a "culture of fact" in England, but which can be generalized to some extent to Western culture. In her work, she analyzes how "discourses of fact" start to spread and gain momentum in various social spheres such as law, history, news and reports, religion, etc., reaching a kind of "democratization, participation and popularization" of the "culture of fact" (Shapiro 2000: 218). Shapiro followed the development of how the "discourses of facts" socially gained their character of *validation*, legitimation and relation to the "social and sectoral epistemologies" in question. The modern fact, associated with human action (deed - hence the words *in fact* and *indeed*), was in its legal origin anything but a settled truth or "natural fact". It arises from "one of the most significant transformations" of the social-legal system of the Middle Ages, namely, when "critical investigation and evaluation of evidence by a body of professional judges" (Shapiro 2000: 8-9) replaced "ordeals" and other forms of evidence production such as "trials by combat". The facts were based on the separation between "matters of facts" and "matters of law". Thus, facts were part of the process of finding truths that were "worthy to be believed", that is, in a process of evaluation, legitimation and validation. The context all of Shapiro's analysis of "fact" at various times is that one should find a truth that would fulfill the epistemological (and validation) function of anchoring truths that would generate "*moral certainty*." (Shapiro 2000: 208) This was first in the creation of legal procedures of evidence, in a proceduralization with manuals and procedural rules of determining the truth; openness for the entry of objective documentation of "reliable witnesses", as well as the professionalization of lay institutions (such as the jury). All this, at a historical moment when the objective divine revealed

truth, such as those of the ordeals and trials by combat was losing in its persuasiveness.

With this, we can already see the intricate form that notions of truth and validity can take. Incidentally, there are studies that analyze precisely how indignation can be the basis of legitimation of legal and political systems par excellence. This, because "*indignation*" would be precisely the negative face of "*acclamation*". Indeed, Giorgio Agamben, in his study "*Il Regno e la Gloria*" deals with the positive acclamation (a collective manifestation of triumph and applause) in conjunction with the *adverse acclamations* of discontent *("acclamatio adversa")* in his arguments on legal-political foundations (Agamben 2007: 189 f), in his consideration *as the ultimate expression of manifestation of popular will*. The *acclamation of discontent* can be related here as a way of conceptualizing collective or *public indignation*. In fact, Agamben deals with Carl Schmitt's position that the acclamations would be the purest form of "*immediate* expression of the people gathered in democracy" in its most direct form, working the notion of the *acclamation as the ultimate constitutional foundation*, where the acclamation would express the immediate character of the people as the constituent power. (Agamben 2007: 192f). In this work, Agamben develops the symbolic liturgy of acclamation and its elements of political theology of "glory" as a foundational element. He even goes so far as to consider, with reference to other authors, that "acclamations are indispensable to the emotional strategy proper to fascist regimes" (Agamben 2007: 209 f; 214f).

Commenting on this work, Byung-Chul Han states that Agamben considers acclamations as transition zones in which politics and theology become indistinguishable: like the doxological liturgies of God's domain, profane acclamations would not be mere ornaments of power, but would constitute its foundation and justification (Han 2010: 1) Han, however, brings the debate to contemporary times of the society of the spectacle (Guy Debord's term) and the new media where the legitimization of political power by acclamation would be returning. Unlike Agamben, however, Han views acclamation - and in other contexts also "indignation" (*Empörung*) - as the opposite of politics. Han

considers, unlike Luhmann, that indignation does not generate norms, but mass anger ("*Wut*") does. His argument stems from his analysis of indignation or adverse acclamation of discontent in the contexts of the new social networks. Han argues that while the discontent of the masses and their anger ("*Wut*") was something directed at political communication, with a claim to becoming some form of entitlement or generalizable theme, the ubiquitous spectacularized and fragmented *indignation* of social media "shitstorms" - which would resemble "swarms" - would not have the capacity to condense into truly political communications on their own (Han 2013).

Armed with these considerations, we can see how indignation presents a claim to symbolic legitimization of truths and validity of normative constructs. Indeed, by being collectively outraged with indignation, we feel an "effect of truth" and reality and a sense of collective legitimacy is produced. Despite the criticism that social network indignation is not something truly politicizable, as Han claims, we have that it is rather a normative stance of the author towards his concept of politics. What remains from this discussion is to note how indignation, through the mode of adverse acclamation, presents itself as a specific mode of symbolic legitimation of power and law. Indeed, as we shall see below, this is made possible by the communicational form of scandal.

3. The "reverse side of justice": Scandals and indignation as a "symbolic big-bang" of normative genesis in Luhmannian theory

One of Luhmann's most impactful theses on human rights, among many others, is that the scandals of human rights violations should be understood, paradoxically, as the validity foundation (*Geltungsbegründung*) of these same rights (1992a: 27f, 1993a: 574f, 1995b: 222f).[102] Considering it as one of the "most

[102] Luhmann (1991: 273f, 1995b: 218) distinguishes validity justifications from validity conditions. Justification and "legitimation" would include both the production of validity (*Herstellung von Geltung*) and the presentation of reasons (*Angabe von Gründen*) (1995b: 218). The conditions of validity, in turn, would presuppose the difference between valid and invalid law, being understood as the positivity of the law itself - as the symbolic circularity of the "symbol-validity"

significant indicators of the legal system of a world society" (1993a: 574), such a "contemporary paradox of human rights would gain relevance in the turbulent world relations (1993a: 581), Luhmann states that

"[...] What one can observe is a very elemental (*ürsprungliche*)form of norm genesis based on scandalous events, which are worldwide reported by the mass media. [...] One is then not bound to comparing legal text and behavior, to extract from this the conclusion, if something violated the Law, or not. In a much more immediate level, the scandal can itself generate a norm (that was not even formulated beforehand). [...] Only and firstly by its violation and the corresponding indignation (*Empörung*) of a *colère publique mondial* in the fashion of Durkheim, human rights acquire its justification of validity." "A legal formatting (*juristische Formgebung*), a regulation of international public Law, can only connect itself to it, but does assume the role of a legal source)" (Luhmann 1992a: 27-28)[103]

Luhmann then enlist cases that would be framed as distinctively *exemplary*, naming them "manifest experiences of injustices" – i.e. "Injustice at any rate!""! ("*Unrecht auf jeden Fall!*"), that would be different from fright or "mere anger" (*Entsetzen und (hilflose) Wut*). The "differentiating criterion" would be the experiences that correspond to the clearest, "most obvious and shocking violations of the most basic measures of human dignity". He further states that "obvious and flagrant indignation could only be spoken in relation to human

as something that maintains continuity in discontinuity, that is, the operability of the legal system itself. (1991: 280f, 1993a: 114f).

[103] Although Luhmann seems to deal with the paradox of the violation of a norm that has not been previously formulated as something specific to human rights, he strangely does not relate the issue to his considerations of the "circularity" of the validity of the legal system, despite following similar patterns. In fact, when writing about the "evolution of the legal system," Luhmann formulates exactly this by considering the "variations" within the legal system itself: "This certainly happens retrospectively (*nachträglich*), on the occasion of a behavior that *a posteriori* shows itself as a frustration of an expectation. The case makes the norm visible, a norm that did not exist as a social communication structure before the case. *Ex facto ius oritur* (1993a: 257). The difference in emphasis between the two (especially after Fischer-Lescano 2007: 2013) seems to be that in positive law and public international law, it is the case ("*ex facto*") that makes the norm visible ("creates" or "originates the Law" - *ius oritur*), whereas with human rights it would be the violation itself (*iniuria*). The difference, however, does not seem to be clear. One could say that the "genesis" ("*oritur*") perspective can make it difficult to understand both the more complex validity as a symbol of circulation in positive law and the validity of human rights, falling back to a semantics of "legal sources."

rights [...]. Those who react in these cases with indignation and express their counterfactual expectations need not expect to encounter dissent - almost as if the normative sense were covered by a sacral power" (Luhmann 1992a: 28).

Moreover, the grounds for its validity would not be clear, nor its texts precise. Its validity would come "from evidence of the violation of the right (*Evidenz der Rechtsverletzung*). In the face of "horror scenes of many kinds, further discussion is superfluous." The discussion of which standard, and specifically on which texts they are based, does not matter (Luhmann 1993a: 577)

These cases would only constitute human rights offenses when "experienced in a unified way all over the world (*welteinheitlich erfahrenen*) on the occasion of simply unacceptable occurrences, [...]! (1992a: 30). Therefore, "viewed cognitively, these are paradoxes, which are not logical, but self-blocking of cognition that are creatively solvable. Seen normatively, these are scandals with the power to generate norms": *ex inuiria ius oritur*[104] (Luhmann 1992a: 31-32). He further considers that human rights cannot be managed as a unit of a norm, nor as a value. "Nevertheless," he says, "it seems to constitute here a specific,

[104] See Fischer-Lescano (2007: 85, 2013: 25): "If not one of these violations of clear injustice, what else, then, could turn something that was licit into something illicit (*Unrecht)*?". Fögen (2003: 104) states that the illicit (or even the unjust in this specific context: *Unrecht*) operates to "make the legal system 'visible' and fundamentally constitute it. (...) 'Lawful law' ('*Recht*') is meaningless if 'illicitness' (*Unrecht*) does not appear. Lawfulness (*Recht*) can then only originate - as concept, as communication, as system - when the opposite concept "unlawfulness" ("*Unrecht*") is known. (...) It is first with an act of illegality (unlawfulness or even extreme injustice - *Unrechtsakt*) (...) that the binary structure, which social systems need, is created. In a founding history of law, however, unlawfulness (*Unrecht*) must be visible, unavoidable (*unübersehbar*), *scandalous*." Fögen sees some scandals as the "symbolic big bang" of value systems, functioning as an inverted side (*Kehrseite*) of justice; as its "foundational myth" (2003: 77; see also Luhmann, 1989: 49f.; on the necessity of origin myths for the legal system Vesting, 2011, Koschorke, 2007: 7f). More than only being part of an epistemological-normative "reflection-stop", "justifications or myths of origin" in legal and political systems are constantly re-interpreted and actualized in different historical, social and cultural constellations (Assmann 1999, 2013). Even if we assume, as Fischer-Lescano correctly shows, that human rights scandals can foster the "informal symbolic circulation of the validity of human rights" and a socio-legal aesthetics of contestation (Fischer-Lescano 2013), the thesis of scandals of human rights violations say very few about the conditionings of these violations, and much less on the evolutionary achievements of human rights enforcement and development that occurred without scandalization. In the specific case of human rights, the iconography of human rights violations encompasses the wounded "*bodies*" (traumatized bodies and souls), that could eventually feed a response to "cultural traumas" (Joas 2011), rendering "plausibility" (Luhmann 1997: 500 f) to a cultural and legal semantic of "universal (or inclusive) legal-like claims. On this theme, albeit somewhat critically, see the study Ribeiro and Egio (2022), and also Ribeiro (2020).

worldwide sensibility of application (*weltweit durchsetzende Empfindlichkeit*)" (Luhmann 1993a: 580).

This worldwide structural objection and outrage would go beyond the "European tradition," indicating that one can hope that the entire "world society will be sufficiently scandalized by drastic intolerance, and build upon it a framework of norms that are independent of regional traditions and regional legal-political interests." (Luhmann 1993a: 582) Moreover, this would be based on a shared "good legal taste" (*Rechtsgeschmack)*[105]*:* "it would be in bad taste (*geschmacklos*), after facing such atrocities, to search in texts or in the locally valid legal order to ask, whether something like this is allowed or not. The problem lies in reporting such violations and maintaining public attention in the face of the massive scale and continuous reproduction of the phenomena" (Luhmann1995b: 221).

Luhmann, however, is somewhat skeptical about the difficulties of establishing this world-legal system of human rights. He considers that the "evolutionary acquisition" called constitution, understood as a structural coupling between law and politics, has no functional equivalent in world society (1993a: 582, 470 f), the "second" paradox of human rights being the need to make supra-positive rights positive, a testament to their dependence on the institution of the territorial state. The world legal system, without functional equivalents to the constitution and the state, correspondingly, would be more similar to the "organizational forms of tribal societies " (1993a: 574, 1995b: 221).[106] This would make the human rights situation dependent on the most contemporary "unfolding" of its paradox: just as "civilizational products are recognizable at

[105] "[…] one could also appeal to the judgment in issues of legal good taste (*Rechtsgesmack*) to make it clear that it concerns neither a simply cognitive issue, nor an employment of practical reason in form of moral law (*Sittengesetz*)" (Luhmann 1993a: 557). Further, Luhmann speaks about an appeal to criteria, which are not rooted in reason. He considers aesthetic ideas, which would however have the problem of not being connected to consensus building". (1995b: 225). See, but in more "conceptual" and less sociological way, albeit working with "esthetical mimesis" and fundamental and human rights, Fischer-Lescano (2013: 90f, 107).

[106] The world legal order would be similar to "tribal" formations, because it would have to renounce both "organized sanctioning authority" and "authentic definitions of legal violations on the basis of known rules" (Luhmann 1995b: 222).

their limits, the most current form of the human rights claim could also be the most primitive. Norms are recognized in their violation. Just as expectations are generally made conscious first after their frustration, so norms are recognized in their violation. In fact, Luhmann goes far enough to suggest that perhaps it was time to find new forms or paradigm to unfold (and invisibilize) this paradox, since it seems "insufficient," and, due to the increasing inadequacy of state measures and increased public attention to these kinds of issues, the paradox has become "too" evident (Luhmann 1995b: 221-222), incurring the dangers of "ideological inflation" of human rights semantics.[107]

One cannot address here all the issues of the systems theory approach to human rights,[108] where the Luhmannian considerations on scandal gain their most familiar contours for legal sociology. These elements, however, can be extrapolated and worked out for other contexts of the relationship between law and the public sphere. What interests us, here, is how the notion that collective indignations given by the scandal formula are treated by Luhmannian theory to demonstrate the evidence and plausibility[109] of violations, providing a

[107]"Norm violations" in the modus "scandal" are one of the "selectors" of the mass media system, that by its diffusion, resonance and escalation, incites the feelings of *common* consternation and indignation. They are usually coupled with the creation of an atmosphere of "extraordinariness", spectacle and moralization – or moral "disembedding". Scandals would also generate the *effect of the unveiling of the truth*, because common knowledge knows that what is said in private is usually sincerer than that, which is said in the public sphere. Notwithstanding, this selector of "scandalous/not-scandalous" remains itself invisible. (see 2017[1995]: 44f, 59, 141). "Themes" can also become more scandal-prone (1990a: 175-6).

[108] Teubner (e.g., 2006, 2012) and Fischer-Lescano (2007: 2013) develop a broader conception of human rights within the framework of system theory, further developing the notion of scandal and *colère publique mondial* in the process of legal formations beyond the national State, including therein private ordering. For a critique of the "scandalization thesis", see Ladeur/Augsberg, 2008: 105f. For the concept of human rights and its *ambivalent* symbolic force, distinguishing "strong and weak publics" and strong and weak legal "forms" of the scandalization potential of human rights, see Neves (2007, 2013). On the three forms of unfolding the paradoxes of human rights, see Luhmann (1995b, 1993a: 574f). In his turn, Verschraegen, 2002, follows a "sociological standpoint" and does not seem to differentiate fundamental from human rights. At last, see also Moeller: 2008, where he analyses Luhmann's "non-humanistic" conception of human rights, differentiation of semantics (value of indispensable norms) and function (structure – keeping the future open for social systems) of human rights. He considers them as "semantic adornment of structural indifference". For human rights as "inclusion" in (the legal system of) world society, see *e.g.* Moeller (2008: 135f) and Neves (2007).

[109] Ideas are plausible when they clarify directly (*unmittelbar einleuchten)* and do not need to be further substantiated with reasons (*begründet*) in the communication process. Evidence (*Evidenz)* can be spoken about, when something clarifies (*einleuchtet)* under the exclusion of alternatives" (1997: 548f). The metaphorical level of "evidence" (both as proof and obviousness or self-

foundation of validity and a force of persuasion that operates as a direct "reflection stop", that is, that dispenses with discussions, procedures, or arguments for its demonstration. Thus, the most "evident" and shocking experience with the violation, generates, creates (almost ex nihilo) the norm itself, giving it validity, coating it with an effect of reality and truth by a direct and primitive way.

The thesis of human rights violation scandals as the foundation of its validity from collective indignation within the Luhmannian theory is already known in the legal sociology literature mainly by the works of Teubner, Fischer-Lescano, and Marcelo Neves. Furthermore, a pioneering and lesser known study that presents a Luhmannian sociological approach using "scandals" to analyze the history of Roman Law and the evolution of the legal system has been presented by Marie Therés-Fögen, who argues that scandals are just a moment of "variation". The problem of "selection" ("the ordeal of decision") is larger and depends on the co-evolution of social systems and semantics. For her, in the very contingent cases where scandals are followed by successful selections, scandals can mark an "event" (*Ereignis*) for a system, that is, a relevant "before/after" distinction. Scandals can therefore function in a similar way to Koselleck's (1992) concept of crisis: that is, they present a scission (*eine Scheidung*) that must be decided (*ent-schieden werden*). In this sense, scandals can sometimes function as a "negative marking" for "values" or "norms," bringing their alleged violation or danger to the center of the "condensing semantics" of attention. They can participate, thus, as negative marcs in the crystallization of "values", being the later "reflexion stop-rules"." (Fögen, 2003). In their justifying and legitimizing function, scandals can (in very few cases) function, in relation to a given system, as "a narrative of beginnings" or as a "*symbolic big bang*," especially by performatively introducing the beginning of the negative side of the code. For the legal system, scandal thus signifies the emergence of its negative side,

evidence) as the sensorial accesses to the world by vision should be clear even in the etymology of the term (*evidentia*, "*vedere*", "to see").

"*Unrecht*." Hence, Fögen states that collective scandals of perceived indignation represent "the other face of justice" (*die Kehrseite der Gerechtigkeit*). (Fögen, 2003)

Indeed, it is noticeable that the focus of the above Luhmannian considerations about scandal, mainly directed to the human rights sphere (and generalized for the symbolic institution of normative systems by Fögen), focus on the notion of "normative genesis". It is about demonstrating how collective indignation, whose form is given by scandal, grounds the validity of normative claims by creating the perception of a direct and immediate, evident violation, which functions as a "symbolic big bang" and instates a perception of "violated injustice." This process, therefore, works as a symbolic legitimization of normative constructions by also generating a relation of evidence, of truth, of its violation. Here, the negative element takes precedence in the plausibilization and legitimization of normative constructions.

As we shall see, however, in addition to this "normative genesis," contemporary studies of the sociology of scandal point to other elements that go far beyond the mere genesis of norms. In fact, scandal as a form of relation between the public sphere, social normativities and law has a large space in reflections ranging from theology, through institutionalization in canon law, and on to contemporary studies. Despite the great diversity of the various texts dealing with the notion of scandal in a legal context, one element of this literature remains very clear: whether in theology, institutional uses of the term in canon law, or contemporary case studies, *scandal always operates in law as a moment when legal procedures come into check and a need or opportunity is created to adopt anti-procedural decisions or stances*. That is, rather than the mere genesis of norms, specialized studies of scandal in law point much more to the symbolic displacement of legal communications from routine procedures to anti-procedural considerations.

4. Scandals as opportunities to displace procedure: Elements of a legal sociology of scandal and its management

An already classic study on the history of the concept of "scandal" was conducted by the theologian Gustav Stählin (1930, 1961), whose analysis points to a complex history mainly through the analysis of biblical translations (see also Thompson 2000: 11f). In short, the first profane uses of the term are found in a comedy by Aristophanes. Here, in relation to a court procedure, the "spectacular" accusation speech was metaphorically compared with a "scandal" *(Σκανδαληθρον - Skandalethron*), in one word denotes the piece of wood, a trigger (or spring), used in traps (*Stellholz*) to capture and trap animals (1961: 339, 1930, Maltby 1830: 603; Bryan 1998: 8f). But it was with the Septuagint translation of the Old Testament that the term gained its wider and more complex religious connotation. Stählin defends the thesis that a "secondary conceptual assimilation" took place (1930: 130, 1961: 341), assimilating two different Hebrew meanings (מוֹקֵשׁ and מִכְשׁוֹל) into the translation of the Greek "Skandalon" (*Σκάνδαλον*) resulting in a religious concept of an obstacle in the way, a bump, a stumbling block (*Stolperstein* and *Stein des Anstoßes*) and also the "occasion of religious ruin".[110]

The boom of the concept and its ambivalent uses is attributed to the New Testament. In the Vulgate, the term acquired a much more differentiated meaning. If in the Old Testament, scandal was understood as an associative network of legal violations, shame and sin in semantic opposition to "righteousness and customs," in the New Testament the term acquired a characteristic of a sin of "spiritual fall" resulting in a grave threat to the will of God and the Christian faith." It was also seen as a test for the Christian

[110] Stählin argues (1961: 340) in the sense of a "*sekundäre Bedeutungsassimilation, i.e.* assimilating, conflating, the meaning of two concepts consisted in conjoining two different "frames of meaning" (Stählin 1930: 88ff). The point is that, in the Septuagint, the Hebraic words *Môqesch* (מוֹקֵשׁ) and *Mikschôl* (מִכְשׁוֹל) both are used in the translated Greek σκάνδαλον (1961: 341). The term acquires then a "surplus in meaning", a religious one. As occasion of spiritual ruin and impact caused. Here the impact, obstacle and impulse are amalgamated. On could say it is an impact (Ger. *Stoß)*, that can be understood as a "violation" (*Verstoß)* and danger to faith and sometimes a stimulus or impact (*Anstoß, Anstoßstein)* to the need of expiation (*Anstoß zum göttlichen Gericht), i.e.* Final Judgment or eschatology (1961: 341).

community, which should react with indignation of damaging violations.[111] Theologically the term has acquired a great differentiation in relation to "positive and negative" scandalizations (see, e.g. Foussier 2009, Aquinas 1947).[112]

Between the 1st and 8th centuries the term then undertook an increasing moralization, popularization, and psychologization, whereby the term came to mean outrage, indignation, social disturbance in conscience and society (Stählin 1961, Brunkhardt 2005: 67f, Käsler 1991: 70f). A very important point is that in the German discursive domain this is the most prominent use of the term, especially after Martin Luther's translation of "scandal" as "*Ärgernis*" ("indignation," "outrage,", see Seil 1971: 504-5), something that mainly underlines the external and active part of the theological concept and that somewhat impeded the reception of theological debates on the concept.

In the 12th and 13th centuries the term acquired a remarkable theological and moral relevance (Seil 1971, Nemo-Pekelmann 2007, Foussier 2009, Bryan 1998: 315). Along with other outstanding works, the subject gained prominence for the extensive classification and development undertaken by Thomas Aquinas (1947 [1272]) Summa Theologiae (II, IIa, cuastio 43). St. Thomas Aquinas extensively treats scandals as a sin "against beneficence" and "against charity" (that is, "an injustice against the love of neighbor"[113]) because it can constitute

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[111] Stählin (1930, 1961), Thompson (2000: 12 f.), Burkhardt (2015), Käsler (1991: 69 f). For "contemporary tests" see De Blic and Lemieux (2005).

[112] In the same way that it was in the Old Testament (OT), "σκάνδαλον still denotes, in the New Testament (NT), a relation to God: it is both an obstacle to the faith and a cause to lose faith. Similar to the OT, it is both cause of guilt and downfall; "because the fall from faith is the most meaningful downfall." (Stählin 1961: 345) If the OT was more related to the violation of costumes and laws, the NT adds the meaning of seductive occasions for sin and downfall. (1961: 347-8). For other uses, especially in Paulus and on the theme of crucifixion, see Stählin (1961: 352 f).

[113] ..."*beneficentiae opponuntur*",..."*contra caritatem*", ..."*iniuste proximum*" (Aquinas 1947). For a leading study discussing the "political theology of the neighbor" in addressing fundamental rights, see the proposal of Vesting, 2014. For the theme of human right, see Hauke Brunkhorst's (2005: ch. 1) analyses of some pre-formulations of the *solidarity* terminology in similar semantics of *caritas and brotherhood* in the Middle Ages. He then follows to undertake a semantic genealogy of solidarity and human rights. However, a "political theology of the scandal" seems to be problematic, because "scandals" are neither "pregnant *concepts* of State Law and State theory", as proposed by Carl Schmitt, nor institutionalized in the sense studied by Ernst Kantorowicz in his "The Kings Two Bodies". There is, however, some attempt to develop a sort of "political (sociological) theology" of scandal: see Girardi (2014). This essay distance itself starkly from his perspective and from moral considerations - even though his mimetic theory may provide some loose insights on scapegoating in scandals.

the loss of "common moral reference points" and the permanent possibility of indiscipline and disorder. The main point here is the connection between scandals and the character of exemplarity (reference to a third party - the "neighbor" - *proximum*) and bringing "spiritual ruin to his neighbor and to the whole community."

This theological tradition, it can be said, had a great influence even on philosophy. See, for example, Kant's uses of the theology of scandal in his text "Toward Perpetual Peace," as argued by Pievatolo (2013). Such theological contours of the concept are already known and studied by sociologists of scandal (*e.g.* Käsler 1991, Brunkhardt 2015). Beyond the insights that the history and etymology of the term may offer, however, the importance of scandal in theology and moral philosophy nevertheless do not do justice to the greater social relevance that the term has acquired as a "juridical terminology" (Seil 1971) and "legal category" (Fossier 2009) in the doctrines of Canon Law, especially for its applications and interpretations of the theological mandate made prominent in these centuries: "avoid scandal!" - "*proter vitandum scandalum*".

As Leveleux-Teixeira (2013: 202) states, it was especially with the canonists, rather than the theologians, that "*l'horreur du scandale*" manifested itself most presently and took institutional forms. According to her, "while the theologians were more focused on moral issues," and "even if moral aspects are also undeniably present in the discourses of the canonists," the latter "privileged the question of collective organization and community identity" when dealing with scandal. Historically, a potentially productive link for the sociological broadening of our understanding of scandal seems to be canon law.

It is possible to summarize some results of these studies: After the theological boom of the theology of scandal in the 11th and 12th centuries, Canon Law incorporated mentions of "scandal" into its doctrine. Incidentally, scandal is present in many articles of the Codex Iuris Canonici (CCC 1917, 51 entries, CCC 1983, 28 entries; see Naz 1965) and the mandate "to avoid scandal" (*propter vitandum scandalum*) is said by some to be even a criterion or normative framework in Canon Law. In this sense, it was applied as a "loose and empty

signifier", as a "pure meaning" and "notion of variable content" - "*une interface juridique flottante*" - so that "norms of popular and common knowledge could be linked to law". (Nemo-Pekelman 2007: 491, Leveleux-Texeira 2013: 200f).

In its increasing use and significance, the concept was heavily used in the disciplinary system of Canon Law. Especially in the field of normalizing the behavior of clerics (Foussier 2009, Nemo-Pekelman 2007, Meyer 2011). Here, the mission of clerics places them in a position of prominence, and their public behavior should be one of setting good examples. This finds correspondence both in theology (as in Thomas Aquinas) and in the contemporary sociology of scandal (Ebbighausen 1989), that positions of "condensed attention or prominence," representation, and power are usually more prone to scandal, exemplarity being a defining characteristic. Theologically, the image of Holy Church, its divine mission, and the theological mandate *propter vitandum scandalum* (the very emergence of which could cause spiritual ruin and consummate mortal sin), were especially at risk when the public image of clerics was at stake. However, the juridical relevance of the term scandal was progressively extended to include the "disciplining" of the Christian population and, later, even of the laity (Foussier 2009, Meyer 2011, Foucault 2014: 175 f.). This was so, because what was at stake by the emergence of scandals was the very (spiritual) bond of the community. As in Thomas Aquinas, neither intent nor truthfulness are paramount in the constitution of scandal, but rather exemplarity. The "disciplinary legal institute" of scandal progressively became a touchstone for disciplinary measures of public conduct in 13th century Europe (Foussier 2009, Astigueta 2012, Naz 1965, Bryan 2008). This would have been translated to the "public administration" of 12th century Europe (Meyer 2011) and to the "*derecho indiano*" of the 17th century Spanish colonies (Agüero 2008). Such a "disciplinary character" of the doctrine of canonical scandal was instrumental in shaping the relations of canonical and public disciplinary powers. This could even be seen in the "Letters of the King (*cedulas reales*)" addressed to both bishops and public officials (Agüero 2008 and Escriche 1863).

Furthermore, it was said that the concept was crucial for the differentiation between "sins and crimes." It functioned in this context as a "legal framework" to distinguish, on the one hand, "private sins and crimes" - which were regulated in private forums with private penance, confessions, forced displacement of clerics from one parish to another -; and, on the other hand, public sins and crimes, whose penance and punishments, or rituals of atonement, took place publicly (see comments in Naz 1965). Scholars like Christoph Meyer (2011: 133, 145), claim that this differentiation, could even be thought to mark the beginning of the development of the "public sphere (*Öffentlichkeit*) already in the Middle Ages," in which the "concept of scandal" was a central operative concept in the co-evolution of politics, religion, and law (at the time not yet differentiated), in the sense that through rituals, procedures, and legal-canonical cases, scandals would make the difference public/secret (*Öffentlichkeit/Geheim* – see also Foucault, 2014). Other authors (such as Foussier 2009, Bryan 2008 and Nemo-Pekelman 2007) claim that the "doctrine of scandal" and the mandate "*propter vitandum scandalum*" were instrumental in giving rise to development of the institution of the "confessionary" in Catholicism. The mandate to avoid scandal was both a justification and a "guideline" (manuals) for the confession distributed to the clergy.

Finally, scandal and the (legal) argumentation of scandals are also a way of "obtaining evidence and truth" for the legal system of the time. Starting from the notion that "scandal" is per se a complete and consummate "evil," the immediate consequences of which could lead to the occasion of the spiritual ruin of one's neighbor through a "bad example," only the mere appearance of scandal could suffice as a means of constituting evidence. (Meyer 2011: 133).

The very appearance of a scandal immediately signified its consummation as a dangerous sin against faith and community. Scandal, then, is both the proof of a sin and a sin in itself. It is no accident that the search for truth and proof in law through the "argument of scandal" appears alongside other public forms of "truth and proof production" in law, such as trial by combat, by God or by ordeal (*Ordalien*), which have been replaced by torture (Foucault 2014, Agüero 2008,

Lepore 2016) and by the trial by jury. They all constitute procedures of evidence production or legal truth, based on ritualized public procedures. However, also in relation to truth the scandal is ambivalent. It (the scandal) was sometimes an evidence-producing phenomenon, performatively constituting a sin or offense before the Law and simultaneously providing evidence of this sin. In other cases, the opposition to the truth was so serious that the scandal had to be pondered (Leveleux-Texeira 2013: 196). The mandate to avoid scandal often meant hiding the truth, something that was sometimes theologically and canonically problematic, especially considering the doctrine of the "triple truth" or *triplex veritas* (see Nemo-Pekelmann 2007, Bohlen 1836: 97).

However, considering the need to "avoid scandals", what the institute presented was a *greater margin of appreciation and openness to case-by-case decisions*: "The paradox is that this same scandal, which in some cases leads to a strengthening of social control by the law, may also result in other hypotheses, in a phenomenon of deregulation or disrespect for the law". (Leveleux-Texeira 2013: 210 see also, Agüero 2008: 169 f).

With this small incursion about specific elements of the legal sociology of scandal we can already see that more than merely "genesis of norms", scandal as a form of communication presents a more complex relationship with legal normativity. In fact, Luhmann himself had already worked in other contexts both the character of pressure to institutions that the scandal generates and the relation of the scandal in displacing the context of legal communication to third parties not involved, that is to a real or imagined public. (Luhmann 1972: 61 s). We see that scandal was, moreover, used as a disciplinary and constitutive instrument for notions of public order and, given its theological career-long contours, as an articulating element to protect the moral order and supposedly threatened cohesion of specific communities. In almost all analyses of the scandal, however, what appears, much more than just a normative genesis, is the displacement of routine procedures to an "extraordinary and dangerous" moment when it is necessary to circumvent the procedure and adopt consequentialist positions. The conclusion we reach is that beyond the symbolic

foundation of normative genesis, what the communicational form of scandal operates is, above all and for better or for worse, a pressure or obstacle for the procedures and their legitimation.

5. Final considerations.

The argument brought forward here is not suggesting that the modern legitimation by procedure is being overtaken by the legitimation by indignation. On the contrary, legitimation by procedure remains the main characteristic of modern legal-political systems. It is, though, contingent and faces other forms of "legitimation". Understanding "legitimation" in this broader sense and including here truth regimes, legal validity and political economy (understood as in Agamben 2007) enables us to better understand how societies deal with (legal) normativity in different ways and in different means in different media. Much has been said about "political economy" – as the laws describing the functioning and allocation of power in politics; and "truth regimes", as in the laws describing the functioning and validation of truths in society. Legal validity, however, despite being also a social (cultural and medial) phenomenon, usually remains relegated to the notion of an empty symbol of the mere circulation of the legal system (as in the Luhmannian formulation).

The legal sociology of scandal, especially if taken way further and deeper than its most famous formulation concerning human rights, tends to show precisely another social way of dealing with the validity of legal norms. Such way is historically and culturally embedded in many social practices and institutions. Maybe one could go as far as to say that the scandals reveal *a part* of the "legal economy", *i.e.* the laws describing the functioning and acceptance of "valid norms"; or, in other words, forms by which society accept norms as valid. The main modern form remains, of course: the legitimation by procedure, with its procedural "factual" truth, and democratic underpinnings. The legal sociology of scandal tends to reveal that legitimation by procedure must live alongside the

legitimation by indignation/acclamation, with its revealed "post-factual" truth, with its revolutionary and populist underpinnings – for better or for worse.

It remains highly improbable that we shall see a presidential election being decided by trial by combat (at least really and not metaphorically – see the arguments in Lepore 2016). Nevertheless, may it be in institutionalized politics, protests, supreme court popular cases or even day-to-day legal cases, the logics of scandal and the legitimation by indignation/acclamation will probably still remain being a "stumbling block" (lat. *scandalum*) for the legitimation by procedure.

References

Agamben, G (2007) *Il Regno e la Gloria: Per una genealogia teologica dell`economia e del governo (Homo sacer, n,2)* (Vicenza, Neri Pozza).

Agüero, A (2008) *Castigar y perdonar cuando conviene a la República La justicia penal de Córdoba del Tucumán, siglos XVII y XVIII* (Madrid, Centro de Estudios Políticos y Constitucionales).

Almond, G and Verba, S (1963). *The Civic Culture: political attitudes and democracy in five nations* (Princeton, Princeton University Press).

Aquinas, Thomas (1947[1272]) *The Summa Theologica.* Translated by the Fathers of the English Dominican Province. Benziger Bros. Eedition, (availiable in: http://dhspriory.org/thomas/summa/SS/SS043.html#SSQ43OUTP1)

Assmann, A (1999) *Erinnerungsräume. Formen und Wandlungen des kulturellen Gedächtnisse*s (München, C.H. Beck).

Astigueta, DG (2012) 'Escándalo' in J Otadu, A Viana and J Sedano (eds), *Diccionario General de Derecho Canónico. Vol. III. (Demanda judicial – Filiación)* (Navarra, Instituto Martín de Azpicuelta, Universidad de Navarra), 693-696

Baecker, D (2007) *Studien zur nächsten Gesellschaft* (Frankfurt a.M., Suhrkamp)

BINDER, Werner (2013) *Abu Ghraib und die Folgen Ein Skandal als ikonische Wende im Krieg gegen den Terror* (Bielefeld).

Bobbio, N (2004) *A Era dos Direitos* (Rio de Janeiro, Elsevier).

Bohlen, P (1836) 'Die Genesis' in *Allgemeines Repertorium für die theologische Litteratur und kirchliche Statistik.* (Rheinwald, Georg Friedrich Heinrich Ed.. Volume 14, Heft 2), 97-103

Brunkhorst, H (2005) *Solidarität: von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (Frankfurt).

Bredow, W (1992): 'Legitimation durch Empörung. Vorüberlegungen zu einer politischen Theorie des Skandal' in JH Schoeps (ed), *Der politische Skandal*. (Stuttgart-Bonn, Burg), 190-208.

Burkhardt, S (2015) *Medienskandale: Zur moralischen Sprengkraft öffentlicher Diskurse.* 2nd ed. (Köln, Halem).

Bryan, L (1998) "*Vae Mundo a Scandalis*": *The Sin Of Scandal In Medeval England.* Thesis submitted for the degree of Doctor of Philosophy (Toronto, Bryan, Graduate Department of History, University of Toronto). (available at http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/tape17/PQDD_0002/NQ35118.pdf)

De Blic, D and Lemieux, C (2005) 'Le scandale comme épreuve: Éléments de sociologie pragmatique' 18(71) *Politix* 2005 9-38.

Ebbighausen, R (1989) 'Skandal und Krise. Zur gewachsenen ‚Legitimationsempfindlichkeit" staatlicher Politik' in R Ebbighausen und S Neckel (ed), *Anatomie des politischen Skandals*. (Frankfurt a.M., Suhrkamp), 171-200.

Escriche, J (1863) 'Escándalo' in *Diccionario Razonado de Legislación y Jurisprudencia* (Paris, Librería de Rosa y Bourbet), 627-628.

Esposito, E (1999) 'Das Problem der Reflexivität in den Medien und in der Theorie' in A Koschorke and C Vismann (eds), *Widerstände der Systemtheorie: Kulturtheoretische Analysen zum Werk Niklas Luhmann* (Berlin, Akad. Verlag), 113-120.

Esposito, E (2017) 'Critique without crisis: Systems theory as a critical sociology' 143(1) *Thesis Eleven* 18–27.

Fischer-Lescano, A (2005) *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (Weilerswist, Velbrück Wissenschaft).

Fischer-Lescano, A (2013) *Rechtskraft* (Berlin, August Verlag).

Fögen, MT (2003) *Römische Rechtsgeschichten. Über Ursprung und Evolution eines sozialen Systems* (Göttingen, Vandenhoeck & Ruprecht).

Fossier, A-V (2009) '*Propter vitandum scandalum*. Histoire d'une categorie juridique (XIIe-XVe siecles)' 121(2) *Melanges de l'Ecole francaise de Rome - Moyen Age, Ecole francaise de Rome* 317-348.

Foucault, M (2014). *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice.* Ed. Fabienne Brion and Bernard Harcourt, trans. Stephen Sawyer (Chicago, IL, University of Chicago).

Gerhardt, V (2012) *Öffentlichkeit: Die politische Form des Bewusstseins* (München, C.H. Beck).

Girardi, R (2014) *The One by Whom Scandal Comes (Studies in Violence, Mimesis, & Culture).* Transl. B. M. de Bevoise. (Michigan, Michigan State University Press),

Glückmann, M (1963) 'Gossip and Scandal' 4(3) *Current Anthropology* 307-316.

Habermas, J (1999) *Wahrheit und Rechtfertigung: philosophische Aufsätze.* (Frankfurt, Surhkamp).

Han, B-C (2011) 'Politik ist ein anderes Wort für Gewalt. Rezension – Giorgio Agamben, Herrschaft und Herrlichkeit' *Frankfurter Allgemeine Zeitung F.A.Z. (29.07.2011)*

Han, B-C (2013) *Im Schwarm : Ansichten des Digitalen* (Berlin, Matthes & Seitz).

Huntington, SP (1991) *The Third Wave: Democratization in the Late Twentieth Century* (Oklahoma, University of Oklahoma Press).

Jacobsson, K and Löfmarck, E (2008) A Sociology of Scandal and Moral Transgression: The Swedish 'Nannygate' Scandal 51(3) *Acta Sociologica* 203-216.

Joas, H (2011) *Die Sakralisierung der Person. Eine neue Genealogie der Menschenrechte* (Frankfurt am Main, Suhrkamp).

Käsler, D (1989) 'Der Skandal als "Politisches Theater": Zur schaupolitichen Funktionalität politischer Skandale' in R Ebbighausen and S Neckel (eds), *Anatomie des politischen Skandals* (Frankfurt a.M., Suhrkamp), 307-333.

Käsler, D (1991) *Der politische Skandal: zur symbolischen und dramaturgischen Qualität von Politik* (Opladen, Westdeutscher).

Kohlrausch, M (2005) *Der Monarch im Skandal. Die Logik der Massenmedien und die Transformation der wilhelminischen Monarchie* (Berlin, Akademie Verlag).

Koschorke, A (2007) 'Zur Logik kultureller Gründungserzählungen' 1(2) *Zeitschrift für Ideengeschichte* 5-12.

Koselleck, R (1992) *Kritik und Krise - Eine Studie zur Pathogenese der bürgerlichen Welt* (Frankfurt am Main, Suhrkamp).

Ladeur, K-H (2007) *Das Medienrecht und die Ökonomie der Aufmerksamkeit.* (Medienpraxis).

Ladeur, K-H and Augsberg, I (2008) *Die Funktion der Menschenwürde im Verfassungsstaat. Humangenetik – Neurowissenschaft – Medien.* (Tübingen. Mohr Siebeck).

Lepore, J (2016) 'After the Fact: In the history of truth, a new chapter begins.' *The New Yorker* . March 21st 2016

Leveleux-Teixeira, C (2013) 'Le droit canonique médiéval et l'horreur du scandale' 25 *Cahiers de recherches médiévales et humanists, Journal of medieval and humanistic studies* 193-211.

Loughlin, M (2019) 'The Contemporary Crisis of Constitutional Democracy' 39(2) *Oxford Journal of Legal Studies* 435-454.

Luhmann, N (1972) *Rechtssoziologie 1* (Hamburg, Rowohlt Taschenbuch).

Luhmann, N (1978) *Legitimation durch Verfahren* (Frankfurt).

Luhmann, N (1981a) *Gesellschaftsstruktur und Semantik: Studien zur Wissenssoziologie der modernen Gesellschaft. Band 02.* (Frankfurt am Main, Suhrkamp).

Luhmann, N (1981b)' Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft' in N Luhmann (ed), *Gesellschaftsstruktur und Semantik*, Band 2 (Frankfurt).

Luhmann, N (1989) 'Am Anfang war kein Unrecht' in N Luhmann, *Gesellschaftsstruktur und Semantik.* Vol. 3, 11-64.

Luhmann, N (1990a): *Ökologische Kommunikation: Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen?* 3. Auflage. (Westdeutscher Verlag).

Luhmann, N (1990b) 'Weltkunst' in N Luhmann, FD Bunsen and D Baecker, *Unbeobachtbare Welt: Über Kunst und Architektur* (Bielefeld, Cordula Haux), 7-45.

Luhmann, N (1991) ‚Die Geltung des Rechts' 22 *Rechtstheorie* 273 – 286

Luhmann, N (1992) *Gibt es in unserer Gesellschaft noch unverzichtbare Normen*? (Heidelberg, Müller, Heidelberger Universitätsreden), Bd 4.

Luhmann, N (1993a) *Das Recht der Gesellschaft* (Frankfurt, Suhrkamp).

Luhmann, N (1995) *Das Paradox der Menschenrechte und drei Formen seiner Entfaltung* in N Luhmann, *Soziologische Aufklärung 6: Die Soziologie und der Mensch.* (Opladen).

Luhmann, N (1997): *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp).

Luhmann, N (2000) *Die Politik der Gesellschaft* (Frankfurt, Suhrkamp).

Luhmann, N (2017[1995]) *Die Realität der Massenmedien*. 5th ed (Wiesbaden, Springer).

Maltby, E (1830) *A new and complete Greek Gradus, or Poetical Lexicon, or The Greek Language. An English-Greek vocabulary and a Treatise on some of the principal rules for ascertaining the quantities of syllables* (London, G. Woodfall).

Meyer, C (2011) 'Das Publicum als Instrument spätmittelalterlicher Justiz' in M Kintzinger and B Schneidmüller (eds), *Politische Öffentlichkeit im Spätmittelalter* (Ostfildern, Thorbecke), 87-145.

Moeller, H-G (2008): 'Human Rights Fundamentalism: The Late Luhmann in Human Rights' 14(1) *Soziale Systeme* 126-146.

Naz, R (1965) 'Scandale' in R Naz, *Dictionnaire de Droit Canonique. I-VII, col. Encyclopédie des sciences ecclésiastiques* (Paris, Letouzey & Ané), 877-878.

Neckel, S (1989) 'Das Stellhölzchen der Macht: Zur Soziologie des politischen Skandals' in R Ebbighausen and S Neckel (eds), *Anatomie des politischen Skandals* (Frankfurt a.M., Suhrkamp), 55-82.

Neckel, S (1989) 'Machen Skandale apatisch?' in R Ebbighausen and S Neckel (eds), *Anatomie des politischen Skandals* (Frankfurt a.M., Suhrkamp), 234-257.

Nemo-Pekelmann, C (2007) 'Scandale et vérité dans la doctrine canonique médiévale (XII e - XIII e siècles)' 85(4) *Revue historique de droit français et étranger* 491-504.

Neves, M (2003) 'A Força Simbólica dos Direitos Humanos' 3 *Revista Brasileira de Direito Público* 139-174.

Neves, M (2006) *Entre Têmis e Leviatã: uma relação difícil. O Estado Democrático de Direito a partir e além de Luhmann e Habermas* (São Paulo, Martins Fontes).

Neves, M (2007) *A Constitucionalização Simbólica* (São Paulo, Martins Fontes).

Neves, M (2009) 'A Constituição e a esfera pública: entre diferenciação sistêmica, inclusão e reconhecimento' in MVM Benevides, G Bercovici and C Melo (eds), *Direitos Humanos, Democracia e República: homenagem a Fábio Konder Comaparato* (São Paulo, Quartir Latin).

Neves, M (2013) *Transconstitutionalism* (Oxford, Hart).

Neves, M (2017) 'From Transconsitutionalism to Transdemocracy' 23(5) *European Law Journal* 380-394.

Neves, M (2019) 'Constituição de Weimar, presente!' *Rechtsgeschichte* 443-446.

Noelle-Neumann, E (1996) *Öffentliche Meinung: Die Entdeckung der Schweigespiurale* (Frankfurt, Ulstein).

Núñez, G (2014) 'Escándalo y canon 1399. Tutela penal del celibato sacerdotal. Comentario a la Sentencia del Tribunal de la Rota Romana de 9 de julio de 2004' 54 *Ius Canonicum* 741-754.

Palma Resende, M and Zaidan, D (2020) 'Juristas contra a democracia: usos do direito e desintegração democrática no Brasil pós-2014' 29(1) *Revista Uruguaya de Ciencia Política* 80-108.

Parsons, T (1963) 'On the Concept of Influence' 27(1) *The Public Opinion Quarterly* 37-62.

Pievatolo, MC (2013) 'Scandalum Acceptum and Scandalum Datum: Kant's Non-Interventionism In The Fifth Preliminary Article of the Perpetual Peace'. 24(28) *Scienza & Politica*.

Ribeiro, PH (2012) *Entre Eclusas e Espelhos.* Master thesis (São Paulo, University of São Paulo) (availiable at https://teses.usp.br/teses/disponiveis/2/2134/tde-25062013-091439/pt-br.php)

Ribeiro, PH (2019) 'Reconceptualizing "systemic corruption" in/for Latin America: a legal-sociological essay on Niklas Luhmann's changing visions' 30 *Revista UDEM.*

Ribeiro, PH (2020) 'Das Recht im Skandal seiner Irrtümer Der Skandal als eine Plausibilisierungsform der Rechtsfehlersemantik aus einer rechtssoziologischen, systemtheoretischen Perspektive' in R Fritsche, R Cadore et al. (eds), *Unsicherheiten des Rechts. Von den sicherheitspolitischen Herausforderungen für die freiheitliche Gesellschaft bis zu den Fehlern und Irrtümern in Recht und Rechtswissenschaft*. 162 *Archiv für Recht- und Sozialphilosophie (ARSP-B)*.

Ribeiro, PH and Egio, JL (2022) 'Von Las Casas zu Luhmann' in S Köhler and M Schaffrick (eds), *Wie kommen die Rechte des Menschen in die Welt?* (Siegen, Universität Siegen), 29-64

Ribeiro, PH and Palma Resende, M (2017) 'Apresentacao' in A Fischer-Lescano, *Força de Direito.*

Seils, M (1971) 'Ärgernis' in J Ritter et alli (eds), *Historisches Wörterbuch der Philosophie* (Darmstadt, Wissenschaftliche Buchgesellschaft), 504-505.

Shapiro, B (2000) *A Culture of Fact. England, 1550-1720* (Cornell, Cornell University Press).

Stäheli, U (1998) 'Die Nachträglichkeit der Semantik - Zum Verhältnis von Sozialstruktur und Semantik' 4 *Soziale Systeme* 315-340.

Stählin, G (1930) *Skandalon. Die Geschichte eines biblischen Begriffs* (Gütersloh).

Stählin, G (1961) 'Σκάνδαλον' in G Kittel (ed), *Theologisches Wörterbuch zum Neuen Testament*, vol. 7.

Teubner, G (2006) 'Die anonyme Matrix: Menschenrechtsverletzungen durch „private" transnationale Akteure' 45 *Der Staat* 161-187.

Teubner, G (2012) *Verfassungsfragmente: Gesellschaftlicher Konstitutionalismus in der Globalisierung* (Suhrkamp, Frankfurt am Main).

Thompson, JB (2000) *Political Scandal: Power and Visibility in the Media Age.* (Nortfolk, Polity).

Verschraegen, G (2002) 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Social Systems Theory' 29(2) *Journal of Law and Society*.

Vesting, T (2007) *Rechtstheorie: Ein Studienbuch* (München, C.H. Beck).

Vesting, T (2011) 'Ende der Verfassung? Zur Notwendigkeit der Neubewertung der symbolischen Dimension der Verfassung in der Postmoderne' in T Vesting and S Korioth (eds), *Der Eigenwert des Verfassungsrechts. Was bleibt von der Verfassung nach der Globalisierung*? (Tübingen, Mohr Siebeck), 71-94.

Vesting, T (2013) *Die Medien des Rechts Bd. 3: Buchdruck.* (Velbrück Wissenschaft, Weilerswist).

Vesting, T (2014) 'Nachbarschaft: Grundrechte und Grundrechtstheorie in der Kultur der Netzwerke' in T Vesting, S Korioth and I Augsberg (eds), *Grundrechte als Phänomene kollektiver Ordnung: Zur Wiedergewinnung des Gesellschaftlichen in der Grundrechtstheorie und Grundrechtsdogmatik.* (Tübingen, Mohr Siebeck).

Vesting, T (2015) *Die Medien des Rechts Bd. 4: Computernetzwerke* (Weilerswist, Velbrück Verlag).

Vesting, T (2018) *Staatstheorie: Ein Studienbuch* (München, C.H. Beck)

Vesting, T (2019) 'Die Veränderung der Öffentlichkeit durch künstliche Intelligenz' in S Unger and A Ungern-Sternberg (eds), *Demokratie und künstliche Intelligenz* (Tübingen, Mohr Siebeck), 33–49.

Voßkuhle, A (2016) *Die Verfassung der Mitte* (Münch, Carl Friedrich von Siemens Stiftung).

13. Judicialization of Vulture Funds and World Society: Observing Sovereign Debts Crisis in Action[114]

Marco Antonio Loschiavo Leme de Barros

The Covid-19 pandemic has had a profound impact on economies worldwide, leading to a sovereign debt crisis in many countries. As governments around the world have tried to contain the virus and mitigate its economic impact, they have taken on enormous amounts of debt. Many countries have had to provide significant financial support to individuals and businesses affected by the pandemic, such as through stimulus payments, grants, and loans. At the same time, the pandemic has led to a drop in tax revenues as businesses have closed and people have lost their jobs.

As a result, many governments have had to borrow heavily to fund their pandemic response efforts. In some cases, they have borrowed from international organizations such as the International Monetary Fund (IMF) or the World Bank, initiatives like COVID-19 Financial Assistance and Debt Service Relief that operates in 90 countries with the total of US$ 170,570.29 million (IMF 2022). In other cases, they have issued bonds on the international markets. However, this increase in sovereign debt has led to concerns about countries' ability to repay their debts, particularly in developing countries with weaker economies (Quirino 2022). As the pandemic continues, the risk of default or debt restructuring grows, which could have significant repercussions for the global economy.

Some experts have called for debt relief or forgiveness for countries struggling to manage their debt burdens during the pandemic (Isgut 2022). Others have suggested that more robust measures are needed, such as debt restructuring, or new debt instruments designed specifically for pandemic

[114] This is a modified and translated version of (2023) 'Dívidas soberanas e regimes jurídicos na sociedade mundial: Observações sociojurídicas sobre a judicialização dos fundos abutres' 10(2) *Revista Brasileira de Sociologia do Direito* 76-104.

response (Segal 2020). In any case, the sovereign debt crisis caused by the Covid-19 pandemic is a major challenge for governments worldwide and recalls the historical debate about predatory practices in the global economy and requires international cooperation to address effectively and prevent long-term damage to the world society.

This chapter addresses the problem of the judicialization of vulture funds in world society. Since the 1970s, hedge funds have systematically purchased and litigated the indebted state bonds, regardless of their participation in local debt restructuring agreements (Barreyre and Delalande 2020). This is a recurring practice in the international market, marked by predatory elements and structured around secondary credits, which has led the identification of these funds with the necrophagic birds such as vultures. The non-participation of these funds in agreements represents a serious obstacle to access to loans and budget reallocations of the states. In these practices, litigation in foreign courts plays a central role for the success of creditor operations, as judges authorize the full payment of the bonds - plus charges - despite examining local problems resulting from the execution.

An important example was the legal disputes involving Argentina. During the economic crisis in 2001, the Argentine state was unable to make payments on bonds owned by foreign investors. One of these bondholders, NML Capital Ltd., filed lawsuits against Argentina in a federal district court in the United States, totaling over $2 billion in favor of the company. The case of NML Capital Ltd. v. Republic of Argentina, classified by many as "the trial of the century", involved the largest judicial intervention in a debt restructuring process (Halverson Cross 2015). As a result of this case, different jurisdictions took positions on a set of funds deposited by Argentina to pay its creditors. Perhaps the most relevant set of decisions came from U.S. courts. In June 2014, the U.S. Supreme Court refused to hear Argentina's appeal of the New York courts' decisions that found Argentina in violation of the *pari passu* clause in its defaulted bonds and then barred Argentina from making payments to the restructured bondholders unless the non-participating creditors were first contemplated.

In the midst of all this situation, argumentative disputes prevailed in light of the definition of legal theses and interpretation of contractual clauses, as well as legal grounds, from determining the applicable law to the discussion of sovereign immunity of execution and the responsibilities of the involved agents. Ultimately, the case of sovereign debts refers to the discussion of the formation and operation of legal regimes in the global context. How can we understand this dynamic of shaping the legal norms and practices influenced by global political economy? What are the underlying risks in the debate over restructurings debts? This text presents a socio-legal observation on the topic, mobilizing literature from Social Systems Theory attentive to legal communications produced in world society, identifying the structures and programs of the legal system that deal with the cognitive complexity inherent in the dynamics of International Political Economy. The main argument is to understand that the recurrent definition of an international regime as a constellation of administrative arrangements constructed and declared by states to coordinate their expectations and organize international behavior in various areas (Krasner 1982), must be relativized for an understanding that examines international legal regimes as reflections of the fragmentation of global law itself - the result not only of conflicts of interest between nations, but derived from the functional differentiation of world society.

The text is divided into four parts, in addition to this introduction. In the first and second parts, the discussion of the concept of legal regimes of world society is rescued to identify the importance of the concept for the case of sovereign debts. Next, the text advances in the study of the procedures for the development of a legal regime from sovereign debt litigation, focusing on proposals led by the International Monetary Fund (IMF) and the United Nations (UN). In the end, the text reflects on the dynamics of world society and the law, identifying that these dynamics are open to contingency and marked by distinct specialized communications, which reinforces the prevalence of a clash between institutionalized rationalities throughout the different functional subsystems, which in many circumstances escape control and signal innovations through law.

1. International Legal Regime for Restructuring Debts?

The debate over an international legal regime for sovereign debt restructuring reflects a primary discussion about models and alternatives for legal regimes. This discussion is influenced by the competition of different sets of norms and organizations dealing with the fragmentation of International Economic Law (Franzki & Horst 2018) and the dynamics of International Political Economy.

In this perspective, an important discussion is to perceive how this is a conflicting dynamic, marked by the collision of international legal regimes. This involves a revision of the concept of legal regime, expanding the definition of the set of norms declared by states to coordinate their counterfactual normative expectations to achieve their own cleavages of global dynamics. In this case, the examination is made of how the fragmentation of global law influences normative production, which is not only the result of conflicts of interest between nations, but also derived from the functional differentiation of world society.

Adopting the Social Systems Theory framework, admitting the functionality of each social system (e.g. the economy, politics, and law), there is a clash between institutionalized rationalities (e.g. codes and programs) in the entire world society, which often reinforce both the operational limitations and cognitive openness of the legal system. The conflict of legal regimes is an ephemeral reflection of a more fundamental multidimensional fragmentation of world society (Blome et al., 2018). The conflicts and tensions between these rationalities also produce innovations within the legal operation, which enables the discussion of models and alternatives for legal regimes, especially in observing a normative compatibility - even if weak - between the different legal regimes involved in the sovereign debt issue. It is a matter of observing a synergistic capacity of conflicting regimes that depends on the prediction of a network or specific implication logic, such as admitting the prevalence of fundamental rights in the restructuring of sovereign debts.

This is the case of observing the inefficiency of the current international mechanisms for debt relief that are based on decisions of foreign courts that

establish excessive burdens for the debtor state, without safeguards regarding the duties of funds to exercise due diligence or guarantees against extortionate interest rates or penalty charges. Contrary to foreign jurisdiction, in an exploratory way, it is important to observe legal proposals that support the application of a model of shared responsibility where states and funds have the mutual obligation to ensure that financial operations do not lead to unsustainable debt situations.

Different scenarios can be highlighted, such as mandatory due diligence for funds that operates with sovereign debt; commitment to periodic examinations of beneficial results for the population of the debtor state derived from financial operations; responsibilities for creating debt crises and corrective actions and improvement of governance, with a similar corporate model of "say on pay" shareholders - where shareholders have the opportunity to issue an advisory vote on their operations.

All of these scenarios in some way develop options for legal responses inherent to the process of constructing and consolidating a legal regime that, on the one hand, can address the issue of debt solvency, and on the other hand, a regime that pays attention to the protection of human rights in the face of defending the sustainability of sovereign debts. Thus, it is important to examine the discourses of international organizations such as the IMF and the behavior of foreign courts, which have historically been resistant to examining public interests - usually related to the protection of a minimum core of economic social rights. This is a systemic perspective on the legal regime of restructuring in which the responsibility of all international actors - not just states - dealing with sovereign debt issues is taken into consideration.

2. Legal Regimes of the World Society

It is important to present the theoretical approach that underlies the discussion outlined in this chapter, which is the theory of social systems by Niklas Luhmann (1927-1998). This sociological framework is concerned with observing the functionalities of social systems, especially how specialized

communications of the world society circulate in the light of their respective codes and functions. According to Luhmann's view (Luhmann 1995), the world society is functionally differentiated, with a higher degree of complexity and, above all, with more interconnected dependencies and independencies. In Luhmann's systemic view, the world society can be described without any reference to regional particularities, although this does not mean that these differences are of lesser importance for the theory. Luhmann argues that a sociological theory should start with the assumption of a world society and then investigate how and why this society tends to maintain or even increase regional inequalities.

One of the characteristics of the world society is the impossibility of total calculations or predictions due to the absence of a center, as it is described as a policontextural society. According to Luhmann, this means that causal constructions (e.g. calculations and planning) are no longer possible from a central and, therefore, "objective" point of view. They differ and depend on the observation of functional systems, which attribute effects to causes and causes to effects, and this destroys the ontological and logical assumptions of central orientation of society.

The debate about sovereign debts, then, can be observed from the operation of a policentric world society. In the systemic view, there is no guarantee that structural developments within function systems remain compatible with each other, for example, ensuring an exact compatibility between the legal system to enable certain economic operations. On the contrary, the instability of economic issues increases the risks for the operation of the legal system and vice versa.

In the international context, according to this view, there is a detachment from the state-centered politics. It is not possible to admit the centrality of state politics in solving social problems, it is necessary to arrogate to a global competence. There is a gradual shift towards a political world society or a global governance, in which nation-states compete for power and relate to international organizations of all kinds.

Increasingly, the world society is characterized by disintegration, contradiction and disputes. Different structural obstacles are revealed, such as the inequality of economic development between regions, separatist movements, situations of domination, and the systemic will for power expressed strongly in political-economic institutions such as the WTO or the IMF. These institutions generate a regulatory framework for global production relations.

It is worth noting that the success of countries in this scenario is now determined by credit risk assessments, especially by the degree of default, produced by rating agencies (e.g. Fitch Ratings, Moody's and Standard & Poor's) that have been operating since the beginning of the 20th century but gained relevance only in the late last century.[115] Such agencies restructured themselves from globalization,[116] becoming true instruments to operationalize the pressures and adjustments that countries should meet to meet the requirements of certain international institutions - despite the historical mistakes made by these same agencies, as in the 2008 crisis.[117][118]

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[115] In some maner this relates with the profilicity that shapes our world society, as described by Moeller, "Profilicity not only shapes individual and collective identity ("national identity"), it also creates value in the economy ("from brand to profile") - or in any other system such as the academic system. Profile-building changes the focus from functional differentiation to second-order observation, which used to get not so much attention. However, the latter may be a concept much more powerful for understanding the world since Luhmann's death two decades ago. Do we really have functional differentiation in Brazil and China? It's problematic, but we definitely have second-order observation, and this is an equally crucial point of modern society. Of course, there is a connection: mechanisms of second-order observation have developed within functional systems, so it became important on the basis of functional differentiation. Profilicity has been preceded by authenticity and sincerity, as previous modes of identity-building. Prestige and reputation were built by performing roles in a community, on the basis of first-order observation. Now, personal identity and value are built through second-other observation, we have to convince the "general peer", sometimes in global, digitalized forums." (Minhoto et al 2021:345)

[116] In the systemic key, the idea of globalization should be understood in a multidimensional way and considering functional differentiation, Holzer et al. (2015:2) explain, "The multidimensional view moves beyond the common distinctions between economic, political, and cultural aspects of globalization and suggests more detailed analyses of globalization beyond economic and political systems"

[117] It is possible to question, therefore, whether the distinction between a "central modern" and a "peripheral" society, as Neves (2006:215-258) proposes, makes sense. After all, "periphery" is assumed here as a condition (or integral part) of the operation of world society, and not exactly as a subordinate society. International institutions depend on "peripheral" countries to justify their positions of domination, as well as to sustain the discourse explaining underdevelopment in light of the "central" countries. Underlying the reading is the fact that "central" countries also operate through patrimonialist means and have widespread problems of corruption.

[118] The three major credit rating agencies assigned a high investment grade rating to Lehman

Furthermore, there is a "liberation" of law from politics (disconnection from the State), since it is now linked to a diversity of global systems and organizations, not limited to constitutional and administrative links. As Brazilian law sociologist Marcelo Neves argues, a deconstruction of the law is at stake because "[i]nstead of emphasizing the bivalence of the lawful / unlawful code, the accent is then placed on the polyvalence resulting from the link between the legal code and the binary codes of other closed systems" (Neves 2006: 263). Law and other subsystems can only be understood if it is admitted that they depend on a multiplicity of self-observations and self-descriptions, the multiplicity of a non-trivial machine.

In view of this theoretical framework, the discussion of the construction of an international legal regime for sovereign debt restructuring takes on another dimension. There is no doubt today that the world society has become a privileged field for the discussion, propagation and control of the economic code. That is to say, the economic system is preferably observed, to the detriment of others, as pointed out in Fischer-Lescano's description (2017: 46), global players play with the law. Transnational corporations move in global markets supported by globally comprehensive treaties.

It is perceived that the "liberation" of law and its adequacy to the world society did not occur through observance of certain horizontality, or with reciprocity presupposed in the idea of structural coupling between law and economy. In part, here, Fischer-Lescano's (2017) and Neves' (2006) diagnoses are shared, that the world society marked unilateral dependencies and structural and diffuse subordinations of law before certain "dominators". However, what do these diagnoses mean for the construction of the legal regime?

It is important to note that any form of international legal framework considers a conflict of rationality - as discussed below in weighing the statutory model of the UN vis-à-vis the contractual conditions advocated by the IMF, such distinctions mark different ways of operating law from common issues. In this

Brothers in 2008, the same year in which the bank filed for bankruptcy in the face of the subprime crisis. For a discussion of the crisis from the legal perspective, see Faria (2011: 21-32).

sense, Ilias Bantekas and Cephas Lumina (2018) argue for the prevalence of legal contradictions in the sovereign debt issue from the perspective of human rights vis-à-vis economic law. It is recurrent to observe that the management of sovereign debts by financial institutions does not consider the human rights implications of the debt.

Considering the primacy of the creditors' interests, the management of sovereign debt admits as a postulate the necessary generation of revenue from borrowing states to produce annual surpluses. Debtor states are required, according to their debt management scheme, to increase taxes and, at the same time, make deep cuts in public spending. As a result of these contractual measures, the debtor state's economy is suffocated, reflecting a vicious cycle: new taxes are implemented to compensate for the deficit, impacting on reductions in public and private spending domestically, which in turn leads to underdevelopment. When the taxes reach their limit, the state is often advised by its creditors to privatize state-owned companies and public services or even mortgage its natural resources.

Among the mechanisms for managing debts, it is possible to highlight both agreements entered into with the IMF, in which the debtor state is obliged to implement a debt restructuring program as a counterpart to the international organization's financial assistance, and the formalization of multilateral and bilateral agreements for debt resolution with creditor states in forums and meetings such as the London Club (private creditors) or the Paris Club (public creditors), which set which and how interest rates will be applied, in addition to defining the payment order and any debt reductions.

The compliance with these contractual obligations is not questioned here, after all, states must honor their obligations since prudent creditors contribute to global well-being, and non-repayment constitutes an abuse of their rights; furthermore, creditors should enjoy the right to property as much as debtors aspire to enjoy the full range of human rights. However, some balance and synergy between debt restructuring legal frameworks must be established, with primacy given to respect for fundamental rights and the control against

predatory practices carried out by some hedge funds, which opportunistically take advantage of the economic fragility of indebted states. To some extent, in a sociological perspective, this reflects the thesis that functional differentiation leads to globalization, which marked the intensification of communicational flows and, in turn, tensions and problems of translation between systems.[119]

According to the reconciliation of these legal regimes, debtor states are not obligated to reimburse debts if, in addition to the odious and illegal nature of the debt, repayment would risk violating fundamental rights. Although this observation is reasonable and consistent with fiscal and financial self-determination, it constitutes a radical purification of the perspective of central states in the dynamics of debt collection and the very funds of coverage, as they vehemently refuse to recognize: (i) the right of all states to unilaterally determine how to deal with their sovereign debt; (ii) the concept of odious, illegal, and illegitimate debt in its entirety. An important example in this sense is the operation of the Paris Club, which, since the 1950s, has informally brought together some creditor states and international financial institutions with the aim of offering debt relief to debtor nations, requiring a series of contractual demands instead of recognizing the possibility that impoverished states may resort to the odious debt doctrine (Rieffel 1985).

Therefore, the debate on mechanisms for restructuring sovereign debt has gained prominence in light of the globally promoted economic process, which has incalculably increased the transfer of speculative risk to other systems, regardless of territorial limits (Buchheit & Gulati 2017). One of the main challenges is to understand how these restructuring mechanisms actually contribute to the recovery of debtor states. In fact, some authors (Easterly 2002)

[119] Luhmann (2015:6) already discussed, for example, the problems related to the transformations of expectations in world society in the early 1990s: from a normative expectation (political, moral and law) to the prevalence in world society of a cognitive and technological expectation (economics and science). Moreover, according to Holzer et al. it assumes that (i) in case a functional field reaches a certain autonomy from its social environment, it tends to universalization and globalization and (ii) argues that this view, is widely accepted when it comes to economic markets, but can also be applied to systems such as politics, law, science, education, and other media, art or sport.

confirm that the adoption of debt relief mechanisms has contributed to the indebtedness of nations in recent decades.

The main case of abusive practice arises from situations that escape the control of these restructuring mechanisms, such as the harmful effects of the litigation of vulture funds on assets and agents of indebted countries, as well as the debate over third-party payments in the face of the possibility of judicial injunctions. What would be the effect on informal sovereign creditors, such as retirees and workers? Or what about the equitable treatment of creditors? These are issues that are generally disregarded in economic forums or in foreign courts and require additional studies on how to contain predatory business models that are not responsible for their local impacts, mainly undermining the state's capacity to fulfill human rights obligations. It is evident, then, the conflict between different rationalities that operate international economic law in the context of sovereign debts.

Finally, it is important to mention that in a recent systemic approach, Gunther Teubner and Andreas Fischer-Lescano (2004) rescue the theme of conflicts of rationalities within international legal regimes. The jurists affirm that from a political perspective, the tensions between legal regimes mirror the strategies followed by collective actors in international relations, who pursue "special interests" driven by power without reference to a common interest and give rise to drastic "political conflicts." In this view, neither doctrinal formulas of legal unity, nor the theoretical ideal of normative hierarchy, nor the institutionalization of jurisdictional hierarchy provide adequate means to avoid such conflicts.

On the one hand, the outcome for dealing with such political conflicts of legal regimes is the explicit politicization of collisions of legal norms through power mechanisms, negotiations between relevant collective actors, public debate, and collective decisions. However, on the other hand, both authors also affirm that the expression of profound contradictions between conflicting sectors of a global society does not simply result from collisions of legal norms or political conflicts but has its origin in contradictions between institutionalized

rationalities throughout society, which the law cannot resolve but which require a new legal approach to conflicting norms.

Given this diagnosis, three important conclusions are drawn regarding conflicts of legal regimes in the global society and serve as a basis for discussions on the judicialization of sovereign debts:

- There is a fragmentation of international economic law, which reflects a deeper multidimensional fragmentation of the world society itself;
- Any attempt to achieve normative unity in international economic law is doomed to fail, given the proliferation of indistinct legal regimes that are frequently in conflict with each other, such as the set of rules and organizations dealing with sovereign debt. In this sense, absolute control by law as a means of conflict resolution in the international arena is entirely illusory. On the contrary, there is an increasing trend towards transnational legal fragmentation;
- Given that transnational legal fragmentation cannot be controlled or reduced to a single legal regime, the focus is on observing the operation of a balance, a synergy, or a normative compatibility - even if weak - among the different legal regimes involved in the issue of sovereign debt. Undoubtedly, this depends on the ability of conflicting regimes to establish a network logic or specific implication, which can cause a coupling of units in collision (e.g., admitting shared responsibility in the context of sovereign debt collections or admitting the doctrine of odious debt in debt renegotiations conducted by the Paris Club, among other ways of considering the primacy of fundamental rights in debt restructuring and collections).

The text then discusses the possibilities of normative compatibility among conflicting legal regimes, such as the idea of shared responsibility among funds, international organizations, and states based on voluntary practices. It also investigates the synergistic construction of an international legal regime for the protection of the economic sustainability of indebted states.

3. Sovereign Debt Litigation

From a legal perspective, it has been proven that, when considering speculative risk as information for decision-making, courts must simultaneously filter economic issues to account for the legal controversy. The challenge is then to resolve disputes over debt in the face of programmatic rule systems (for example, how to promote an international legal regime for debt restructuring?) or through an international framework for sovereign debt adjudication. The main objective is to restore public debt sustainability while simultaneously deciding a classic individual legal dispute between creditor and debtor.

On the one hand, how to support the recovery and economic sustainability of the indebted state? On the other hand, how to reconcile with court executions? Is it possible to articulate the conflicting interests? These dilemmas reflect the underlying complexity of the debate over a restructuring regime in a context of fragmentation of the world society and in the face of the operation of global financial capitalism, which strongly influences the relations between states and international organizations.

Foreign courts stand out in this context, with some jurisdictions being more creditor-friendly. Historically, judges tend to authorize the full payment of creditors' debts - plus interest, fines, and monetary updates - despite examining the problems arising from increasing indebtedness (Schumacher, Tregsch, Enderlein 2018). There is always a probabilistic complaint about sovereign debt regarding the country's ability to pay in difficulties that judges should address: what level of relief would restore sustainability with high probability? (Guzman & Stiglitz 2019: 449-453). However, many decisions of foreign courts on sovereign debt issues are contested, as they lack experience and usually challenge the application of human rights by frustrating debt restructuring through adjudication of choice of law and jurisdiction of creditors - usually by contractual provision of the place where most of the securities were issued.

New solutions must be implemented by the courts regarding the observation of human rights in the trial of sovereign debt cases (Paliouras 2017). For example, the Greek Debt Committee stated in the report that the implicit

objective of creditors in their choice-of-law clause was to circumvent the Greek Constitution and Greece's international human rights obligations. Furthermore, to the extent that English law does not incorporate or conflicts with Greece's human rights treaty and customary obligations, it is invalid and deserves no obligation to be honored.

After the NML Capital v. Argentina case, different actions by the IMF and the UN were perceived, including to avoid actions by foreign courts. There is an important regulatory debate on mechanisms for restructuring sovereign debt, but with few positive results for indebted states - a reflection of the conflicts between legal regimes of a fragmented world society mentioned in the previous topic. In 2013, the IMF released a report that pointed out flaws in the way sovereign debt collection is carried out and, together with the working groups of the US Treasury and the International Capital Market Association, presented some contractual proposals to avoid increasing indebtedness, mainly through the inclusion of collective bargaining clauses and preferred creditors.

At the same time, the UN General Assembly adopted a statutory model - Resolution 69/319, 2015, which established a series of nine principles that must be observed. It is important to highlight the countries that voted against the resolution: Germany, Canada, Israel, Japan, the United Kingdom, and the United States. Regarding the regulatory differences between both models, articulation via legal processes becomes more interesting, mainly because there is no international insolvency regime for indebted states. This scenario reinforces the difficulties for the realization of human rights in indebted countries, since the real and legal dependence of creditors through foreign courts prevails.

Some results indicate that funds have won 72% of their legal actions and usually target poor countries that do not have the legal capacity to defend themselves (Lumina 2013 and Michalowski 2008). A series of initiatives have been taken by private organizations, but without a more robust international structure, this predatory business model is growing. There is no doubt that these measures are intended to promote development, but in many cases, they have the opposite effect - court orders can contribute to public debt and poverty as

they limit access to essential public services or force severe budgetary adjustments in social programs.

In addition to legal actions, indebted states also need to deal with certain external factors that relate to the conditions for obtaining loans or exemptions from international financial institutions (such as: privatization of state-owned companies; reduction of expenses related to public services; introduction of user fees for basic services; commercial liberalization; tax reforms, and other deregulations). Such measures reinforce the dependence of these states on meeting the demands of commercial creditors. Observing the effects on the development indicators of indebted states (and not just the long-term sustainability of debt) becomes an important metric for evaluating restructuring programs conducted by the IMF, for example.

It is argued that the judicialization and imposition of structural adjustment programs in debtor states do not solve the problem of sovereign debt. On the contrary, such adjustment and judicial execution programs exacerbate debt, undermine the economic sovereignty of the state, and produce collateral damage in the protection of individual fundamental rights. Possible debt write-offs and extended payment deadlines can incentivize negative effects in certain contexts, with worse borrowing conditions in the future and delays in structural reforms (Easterly 2002). The challenge is to balance relief with monitoring mechanisms that accompany the implementation of reforms and improvements in states, especially with social and environmental advances.

The case of the IMF is paradigmatic. In 2002, the organization proposed the creation of an adjudicatory mechanism for sovereign debt, beyond the traditionally offered adjustment program - with the implementation of a Dispute Resolution Forum, headquartered at the IMF - but this was rejected by the Fund's board in 2003, mainly because it was contested by the majority of stakeholders. Some lessons learned from this case were (i) the difficulty of implementing a broad reform at the international level without credibility from the private sector, (ii) the risk of increasing decision-making power at the international level in a single organization such as the IMF, (iii) the difficult separation between the

functions of the IMF as a lender and as a specialized consultant for decision-making as a possible international insolvency court, and (iv) the need for articulation with national legislation, mainly in the jurisdictions of the United States and the United Kingdom, which did not agree with the terms of the UN resolution.

In any case, historically, the IMF provides financing for its member states to solve their balance of payments deficits. When a country faces economic difficulties, the IMF collaborates to identify possible financing from the private sector. In these cases, a state can continue to pay the service of its debt on the original terms, without having to adhere to a restructuring program. However, as seen in the previous topics, there are circumstances in which this logic is not viable.

The difficulty for a country to have easy access to the market and an excessive level of debt appear as warning signs for the IMF when committing its resources. In this sense, a Debt Sustainability Analysis system is adopted, which is often a condition for implementing financing. It is up to the fund to arbitrate and formulate a restructuring plan, as well as to monitor and determine the program signed with national authorities as long as it lasts.

For this text, it is interesting to note that the IMF does not have a unified legal structure specifically designed to deal with such processes. This normative legal framework arises, primarily in light of the political economy context. As described by Manzo (2019), its content results from a combination of prescriptions established, at least, in the following "regulatory instruments": IMF agreements, its conventions with other forums or financial institutions, and its reports and guidelines that organize its credit policy, debt sustainability analysis, and its conditionalities, and introduce models of contractual clauses to be incorporated into contracts for future debt issuance. None of these modalities operate separately; only their articulation at a given historical moment can outline the content of the referred framework.

It is worth noting that most of the IMF's structure for sovereign debt was built after the financial crises that affected emerging countries in the late 1990s

and early 2000s, based on the architecture constructed in the post-Bretton Woods period. This structure is constantly being updated and depends on the analysis of policies and institutes instituted in response to the mentioned crises and the international context of the political economy.

In general, it is possible to articulate the following stages of the sovereign debt restructuring program, in the contractual model supported by the IMF:

- Define debt as unsustainable by the IMF. Historically, after the declaration, financial agents tend to avoid financing the affected economy, and even worse, they tend to withdraw their capital until the central problems are solved. Therefore, this IMF declaration impacts the government's decision to activate a debt restructuring process.
- Determine the amount and type of debt to be restructured and, consequently, its restructuring plan.
- If this plan is executed with the support of an IMF financing program, the debt sustainability analysis helps define its conditions. IMF resources are granted in stages, with the aim of monitoring the effective compliance with the conditionalities by national authorities, according to a schedule that can be extended for 3 or 4 years depending on the type of approved programs. In practice, the Fund frequently coordinates financial rescue packages with other multilateral or official creditors and, in some cases, also with private actors whose resources are delivered according to the schedule. The values of these packages are strategically set below the financial needs of the member state to ensure that it adjusts its fiscal policy to meet its debt.

The great dilemma arises when a state cannot honor its debts, and it is necessary to promote refinancing or reduction. In this case, the possibility of debt restructuring to creditors is questioned. In the contractual model, no change in the original terms of a debt contract can take effect until the new terms have been voluntarily accepted by the creditors. Furthermore, it is important to understand the problems related to *pari passu* clauses and collective action clauses.

3.1 *Pari passu* Clause

It is important to understand the accuracy of the interpretation of the *pari passu* clause, which derives from Latin and means "in equal steps". Such a clause is common in contracts for international sovereign and corporate bonds. In case of default, it ensures that the debt in question will have the same priority as the other unsecured debt of the debtor. Undoubtedly, considering that decisions against debtor states are difficult to enforce in court due to their sovereign character, the *pari passu* clause has become an alternative to protect the creditor, but its meaning is the subject of debate. For some interpreters, it is a legal "classification" clause, intended to protect a creditor from the legal subordination of its credits in favor of another creditor. However, some have argued (Galvis 2017 and Newfield 2016) that the *pari passu* clause goes further to include a payment obligation requiring the sovereign to pay its creditors on a pro rata or "ratable" basis. Considering that a debt is owed and payable to a creditor, the clause would prevent a debtor from making payments to that creditor unless they make taxable payments to other creditors whose debts are also due and payable. The clause thus protects a group of creditors from possible discrimination of their credits in favor of other groups among them.

The case of Argentina through the decision of the New York Court had an important impact on this debate, as it supports the interpretation of the taxable payment of the *pari passu* clause. Finding that the clause was violated in a particular case, judges issue an injunction requiring the debtor state to refrain from paying the creditors who accepted the restructuring until it complies with the judgment ordering payment to the plaintiff creditors. Undoubtedly, this type of mechanism exacerbates the problem of collective action and therefore increases uncertainty in international financial markets.

3.2 Collective Action Clauses

A second issue that arises concerns collective action clauses that include a more robust "aggregation" feature designed to limit the ability of non-participating bondholders (holdouts) to neutralize the operation of such traditional series-by-series clauses. The inclusion of collective action clauses has become market standard practice for international sovereign bond issues. Although collective action clauses allowing collectively binding restructuring decisions have traditionally been included in English and Japanese law-governed sovereign bonds, prior to 2003, New York law-governed sovereign debt issuances generally did not include such clauses.

Theoretically, collective action clauses improve restructuring efficiency through coordination gains, while reducing the cost of restructuring for the debtor, thus making the recourse to restructuring more attractive. Evidence on the impact of the introduction of collective action clauses on sovereign yields suggests that efficiency gains were dominated by countries with good ratings. Again, according to IMF evaluation, collective action clauses played a useful role in achieving high creditor participation in various prior debt restructurings, such as Belize (2007, 2013) and Seychelles (2010). The adoption of series-by-series collective action clauses enabled high creditor participation and facilitated the debt restructuring process.

Although series-by-series collective action clauses helped mitigate the problem of collective action in sovereign debt restructuring, they do not eliminate the holdout problem as such clauses allow the possibility for a creditor, or group of creditors, to obtain a "blocking position" in a particular series and effectively override the operation of collective action clauses in that series. Thus, while these collective action clauses have worked well in many restructurings, their vulnerability to "resistant" creditors has limited their effectiveness in other cases.

An important case was the Greek debt restructuring of 2012, which, although conducted relatively smoothly, revealed the limitations of existing

collective action clauses in dealing with remaining creditor issues. In this case, holdouts were able to obtain a blocking position in about half of the foreign law governed bond series, thereby preventing the operation of such clauses. The possibility for holdout creditors to obtain a blocking position in a particular bond series can, for reasons of equity among creditors, undermine the incentive of holders of other series to agree to the restructuring terms, besides obviously impairing the recovery of the debtor State.

Given that such decisions give holdouts a more powerful monitoring tool, this will increase the incentive for them to obtain blocking positions and to claim full recovery. In addition, potentially more cooperative creditors may be reluctant to adhere to agreements with the possibility of holdouts using this tool in a way that disrupts payments on the restructured bonds, which may make them more hesitant to participate in a restructuring.

In this scenario, the IMF has recognized the importance of adopting contractual clauses that allow for the "aggregation" of claims in series of bonds for voting purposes, which can significantly mitigate the limitations of series-by-series collective action clauses. Aggregation also provides creditors from other series with the certainty that holders of all series will be bound by the restructuring, giving them an additional incentive to participate. The benefits of aggregating credits in all issuances were demonstrated in the 2012 restructuring of Greek debt. The main vulnerability of the contractual model is that the incorporation of clause models is voluntary and relies on a broad consensus of creditors and market construction.

The success of restructuring processes depends on how courts will interpret the *pari passu* clauses in future litigation. The central problem with collective action clauses is that holders of bonds under the same conditions can receive significantly different treatment in the same restructuring process simply because their bonds have differently worded collective action clauses. To limit this risk, the IMF recommends replacing old bonds with new ones that include aggregation models. However, even in the aggregation model, there is a risk that the new voting procedure may cause inequality among groups of creditors. To

address this concern, the IMF's proposal prescribed that in circumstances where the sovereign issuer wishes to use a single-member voting procedure, it could only do so if all affected bondholders received the same restructuring instrument.

The debtor state must act with transparency and provide adequate information to creditors before making a restructuring offer, particularly regarding the content of collective action clauses. In addition, the IMF suggests promoting the inclusion of "covenant information" in debt contracts, whereby the debtor state commits to providing creditors with data on its economic and financial situation and government programs. On the other hand, there is also a discussion of the risk of abuse of power in the face of the possibility of a sovereign debtor manipulating the voting process by exerting influence over control entities. Thus, the IMF proposes the adoption of robust revocation provisions to exclude from the vote all bonds held or controlled directly or indirectly by the sovereign issuer or its public sector instruments. As a brief summary, it is possible to perceive the collision of two distinct regimes for the operation of sovereign debt restructurings. On the one hand, there is a principled and statutory model such as the UN General Assembly's (A/RES/69/319, 2015), and on the other, a contractual model advocated by the IMF.

Table 1. Criteria of the contractual legal regime vis-à-vis principled and statutory.

Criteria of the Legal Regime	Contractual	Principled and Statutory
Key Institution	IMF	UN
Motivation	Voluntary	Mandatory
Prevalence	Market oriented	Human right oriented
Challenges	Adjustments and maintenance of clauses (*pari passu* and collective)	Internalization of key jurisdictions (e.g. United States and United Kingdom)
Recurrence in practice	High	Low
Chance of judicialization	Probable	Limited

Source: Author

Final Remarks

Comparing the contractual and statutory regimes allows us to understand, for example, how the principled model operates independently of the will of the

contracting parties and defines a supra-contractual basis for any sovereign debt restructuring program. The prevalence becomes the understanding of the central principles that defend individual and social fundamental rights. On the other hand, the contractual model is voluntary, decentralized, and follows a market solution.

It would also be possible to discuss whether these models are pro-creditor or pro-debtor, but the interesting thing is to perceive the prevalence of an economic code in the contractual model and the political one in the statutory model. The relevant point is to observe the domination of an economization process in the construction of these legal regimes, i.e., the result of the incorporation of economic risk into the operative ambit of other systems, especially as comparative information. It could be discussed, for example, how restructuring processes lead agents to compete, agents seeking to maximize their profits and minimize their losses in an economic crisis scenario that, from the outset, prevents debtors from honoring their debts as originally planned. This situation of scarcity makes these processes essentially conflicting.

Economization - as a circulation of risk - becomes the way in which economic risk reverberates in other social systems, especially as an environmental hazard and as irritation in the observation of coupling structures or through the action of social organizations (Luhmann 2006). Different economizations can even have collateral effects. This is because economic risks are not only unfolded by central operations of the economy but can also be observed by organizations or channeled through contracts and negotiated by law or even by economic and social policies or taxation that depend on the symbolization of money - coupling situations that limit the transformation of communication in the face of its codes.[120] Law and politics are obliged to deal

[120] In this sense, economization is a comparative communication that goes beyond local boundaries and radiates to different functional systems, beyond the global economy, and that enables the production of expectations. You see that the very idea of pricing already ensures the degree of comparison in markets, but it also unfolds as a danger, therefore new information, for the selection of other function systems and organizations. This is why, for example, a labor judge when deciding a case may be concerned with the values of worker compensation or unemployment, beyond the programs of labor law. The economic risks understood through the

with these highly complex problems since they demand, in the present, through legal or political decision, a linkage to the future, always unknown.

In this circumstance, other systems need to calculate and evaluate risks, now amplified - "legal," "political," "educational," "health." In this sense, it is possible to understand the expansion of consequentialist arguments in law from the understanding of the relationship of society with economization as an environment.[121] As already seen, it is necessary to observe inter-systemic relationships between law and other systems, whose counterpart is the unfolding of a translation under the danger of producing a "deformation," or non-observation of functional limits (Luhmann 2008:168).

The statutory model, contrary to the contractual approach of the IMF, takes into account the maintenance of individual and social fundamental rights as necessary steps for the success of a restructuring plan. The criticisms made by this model reinforce, for example, that the IMF is strongly influenced by advanced economies, mainly with predominance in the US.

Furthermore, the principles adopted by the UN require impartiality and independence in the handling of plans, which the IMF does not specifically enjoy to manage or coordinate these processes. This principled model proposes that entities (bankruptcy courts, commissions, or forums) be endowed with specific instruments that allow them to intervene in the restructuring processes with greater impartiality and neutrality. This view reveals that, in highly conflicting events, the IMF tends to guide its decisions not necessarily based on technical criteria, and warns that a statutory mechanism can help reduce these types of deviations.

This perspective questions the conditionalities of IMF programs that usually accompany restructurings, such as negotiating these conditionalities and the political costs associated with their austerity policies, which often contribute

lens of law then becomes a reference for decision-making practice. For a complete observation of economic circulation, see Luhmann (2017).

[121] In this regard, Correia (2014: 125-126) and Amato (2017: 150) precisely note when they stress that a threefold dependence and independence between the legal, political, and economic systems is evident here, especially when social and economic rights are in dispute.

to delays in the restructuring process; or that implementing conditionalities may undermine the basic pillars of the debtor state's democratic system. In practice, the possibilities of a highly indebted country's government operating outside the IMF are severely restricted, since international financial governance was created around the IMF. From this perspective, in many cases, the Fund has used its position of strength to impose conditionalities on debtors, which violates democratic principles of popular sovereignty, government accountability, transparency, and autonomy and sovereignty of a State.

Additionally, many argue that IMF adjustment policies are pro-cyclical and exacerbate the debtor state's economic slowdown, and Fund policies aimed at liberalizing and deregulating its economy expose the State to greater volatility and risk (Stiglitz, 2009). Therefore, statutory interpretations understand that this position in the IMF's analysis - which treats essentially dissimilar agents as similar and, at the same time, reduces the field of restructuring to the economic question that begins and ends in the analytical universe of an idealized, even enabling the judicialization of these titles by those who take advantage of the economic dimension, such as hedge funds.

From the point of view of judicialization, following notes by Manzo (2018, 2020), it is important to indicate that contractualists consider the discussion of financial issues in any other forum than that of international financial institutions inappropriate,[122] and the IMF did not include the role of jurisdictions in debt collection in its defended model. Undoubtedly, the contractualist regime model that accepts and favors judicialization does not concern itself with the construction of new specialized international organizations that intervene in restructuring processes in light of an international bankruptcy law.

These findings clarify the challenges of implementing an international legal regime for debt restructuring in relation to IMF or UN models, which are based on distinct normative designs. Both models also highlight the importance

[122] According to Manzo (2020:18), "the main premise on which these contractualist statements rest, in the hegemonic version of this position, considers that equally efficient results to those proclaimed by the statutory or legal position can be achieved without the need of the creation of a statutory or legal SDRs mechanism, and by wording standardized contractual clauses".

of an alternative based on negotiations and voluntary measures capable of promoting normative compatibility between solutions. It is a matter of observing the operative limitations and cognitive openings that mark the experience of the legal system of the world society, attentive to the environmental dynamics of International Political Economy.

References

Amato, LF (2017) *Construtivismo jurídico: teoria no direito.* (Curitiba, Juruá).

Bantekas, I and Lumina, C (eds.) (2019) *Sovereign Debts and Human Rights* (Oxford, Oxford University Press).

Barreyre, N and Delalande, N (2020) *A world of public debts: a political history* (New York, Palgrave Macmillan).

Blome, K et al. (eds) (2018) *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge, Cambridge University Press).

Buchheit, L and Gulati, M (2017) 'Restructuring Sovereign Debt after NML v. Argentina', *Capital Markets Law Journal* 224-238.

Correia, JGV (2014) *Sociologia dos Direitos Sociais: Escassez, Justica e Legitimidade* (São Paulo, Saraiva).

Easterly, W (2002) 'How did heavily indebted poor countries become heavily indebted? Reviewing two decades of debt relief', 30 *World Development* 1677-1696.

Faria, JE (2011) *O Estado e o Direito depois da crise* (São Paulo, Saraiva).

Fischer-Lescano, A and Moller, K (2017) *Luta pelos Direitos Sociais Globais* (Rio de Janeiro, Lumen Juris).

Fischer-Lescano, A and Moller, K (eds.) (2016) *Transnationalisation of Social Rights* (Cambridge, Intersentia).

Franzki, H and Horst, J (2018) 'On the critical potential of law – and its limits: double fragmentation of law in Chevron Corp v. Ecuador', in K. Blome et al. (eds.) *Contested Regime Collisions: Norm Fragmentation in World Society*. (Cambridge, Cambridge University Press), 347-371.

Galvis, S. (2017) 'Solving the paripassu puzzle: the market still knows best', 12 *Capital Markets Law Journal* 204-214.

Isgut, A (2022) Addressing sovereign debt challenges in the era of covid-19 and beyond: The role of the United Nations. 28(2) *Asia-Pacific Sustainable Development Journal* 149-192.

Teubner, G and Fischer-Lescano, A (2004) 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* 999-1046.

Guzman, M, Ocampo, JA and Stiglitz, JE (eds.) (2016) *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises* (Columbia, Columbia University Press).

Halverson Cross, K (2015) 'The Extraterritorial Reach of Sovereign Debt Enforcement', 12 *Berkeley Business Law Journal* 111-143.

Holzer, B, Werron, T and Kastner, F (2015) *From Globalization to World Society: Neo Institutional and Systems-Theoretical Perspectives* (New York, Routledge).

IMF – International Monetary Fund (2022). *Annual Report*. Publisher Division of the IMF. Retrieved from: <https://www.imf.org/external/pubs/ft/ar/2022/downloads/imf-annual-report-2022-english.pdf>

Krasner, SD (ed.) (1983) *International regimes* (Ithaca, Cornell University Press).

Luhmann, N (2017 [1998]) *La economía de la sociedad* (Mexico, Herder).

Luhmann, N (2016 [1993]) *O direito da sociedade* (São Paulo, Martins Fontes).

Luhmann, N (2006 [1991]) *Risk: a sociological theory* (New York, Gruyter).

Luhmann, N (1997) Globalization or world society: how to conceive of modern society? 7 *International Review of Sociology: Revue Internationale de Sociologie* 67-79.

Luhmann, N (1995 [1984]) *Social systems* (Stanford, Stanford University Press).

Manzo, AG (2018) 'Enforceability of judgments against sovereign States: critical analysis of the NML vs. Argentina injunction' 14(2) *Revista Direito GV* 682-706.

Manzo, AG (2019). 'Where do they speak from? Positions about the new IMF contractual proposal for ordering sovereign debt restructurings' *Revista Direito e Práxis*.

Manzo, AG (2020) 'Global Justice: Why not State jurisdictions in transnational financial disputes?' 11(3) *Revista Direito e Práxis* 1483-1547.

Minhoto, LD, Amato, LF and Barros, MALL (2021) 'Observing observers in social systems theory: an interview with Hans-Georg Moeller' 33 *Tempo social* 333–353

Neves, M (2006) *Entre Têmis e Leviatã: uma relação difícil* (São Paulo, Martins Fontes).

Newfield, D (2016) 'Pari Passu as a Weapon and the Changes to Sovereign Debt Boilerplate after Argentina v. NML' 24(2) *University of Miami Business Law Review* 1-25.

Paliouras, V (2017) 'The Right to Restructure Sovereign Debt' 20(1) *Journal of International Economic Law* 115-136.

Quirino, O (2022) 'Diplomacy, debt, and change: the international debt architecture after the covid-19 pandemic' 28 *Revista Tempo Do Mundo* 151-176.

Rieffel, A (1985) *The role of the Paris Club in managing debt problems* (Princeton: Princeton University).

Schumacher, J, Trebesch, C and Enderlein, H (2018) 'Sovereign Defaults in Court' 6931 *CESifo Working Paper Series* 1-73.

Segal, S (2020) 'Covid-19 and the global financial safety net'. *Center for Strategic and International Studies*. Retrieved from <https://bit.ly/3x6kv3B>

14. Some Preliminary Notes on a Systems Theory Critique of Academic Capitalism[123]

Laurindo Dias Minhoto

In this chapter, I will first briefly outline some of the main dimensions of an argument I have been trying to develop in recent work about the meaning and possibility of a critical reading of Luhmannian systems theory. I will then try to mobilize some of these dimensions in the direction of a preliminary systemic critique of 'academic capitalism'. This term emerged in the early 1990s and has since been used by a growing body of literature on the changing organizational and semantic settings of the university.

In the first part, I will focus on two aspects: the presence of some crypto-normative elements in Luhmann's conceptual formations and the presence of some elective affinities between Luhmann's and Theodor Adorno's theoretical designs. In the second, I will try to characterize some elements of neoliberal rationality as a distinctive feature in the configuration of contemporary capitalist society, and to present academic capitalism as a project for reorganizing the university along the lines of this rationality. Finally, I will make some preliminary methodological observations regarding the importance of empirical research for a systemic critique of academic capitalism.

1. Normative motives

Let us begin with an attempt to identify some crypto-normative elements in Luhmannian systems theory, especially those with a high potential for

[123] This text largely corresponds to the transcription of a presentation given at the seminar "Rethinking Luhmann and the socio-legal research: an empirical agenda for the social systems theory?", held at the Law School of the University of São Paulo in 2019, and later revised by the author for this publication. I thank the participants for their comments.

establishing counterfactual expectations regarding current empirical socio-historical trends. To name just a few:

(a) The emphasis on polycontextuality: As is well known, by overcoming the primacy of historical patterns of segmentary, geographical and stratified differentiation (which, however, do not simply disappear), modern - functionally differentiated - society presents itself as a social arrangement without a center or apex. Thus, in a polycontextual social world, different partial systems would form a mosaic of different rationalities. What is important here is the radical theoretical investment in the possibility of a plurality of autonomous and interdependent processes of meaning production in society.

(b) The emphasis on a non-totalizing relationship between the individual and society: In a society characterized by the primacy of functional differentiation, the various operations that reconstruct the individual within each partial system (as consumer, contributor, voter, patient, student, etc.) certainly do not do justice to the complexity of the individual as a concrete being. However, these abstractions do offer her something like the possibility of navigating a contingent and diversified social environment, which (i) would not be able to completely reduce the individual to the social whole and (ii) would not be able to unilaterally generalize and impose on the individual a single criterion of reduction over others.

(c) The emphasis on the universal access of individuals to the performances of different partial systems – mainly in the context of the welfare state institutional arrangements and policies – and the corresponding claim that criteria for exclusions have been redirected from hierarchical to functional premises in the transition to modern society. To quote an exemplary passage:

> The scheme 'having/ not having' becomes autonomous to the extent that it does not mean anything for the extra-economic functional contexts, namely, that property inequalities are not transferred to other subsystems of society – therefore, that masses are not celebrated more frequently for the owners, that

> owners are not given better chances of education, better procedural chances in the legal system, better chances of being elected to political office, better chances of treatment in cases of illness, etc., than for the non-owners. (Luhmann 1983: 137-8)

(d) And last, but not definitely least, the emphasis on the concept of system as a form, that is, as a difference between system and environment. The unity between system and environment is not conceived along the traditional dialectical lines as the unity of identity and non-identity, rather, as is well known, it is conceived as the non-identity of identity and non-identity. If I am not mistaken here, this opens up various possibilities for a critical reading of systems theory. Let me elaborate a little bit on this:

For different strands of critical theory, a system is mainly regarded as a domination device that allows for the blind reproduction of society at the subject's back. A system operates on the basis of real abstractions that inflict violence against both the object and the subject, internal and external nature. According to a Hegelian formulation, a system deals with mere classificatory (external) differences that does not differentiate enough, a "distinction without a difference" (Hegel 2010: 59 [21.69]). This way of conceiving systems applies in particular to the capitalist system and the commodity fetishism that it engenders, running from Marx through Adorno until Habermas' communicative theory of society. For this tradition, system autonomy means tautology and solipsism and the relationship between systems is framed as one of colonization. With Adorno we could say that a system is a difference-devouring machine.

The point here is that Luhmann reconceives systems in a radically distinct direction. To begin with, as a form, the system not only is conceived as the difference between identity and non-identity but as a social system it constitutes itself from "differences that make a difference" (Bateson's 1979 concept of information). A system is not only closed in the recursive circuit of its internal operations but it is also cognitively opened to its environment. More precisely, it

is capable of opening because it is closed. There is no external determination. Nothing comes directly from the environment into the system. There is no exact correspondence between system and environment. The environment is, by definition, always more complex than the system. On the one hand, there is always a supplement that the system cannot totalize; on the other hand, there is always an internal work of coding, filtering or translating. Thus conceived, the system form is a form for both autonomy and interdependence. In other words, there is no solipsism and there is no colonization.

For the sake of brevity, one could say that these crypto-normative motives are not conceived here as social faits accomplis; rather, as in ideal typical formations, they seem to point to and emphasize some socio-historical tendencies and objective possibilities that are not fully realized in an unproblematic way. From this perspective, the empirical limits confronting the theoretical constellation could be illuminated from within the constellation itself, provided it is used in a negative way, that is, as I have said elsewhere, as an analytical device for mapping countertendencies of dedifferentiation, tautology, and colonization.

2. Elective affinities

The second dimension of the argument concerns an attempt to articulate some aspects of Luhmann's systems theory and some aspects of Adorno's very particular strand of critical theory. This is done with the twofold aim of pointing out some elective affinities between these very different theoretical constellations and of substantiating a critical reading of Luhmann's theory. In Adorno, what interests us most is both a specific way of conceiving the relationship between different social spheres and his project of negative dialectics and the critique of identity thinking. Although both aspects are articulated, they can be analytically decomposed for the sake of exposition.

Regarding the relationship between different social spheres, I take as my starting point the observation of a commentator on Theodor Adorno's work:

"The more society becomes one-dimensional, the more critique must pay attention to the internal structure and relatively autonomous logic of cultural objects" (Bernstein 1991: 18). In a sense, Adorno's social analyses could be seen as a theoretical effort to articulate this paradoxical claim and the tensions it implies. These tensions seem to have to do with the contradictory character of social development in modernity, which points simultaneously to differentiation and unidimensionality.

From this perspective, modern tendencies towards autonomy and heteronomy, differentiation and unidimensionality could be analytically grasped within different social spheres conceived as force fields or conflictual formations. In this sense, the elaboration of a critique of society means (i) taking seriously the claims to autonomy made by the partial spheres of society and, at the same time, (ii) the obstacles that capitalism puts in the way of the realization of these claims. And this can only be done by turning to the inner workings and particular character of these spheres. It almost goes without saying that this goes far beyond the so-called economic reflection studies.

To reinforce this point, let's briefly consider some aspects of the Adornian critique of art. To refer to a well-known Adornian formula, "the work of art is both autonomous and socially mediated" (see Schweppenhäuser 2009: 114). As an expression of this double nature, "the aesthetic articulation of dimensions of the social process constitutes a manifestation of art's freedom". According to its self- concept, art is a form that can elaborate other social forms in an internal way, that is, based on its own criteria.

The problem lies precisely in the direction of the historical process. In late capitalism, the sphere of art presents a bifurcated movement, finding itself under a double attack so to speak: on the one hand, commodification, which establishes economic procedures that instrumentalize the aesthetic, as in the case of the cultural industry; on the other, hyperformalization, which can be seen as a kind of internal reaction to the tendency of colonization and points to the increasing loss of articulation between aesthetic form and lived experience. On the one hand, external, unmediated determination implies loss of autonomy; on the

other, as a reaction to this process, the internal formalist affirmation of art's autonomy leads to a loss of social relevance.

The social critique of the sphere of art proposed by Adorno corresponds to the mapping of this deterioration of aesthetic meaning and the emptying out of the subjects' experience that is related to it. In this sense, perhaps one could say that this kind of critique takes into account the increasing discrepancy between art's self-descriptions and social tendencies towards both solipsism and colonization. Even as the autonomous and socially mediated artwork becomes increasingly improbable under late capitalism it is retained as a possibility and offers guidance for analysis and critique.

With regard to the project of negative dialectics, the first thing to note is that Adorno refers to his project as a sort of utopia, more precisely (and I quote): "a cognitive utopia would be to use concepts to unseal the non-conceptual with concepts, without making it their equal" (Adorno, 1973: 10).

The recognition of the insufficiency of the identificatory procedure, always present in the process of building concepts, is the first distinctive feature of the Adornian project for a critical materialism conceived in terms of a negative dialectics: "The name of dialectics says no more, to begin with, than that objects do not go into their concepts without leaving a remainder, that they come to contradict the traditional norm of adequacy" (Adorno, 1973: 5).

In negative dialectics, the operations of meaning fixation, proper to conceptual identifications, maintain a relation of non-identity with a horizon of meaning possibilities that always remains latent because it is not exhausted by these operations. In this sense, negative dialectics is precisely the reverse of commodity's logic and the violent identification it operates in things by disregarding its particular character. If I were allowed to think with Luhmann in order to clarify Adorno on this point, perhaps it could be said that these operations are conceived – as it were – as "conscious" operations of reduction of complexity that always remain contingent.

Similarly, perhaps we could read Luhmann from this Adornian perspective and note that the simultaneous constitution of system and

environment, as conceived by Luhmann, is a kind of negative dialectics in action: a real abstraction elaborated by society that incorporates its other (the environment) through the recognition of its non-correspondence and non-identity; in relation to the environment - understood as a repertoire of unstructured possibilities for the actualization of meaning - the system "consciously" performs a reduction.

In this way, systems seem to constitute a socially mediated autonomy, in which internal procedures filter, translate and internally recreate external events. It should also be noted that these reductions are contingent, always leaving room for other possibilities of selection. In this sense, a certain elective affinity in the proper sense could be identified between the negative dialectics of subject and object and the reciprocal constitution between system and environment. After all, both are concerned with openness without loss of identity, without any direct determination and without totalization.

3. Neoliberal capitalism

Moving on to the second part, it should be noted that for Adorno, "identitarian thinking and exchange are isomorphic" (Cook, 2008: 13). In the same way that identity thinking strips objects of their particularities by identifying them with universal concepts, exchange relations "make non-identical individuals and performances commensurable and identical" (Adorno 1973: 146). It is not by chance that the critique of the cultural industry in late capitalist society is not about the fact that its products are produced by large corporations, but rather about how economic relations imprint on them the mark of the whole, which reorganizes internal procedures in a heteronymous way ("the whole is the untruth").

This is why Adorno emphasizes that the notion of technique in the products of industry has nothing to do with technique in its proper aesthetic sense – that is, "with the internal organization of the object itself, with its inner logic." On the contrary, the cultural industry "lives parasitically from the extra-

artistic technique of the material production of goods, without regard for the obligation to the internal artistic whole implied by its functionality (*Sachlichkeit*), but also without concern for the laws of form demanded by aesthetic autonomy." (Adorno 1991: 101).

Luhmann, for his part, seems to reject capitalism as a working concept for describing modern society precisely because of its economistic nature. In the preface to *The Differentiation of Society*, the author states:

> We can no longer define society by giving primacy to one of its functional domains. It cannot be depicted as civil society, as capitalist/socialist society, or as a scientific-technocratic system. We must replace such interpretations by a definition of society that refers to social differentiation. Modern society, unlike all earlier societies, is a functionally differentiated system. Its analysis thus requires a detailed study of each of its single functional subsystems. Society can no longer be grasped from a single dominant viewpoint. Instead, its dynamic is clarified through the fact that functional systems for politics, the economy, science, law, education, religion, family, etc. have become relatively autonomous and now mutually furnish environments for one another. (Luhmann 1982: xii)

What seems to be interesting here is that for both Adorno and Luhmann capitalism seems to be connected to identity thinking and the primacy of the economic. At the same time, while non-identical relations remain a possibility in Adorno, Luhmann seems to take them as a condition for the emergence of functional differentiation. At least from this very specific perspective, a fully realized functionally differentiated society seems to present important tensions with capitalism conceived in this way.

Among the many varieties of theorizing about contemporary capitalist social formations, the Foucauldian account of neoliberalism as a new rationality of government – more precisely, as neoliberal governmentality – seems to offer

some interesting insights for the kind of inquiry we have been developing. Let's look at this briefly.

In *The Birth of Biopolitics*, based on an analysis of the German ordoliberal tradition and the Chicago School of economics of the 1970s, the French author sought the specificity of neoliberalism in contrast to the classical liberal epistemic and social formation. According to Foucault, neoliberal economic thought breaks with the "naive naturalism" of eighteenth-century liberalism, which saw the market as a given of nature. For neoliberals, competition is not a natural game between individuals and behaviors, but "an essential economic logic [that] will only appear and produce its effects under certain conditions which have to be carefully and artificially constructed" (Foucault 2008: 120). It is precisely this postulate that implies a redefinition of the relationship between the market and the state. It can no longer be one of "the reciprocal delimitation of different domains" because "competition, which is the essence of the market, can only appear if it is produced, and if it is produced by an active governmentality." From now on, the market is conceived as "an organizing and regulating principle of the state." In other words: a state under the supervision of the market rather than a market supervised by the state.

From this, Foucault derives a specific dynamic of neoliberal rationality that is of most interest to us here:

> There will thus be a sort of complete superimposition of market mechanisms, indexed to competition, and governmental policy. Government must accompany the market economy from start to finish. The market economy does not take something away from government. Rather, it indicates, it constitutes the general index in which one must place the rule for defining all governmental action. One must govern for the market, rather than because of the market. (Foucault 2008: 121)

Another distinctive feature of neoliberal rationality is that it not only leads to a transformation of state-market relations, but extends far beyond them into

other social spheres and the sphere of subjectivity. According to Foucault, it is a matter of making market regulation the regulating principle of society as a whole. Here, the decisive analytical step": it is a matter of "constructing a social fabric in which precisely the basic units would have the form of the enterprise" (Foucault 2008: 148), in other words, "what is involved is the generalization of forms of 'enterprise' by diffusing and multiplying them as much as possible […] It is a matter of making the market, competition, and so the enterprise, into what could be called the formative power of society" (Foucault 2008: 148).

This analysis is completed by the presentation of the American case as one of intensifying and radicalizing neoliberal rationality in the direction of the theory of human capital and the economic analysis of crime. In both situations, neoliberalism is depicted as a grid of intelligibility that seeks to apprehend the internal calculations of human action framed from an economic perspective, that is, whatever the concrete situation, the question is always about how the individual allocates scarce resources, how he or she can manage the resources he or she possesses. In the sphere of labor, "the worker himself appears as a sort of enterprise for himself." (Foucault 2008: 225). In the broader social sphere, the whole of society appears as a system of corporate units. A new homo œconomicus is born and he or she is an entrepreneur, "an entrepreneur of himself […] being for himself his own capital, being for himself his own producer, being for himself the source of [his] earnings" (Foucault 2008: 226).

In radicalizing neoliberalism, the American case is crucial in that it entails that "analysis in terms of the market economy or, in other words, of supply and demand, can function as a schema which is applicable to non-economic domains." (Foucault 2008: 243). It constitutes a sort of economistic analysis of the non-economic.

This set of Foucauldian insights into the nature of neoliberal rationality as an art of governing populations and individuals is crucial in pointing out some peculiarities of current capitalist formations. First, neoliberal capitalism is not only about the commodification of different social spheres, i.e., turning them into commodities to be bought and sold on the market (this seems to be particularly

true for organizations like universities that remain public in a formal legal sense); thus, it is not only about a set of economic policies such as privatization and so on; rather, it is about the remaking of these spheres (including the sphere of subjectivity) from the perspective of the competitive enterprise.

Second, neoliberal capitalism is about power relations in the sense that neoliberal rationality is not capable of extending itself into different social spheres. It implies the increasing use of political and legal interventions to produce market-like situations in non-market domains. In this perspective, it is not about undifferentiated "de-regulation" and the reduction of the state. In Foucault's words (2008: 167), "a minimum of economic interventionism and a maximum of legal interventionism". In the same vein, this legal and political interventionism seems to go far beyond the old conception of an external instrumentalization of law and the state. Rather, it seems to be about the internal reconfiguration of these spheres.

Third, especially in line with the American experience, neoliberal capitalism is about the power-based extension of a normative practical and totalizing economic rationality to different social spheres (Dardot and Laval, 2014). In Luhmannian terms, it seems to be not only about the more visible corruption of the autonomy of different partial systems by the external imposition of the have/have not code of the economic system, but also about the extension of economic procedures and theories of reflection to different social spheres in a more insidious way.

Similarly, Wendy Brown has pointed to a trend of de-democratization in advanced Western societies. She refers not only to the economicization of electoral procedures and practices, but above all to the emptying out of the very political values that once formed the center of the political system. According to her (Brown 2015: 18), to the extent that "neoliberal reason is evacuating these ideals and desires from actually existing liberal democracy […] dedemocratized subjects and subjectivities […] might be undoing democracy, that is, hollowing it out from within".

What seems to be at stake in these analyses is, among other things, the growing contraction of possibilities for the production of meaning in society through the advance of neoliberal rationality. It is as if a certain way of reducing complexity, in this case primarily economic, is being unilaterally imposed on different social spheres without regard to other ways of producing meaning.

4. The case of Academic Capitalism

In the wake of Max Weber's well-known comparison between the academic and business worlds in his essay "Science as Vocation", the term academic capitalism was coined by Edward Hackett (1990) to shed light on the growing rapprochement between university research and business, especially in the hard sciences and engineering. The term was developed and expanded by Slaughter and Leslie (1997; 2001) and has become a privileged object of international research.

According to Hackett, the notion seeks to capture the ways in which "capital influences the structure, conduct, and substance of research" (Hackett 2014: 3). In its contemporary face, the phenomenon acquires borad and diversified contours, ranging from the constitution of industrial research parks and technology transfer offices, the enclosure of publicly produced knowledge in trademarks and patents, to the commercialization of research activities through the purchase of research and publication content by large economic conglomerates - the case of the global pharmaceutical industry is exemplary in this regard (Sismondo 2009).

It involves a broad organizational change that redefines the division of academic work between teaching and research, introduces new criteria for hiring and allocating material and human resources, and constitutes new organizational forms such as foundations and public-private partnerships within the university. It is a process of restructuring the university in the mirror of the restructuring processes that are taking place in the corporate world. Through a dense network

of think tanks and multilateral organizations, it has been spreading across different regions and sectors of global society.

Hackett's analysis goes on to point out that (2014: 3-4) through this "quiet academic revolution," [...] "the academic enterprise becomes increasingly dependent on allocations of capital from without and the accumulation of capital within; [in the process] it cedes freedom, purpose, and the ability to act as an independent moral force in society."

Slaughter and Leslie (2001: 154) use the term to define

> the way public research universities are responding to neoliberal tendencies to treat higher education policy as a subset of economic policy. In this policy environment faculty and professional staff increasingly must expend their human capital stocks in competitive environments. The implication is that some university employees are simultaneously employed by the public sector and are increasingly autonomous of it. They are academics who act as capitalists from within the public sector: they are state-subsidized entrepreneurs.

Academic capitalism encompasses both market-like behaviors, referring to institutional and faculty competition for funds, and market behaviors, referring to for-profit activity in the strict sense. In this way, the notion of academic capitalism seems to indicate the multiple ways in which a process of neoliberal governmentalization is remaking the contemporary university. Not only through the operations directly aimed at extracting profit from academic practices, but also and decisively through the fine-tuning operations of remaking scientific and educational procedures and tools of reflection in the mirror of corporate practices.

In this regard, Stephen Ball (2012: 30) stresses the importance of understanding neoliberal academic reforms in terms of **a new imaginary** centered on the market as the linchpin for the "universalization of market-based social relations, with the corresponding penetration in almost every single aspect

of our lives of the discourse and/or practice of commodification, capital accumulation and profit-making". It is no coincidence that educational policy is increasingly made in places, at scales and in organizations where the production of economic meaning prevails.

Ball (2012: 32-33) shows that the infusion of new sensibilities and values into public sector practices occurs through performativity - the "quintessential form of neoliberal governmentality": "It demands the redesign of organizations, organizational relationships and organizational ecologies. it is both individualizing and totalizing. It produces both an active docility and depthless productivity [...] It is composed of audits, inspections, appraisals, self-reviews, quality assurance, research assessments, output indicators and so on". Accordingly, it is important to note that in the process of this economic saturation of the university world, other imaginaries tend to be increasingly marginalized.

Stephen Ward (2014) affirms that neoliberal rationality seems to superimpose academia and capitalism in distinctive ways. Two of these are worth noting: the rationalization of university management practices brought about by the importation of New Public Management into university administration, and the creation of schemes that generate student choice, consumerism, and responsibility.

The university that is now emerging in the wake of these neoliberal reforms looks and feels very different from the liberal university that preceded it. Unlike the liberal university, the neoliberal university is reconfigured to both act like a competitive enterprise in the marketplace and to serve the ever-changing interests of those in the marketplace: "The end result of 'actually existing neoliberalism' is a 'worst of all worlds' situation where market authoritarianism or illiberal liberalism prevails. Here, all previous social and political checks and balances on markets are essentially released" (Ward 2014: 472).

5. Building a critical diagnosis of academic capitalism

We can systematize what has been said so far in the following statements:

i) It would be possible to identify some normative motives in Luhmannian systems theory, especially in the way it links modern society, the primacy of functional differentiation, and polycontexturality;

ii) There seems to be an internal connection between Adorno's critique of identity thinking and the Luhman's emphasis on reconceptualizing systems as non-identity between system and environment;

iii) Neoliberal rationality could be understood as a normative totalizing project aimed at extending competition and corporate values throughout different social spheres, with the potential to undermine their immanent constellation of meaning;

iv) Academic Capitalism could be understood as a case of the peculiar extension of neoliberal rationality to the university organization – which systems theory conceives as a structural coupling between the functional systems of science and education.

Taking these premises into account, I will briefly make some methodological observations about the importance of conducting empirical research oriented towards functional-systemic concepts, especially in relation to a critique of neoliberal rationality and academic capitalism.

The first remark is to be prepared for a degree of heterodoxy; in my view, the worst kind of research would be the procedure of merely applying conceptual "rules" to concrete "cases"; in line with the critical reading proposed above, conceptual tools are not to be taken as having an exact correspondence with empirical reality. In the tradition of both critical theory and Weberian ideal types, the gaps between conceptual formation and reality constitute a strategic space for reflection (either in the direction of immanent critique, or in the direction of accounting for mixed social formations). There always seems to be something

that escapes the conceptual grid, and showing how this happens in concrete situations would be one of the main tasks of empirical research.

Second, compared to other hegemonic theoretical perspectives in the social sciences, systems theory seems to have at least one decisive advantage: the emphasis on functional differentiation and system autonomy implies a remarkable deepening of our understanding of the inner workings of different social spheres. Whatever the scope of empirical research, this should be taken into account in the reconstruction of empirical reality, even or especially if the conceptual constellation is to be used in a negative way, *i.e.*, as an analytical map of processes of dedifferentiation, system corruption, etc.

Third, and correspondingly, emphasis should be placed on the internal workings of different systems, especially on reflexive procedures (*e.g.*, "learning to learn") and theories of reflection (such as pedagogy and epistemology); after all, systems are observing systems, both observing and being observed. How a system produces its procedures, observations, and descriptions should be a major concern of empirical research. As far as the spread of neoliberalism is concerned, this seems crucial for mapping the intended totalizing nature of this rationality.

Fourth, in line with some Adornian articulations mentioned above, different social spheres could be refocused as force fields in which opposing tendencies of differentiation and dedifferentiation intersect. Empirical studies of different system dynamics could help to shed light on the specific nature of these tensions. Especially in concrete situations under processes of neoliberal remaking, research should be able to account for both tendencies of erosion of system autonomy and resistances against them.

As a starting point, Luhmannian systems theory seems to provide valuable methodological guidelines for orienting empirical research towards the kind of observations just made above.

As an organization, the university could theoretically be conceived as an autonomous system that produces its own operations and, in this process of self-production, distinguishes itself from its environment. According to Luhmann,

organizations construct themselves through decisions, that is, "as operationally closed systems reproduced only through the communication of decisions" (2018: IX).

The specific meaning of these decisions depends on the decision-making context of the organizations themselves. This implies that the environment can only "irritate" or "disturb" the system's internal mode of decision-making. "A system only reacts to differences which it can distinguish itself" (Vanderstraeten 2002: 246). For instance, the meaning and centrality of evaluations for the educational system are "defined within the educational system itself, following an internal scale" (Vanderstraeten 2002: 248). For this reason, "the effect of external factors is inhibited or 'mediated' by the structure of the system; rather than regulating or determining from outside, the environment can only really 'irritate' the system and initiate internal processes" (Vanderstraeten 1997: 322).

If functional systems are differentiated-out as autopoietic systems, and thus closed at the level of their operations, "this alone means that they do not determine one another but can only irritate one another to varying degrees through structural couplings" (Luhmann 2018: 331). In the university, as an organizational type of autopoietic system, the systems of science and education are structurally coupled, which allows both the reinforcement of systemic interdependencies and the filtering of the irritations thus produced by the internal references of each system. Consistent with this irritation-based view of system opening, "information is a product of the system itself and not something which exists 'out there'. The information value of an environmental stimulus depends on the selectivity operative in the system" (Vanderstraeten 2004: 258).

Although structural couplings are not a function of organizations,

> they would scarcely be possible at the necessary level of complexity and differentiation if there were not organizations able to gather and bundle communications and thus ensure that the continuous irritation of the functional systems generated through structural couplings

> can be translated into connective communication (Luhmann 2018: 331).

With regard to the specific case of academic capitalism, it is precisely this form of conceiving the university in terms of autonomy and the maintenance of system-environment differences that could serve as a guide for illuminating the ways in which today's trends toward neoliberal dedifferentiation of science and education manifest themselves in and affect the internal dynamics of these systems. It is here that empirical research would play a key role in the elaboration of a diagnosis of the contemporary university. To name just a few preliminary possibilities, research could help refine our perception of the specific ways in which economy, education, and science intersect in today's universities by addressing questions and processes such as the following:

To what extent can tendencies of economic colonization of the university be attributed to the fact that state policies and reforms in this area have been formulated mainly from the perspective of economic rationality and by non-academic actors?

How has the constitution of a market of educational consulting services, mainly aimed at selling packages of training, curricular reform and distance learning techniques to educational organizations, affected their teaching and research practices?

How does the restructuring of the university's internal hierarchy, which mirrors that of the corporate world, affect day-to-day policy and decision-making processes, especially in terms of creating a competitive environment aimed at maximizing fundraising, cost reduction, and participation in market-oriented product development and corporate partnerships?

How does the new semantics of entrepreneurial subjectivity influence educational and research activities? How do emphases on productivity, rankings, and evaluation affect the core functions of educational and scientific systems? How do these emphases translate into the internal dynamics of research and pedagogical routines?

How do tendencies of economic colonization relate to different levels of systemic self-referentiality? Beyond the extreme situations of corruption of systemic codes of preference (for example, the purchase of scientific articles in prestigious academic journals as a product sales strategy, a practice well documented in the literature on the relationship between academia and Big Pharma), by what mechanisms does economic reason spread to the levels of reflexive procedures and theories of reflection of education and science?

Careful empirical observations guided by these kinds of questions could eventually lead us to compare different ways of attributing meaning to the reflexive formula "learning to learn" in the educational system, thus contributing to map the tensions between the ways in which business and economics, on the one hand, and education and pedagogy, on the other, schematize learning processes and problem-solving activities.

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Postscript

Given the volume and scope of research on academic capitalism and current proposals for university reform that have emerged since this text was first presented – focusing on class, gender, race, and, of course, agency and interests of all kinds in various power and money constellations – the theoretical wager proposed here remains homologous to them, but reversed: it is more about 'how' questions than 'what,' to be taken from the inside out rather than the other way around. That is, the analysis should focus on the internal level of the functioning of the university and the systems of education and science. *How* each system specifically gives meaning to these issues, *how* its autonomy is or is not compromised, and to what extent, are central questions to be researched, rather than simply assumed from the abstract postulate of the predominance of external determinations.

References

Adorno, Th (1991) 'Culture industry reconsidered' in Th. Adorno, *The Culture Industry. Selected essays on mass culture* (London, Routledge), 98-106.

Adorno, Th (1973) *Negative Dialectics* (London, Routledge).

Bateson, G (1979) *Mind and nature: a necessary unity* (New York, Dutton).

Bernstein, JM (1991) 'Introduction' in Th Adorno, *The Culture Industry. Selected essays on mass culture* (London, Routledge), 1-28.

Brown, W (2015) *Undoing the demos: Neoliberalism's stealth revolution* (New York, Zone Books).

Cook, D (2008) *Theodor W. Adorno: an introduction*, in D Cook (ed), *Adorno: Key Concepts* (Stocksfield, Acumen).

Dardot, P and Laval, C (2014) *The new way of the world: On neoliberal society.* (London, Verso).

Foucault, M (2008) *The birth of biopolitics: lectures at the Collège de France, 1978-79.* (Hampshire, Palgrave Macmillan).

Hackett, EJ (2014) 'Academic Capitalism' 39(5) *Science, Technology, & Human Values* 635-638.

Hackett, EJ (1990) 'Science as a Vocation in the 1990s: The Changing Organizational Culture of Academic Science' 61(3) *Journal of Higher Education* 241-79.

Hegel, GWF (2010) *The science of logic* (Cambridge, Cambridge University Press).

Luhmann, N (2018) *Organization and decision* (Cambridge, Cambridge University Press).

Luhmann, N (1983) *Sistema jurídico y dogmática jurídica* (Madrid, Centro de Estudios Constitucionales).

Luhmann, N (1982) *The differentiation of society* (New York, Columbia University Press).

Schweppenhäuser, G (2009) *Theodor W. Adorno: An Introduction.* (London, Duke University Press).

Sismondo, S (2009) 'Ghosts in the Machine: Publication Planning in the Medical Sciences' 39 *Social Studies of Science* 171-198.

Slaughter, S and Leslie, L (2001) 'Expanding and Elaborating the Concept of Academic Capitalism' 8(2) *Organization* 154-161.

Slaughter, S and Leslie, L (1997) *Academic Capitalism: Politics, Policies, and the Entrepreneurial University* (Baltimore, MD, Johns Hopkins University Press).

Vanderstraeten, R (2004) 'The Social Differentiation of the Educational System' 38(2) *Sociology* 255–272.

Vanderstraeten, R (2002) 'The Autopoiesis of Educational Organizations: The Impact of the Organizational Setting on Educational Interaction' 19 *Systems Research and Behavioral Science* 243-253

Vanderstraeten, R (1997) 'Circularity, Complexity and Educational Policy Planning: a systems approach to the planning of school provision' 23(3) *Oxford Review of Education* 321-332.

Ward, SC (2014) 'From E Pluribus Unum to Caveat Emptor: How Neoliberal Policies are Capturing and Dismantling the Liberal University' 36(4) *New Political Science* 459-473.

Part III. Law, exclusion and inclusion

15. The rise of modernity and the changing patterns of inclusion in the world society

Douglas Elmauer

1. Introduction

The transformation from hierarchically differentiated to functionally differentiated society is the main structural change which reformulated the possibilities of access to opportunities distribution promoted by social sub-systems (economics, politics, law, education, health, etc.) in the modern world. The organization dynamics of the "inclusion" and "exclusion" schemes in society is always determined according to the form of structural differentiation (Luhmann 1997, Stichweh 2000). Ancient (or pre-industrial) societies (Milanovic, Lindert & Williamson 2011: 255 ff.) are arranged hierarchically through structural inequalities of strata, because all resources and conditions for access to systemic provisions are determined by the social position (status); that is to say, only aristocracy or elite concentrate communicative accesses and opportunities. In this situation, other 'social strata' are excluded (or semi-excluded) automatically from social systemic provision's scope – in short, in the premodern societies the political status primacy (Luhmann 1971, 1972: 168) plays a key organizational role through the status privileges (Aristotle 1973: 47-6 [1252a-b], Luhmann 1997: 688).

Our argument is that the modernization process reversed this trend towards exclusion, which resulted in increasing inclusion waves (Stichweh 2018, Roser 2017a, Rosling 2018, Pinker 2018). Premodern societies were radically unequal and the access to resources was always limited by social status. This reality does not hold place in a functionally differentiated society, although it has not been totally mitigated at all. However, this article does not propose to discuss these residual problems of exclusion (Luhmann 2000: 427), but to demonstrate

the existence of "inclusion waves", promoted by modernization under conditions of functional differentiation. We would like to do this based on data and evidence from empirical research collected throughout historical series from 19th century to nowadays (Maddison 2001, Milanovic 2016: 29). Contemporary society is no longer a society divided by social classes (in Marxist sense, for example – cf. Luhmann 2008: 72 ff., Marx 1962 [1867], 1964 [1894], see also Milanovic 2013, 2016) in which exclusion and pauperization predominates; instead, today different forms of inclusion are advancing worldwide, although regional differences generate asymmetries in this process (Luhmann 1993: 572-573, Milanovic 2013, Deaton 2013, Acemoglu & Robinson 2006). In the next section we will look at these issues.

2. World society, functional differentiation and regional diversification

It is possible to identify three central points that characterize the modern society: (i) the emergence of a world society at the structural, procedural and semantic levels; (ii) functional differentiation of social subsystems due to the social hyper-complexity; and (iii) regional diversification that provides a high degree of heterogeneity (Stichweh 2000: 245 ff.).

World society (i) arises from the expansion of social subsystems communications network from the 15th and 16th centuries (Stichweh 2000: 249-250). For this reason, the world society cannot be confused with the actual globalization, because it corresponds only to the world's society intensification. Functional differentiation (ii) is a result of social system's specialization in autonomous subsystems (Luhmann 1997: 707 ff.). The last aspect is (iii) regional diversification that leads to constitutive asymmetries among different world regions. That is the result of a heterogeneous world society – here we are dealing with multiple modernities (Eisenstadt 2000: 1-26) and civilizations (Huntington 1996) that are considerably different from each other.

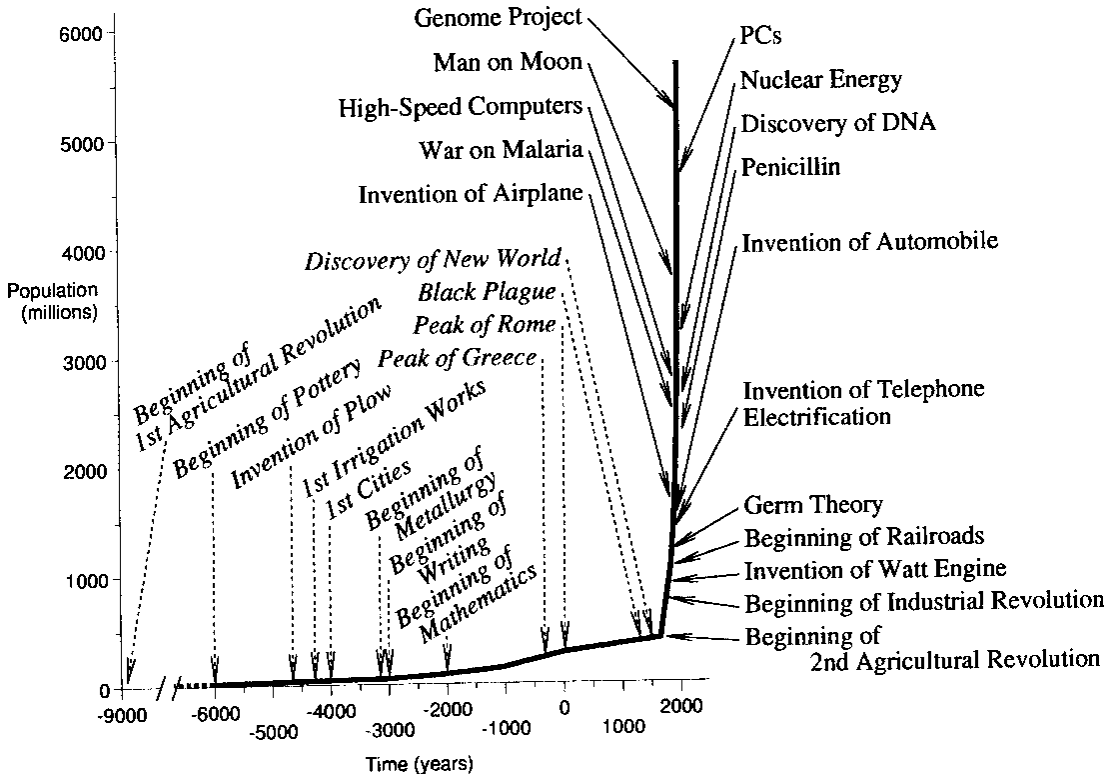
As mentioned before, premodern societies are usually organized hierarchically around aristocracies and elites. In this type of society, the higher

strata concentrate all resources and communication opportunities. In this context, society's remaining portion (commoners, servants, slaves, barbarians, metics, etc.) is excluded from the access to material and intellectual resources; in other words, the normality is the exclusion of the lower strata. Societies based on hierarchic structures have an organizational dynamic that utilizes lower/upper distinction to differentiate social classes – thus, status inequality is seen as "natural" and institutionalized (Aristotle 1973: 47-6 [1252a-b], Luhmann 1997: 688). However, a deep change of scenery takes place between 17th and 18th centuries, especially in Europe and the United States.

Society's modernization process deeply altered structures and institutions, especially due to the general complexity increase. This resulted in a transition from hierarchical and rigid premodern society to polycentric and functionally differentiated society constituted by multiple social subsystems, such as economics, politics, law, education, health, art, to name a few. Through autonomous social subsystems formation (not determined by politics or religion), the criteria for inclusion and exclusion are now defined according to their functional specificities. This means that society's upper strata cease to be the common denominator in the selection between included and excluded. In this sense, although the difference between social strata (or classes) still subsists in a residual form in some world regions, it loses its primacy in structuring the modern society as a whole (Luhmann 2008: 130).

The functional systems autonomy led to the consolidation of modern central institutions, such as subjective rights, private property, scientific freedom, democratic constitution, citizenship, law regulations – without these institutional innovations increasing inclusion and development would never be possible (Acemoglu 2010: 30, Aghion, Antonin & Bunel 2021: 32ff.). Technological and scientific advances' emergence enabled industrial and the last two agrarian revolutions, which removed humanity from a hunger, poverty and disease *vicious circle* and placed it in an inclusive spiral that promoted a "great escape" never experienced before in human history (Deaton 2013, see also Friedman 1962: 9).

The empirical evidence shows the existence of a direct relation between technological advances derived from industrial revolutions and gains in living standards and health of world population, which has grown rapidly and globally in the last two centuries (Fogel 1999: 2, Finch 2012: 9 ff.).



Source: Fogel 1999: 2

In the economics field, for example, "from 1800 to the present, the average person on the planet has been enriched in real terms by a factor of ten, or some 900 percent" (McCloskey 2016: 1, see also Maddison 2001). In the last two centuries, a progressive trend towards economic inclusion has been verified, although residual exclusion still exists in some parts of world society. However, in the last three decades a large portion of these regions around the planet is also gradually experiencing a transition provided by the "inclusion waves", like China, India and even sub-Saharan Africa (Roser 2017b).

The modernization process brought "inclusion waves" which are spread around the economics, political, legal and educational systems, to name a few. In this context, it is important to differentiate between inequalities and exclusion

problems. In modern society, the inequalities are bad only when they create obstacles to inclusion.

The process of functional differentiation replaced the distinction "equal/unequal" with the distinction "inclusion/exclusion". Furthermore, the meaning of the distinction equal/unequal has also been profoundly changed. In modern society, the equal/unequal distinction no longer reflects the old hierarchic way of structuring societies divided into classes or strata. Now the distinction equal/unequal has a broader spectrum of coverage, which includes the functional inequality itself among the social subsystems, which does not necessarily reflect something negative. On the other hand, the distinction inclusion/exclusion has come to define individual's existential condition, facing the access possibility that benefits from social subsystems – this is the crux of this change: the shifting from inequality problems to exclusion problems. Obviously, it is still allowed to talk about the distinction equality/inequality regarding the access possibility to subsystems; however, it is an issue subsumed to distinction inclusion/exclusion. Under these conditions, this distinction becomes a kind of "metacode" which mediatizes all modern social subsystems (Luhmann 1993: 583).

The concept of "inequalities" is multidimensional now (not only economic), but I address here the inequalities of access possibilities to social subsystems, that is, inequalities that are capable of generating "exclusion" and undermining some human beings' essential conditions for subsistence. In order to clarify these differences, our next chapter emphasizes inclusion-increasing waves as a structural phenomenon, which mitigate residual exclusion in the world society.

3. The inclusion waves of modernity

Modern society is structured around the need of inclusion; initially, "the concept of inclusion means the encompassing of the entire population in the performances of the individual functional systems. On one hand, this concerns

access to these benefits; on the other, *dependence* of individual modes of living on them" (Luhmann 1981a: 25 [1990: 34]). More precisely, "individuals must be able to participate in all these communications and change their couplings with functional systems accordingly from moment to moment. Consequently, society no longer offers them a social status that at the same time defines what the individual 'is' in terms of origin and quality. It makes inclusion depends on highly differentiated opportunities for communication, which can no longer be coordinated with one another in a secure and, above all, time-stable manner. In principle, everyone should have legal capacity and sufficient income to participate in the economy. As voters in political elections, everyone should be able to react to their experience with politics. Everyone goes through elementary schools as far as they can, at least. Everyone is entitled to a minimum of social benefits and health. Anyone can get married without depending on permits. Anyone can choose a religious faith. And if someone does not use his chances to participate in inclusion, this is attributed to an individual choice" (Luhmann 1997: 625).

However, the process of functional differentiation creates necessarily an unequal society, in a sense that each one of the subsystems starts to perform a specific function within society: economy deals with the scarcity problem; law, with justice; politics takes care of power legitimation, etc. Therefore "a functionally differentiated society is capable of producing and tolerating extreme inequalities in public and private goods distribution, but from a semantic point of view, this effect is subject to two limitations: (i) it is seen as only temporary and can change rapidly; (ii) it is limited to the individual functional areas and establishment interruptions of interdependence between them" (Luhmann 1994a: 249).

Inequalities in this sense correspond to functional questions of systems and not among social classes, since the primacy of hierarchical differentiation has been replaced by the primacy of functional differentiation. In a modern society conceived as an *unitas multiplex*, it is no longer possible to focus analyzes on "classes" or "strata" problems, since levels of complexity understood by world

society diverge from structuring, hierarchical and static forms. Moreover, inequalities in the functional sense are not negative; instead, they are constitutive and necessary inequalities of modern society (Luhmann 2008: 129 ff.).

Nevertheless, there are two other negative forms of inequalities, which still subsist residually in modernity. These two other forms of inequality generate exclusion because they create obstacles on individual access to various social subsystems central benefits. Such inequalities may be either (i) a kind of forms inheritance of traditional social structures (*e. g.* caste system in India), or (ii) a consequence of the transformation process of premodern agrarian societies into urban industrial societies, especially with slums emergence and "exclusion pockets" in peripheral countries (Luhmann 1995b: 147).

The lack of access to the essential benefits of functional subsystems such as education and economics can lead to "exclusion chains" (Luhmann 2000: 427), which means that an individual excluded from one system can fatally be excluded from others as in a domino effect. For example, someone who does not go to school and does not develop his "human capital" (Heckman 2008) is automatically excluded from the job market.[124] For those who are excluded, all that is left is underemployment or very low-productivity jobs in informal markets (La Porta & Shleifer, 2014), where they earn wages below those required for subsistence.

Although world society is polycentric (Luhmann 1990 [1981]: 31), functional differentiation of the economic system and its growth influenced the way in which the population of different globe regions were included or excluded from the other functional subsystems, mainly because of the interdependencies (Luhmann 1990 [1981]: 30) the economic system created with

[124] "In this respect the order of inclusions corresponds to the general condition of a functionally differentiated society: the relations between the functional systems fluctuate and can no longer be defined in terms of society as a whole. In the area of exclusion one finds the opposite picture. Here society is highly integrated. Highly integrated because the exclusion from one functional system virtually automatically entails the exclusion from others. An example from India: Families who live on the streets and have no fixed address cannot send their children to school. Or: who has no identity card is excluded from social benefits, cannot vote, cannot marry legally. Economic hardship creates a high indifference to the legal code (which must be interpreted as indifference and not as a preference for crime)" (Luhmann 1994a: 259-260). See also Luhmann (1995a: 7 ff.).

other subsystems (health, education and politics). This reality becomes clearer especially with welfare state emergence and its financing (Luhmann 1990 [1981]: 84).

In an economic sense, for example, some of the main residual inequalities of modern society are verifiable not only in the gap between rich and poor countries (Acemoglu 2007: 4; Stichweh 2007: 7), but also even more markedly, when we compare individuals from different nations (Milanovic 2013: 198 ff.). As Milanovic said, "in the age of globalization, another way of looking at inequality between individuals is to go beyond the boundaries of a nation-state and observe inequality among all the individuals in the world" (Milanovic 2013: 198).

Nonetheless, the inequalities among countries are significant in the segmentation sense between national states (Luhmann 1993: 582; Stichweh 2007: 7). The structural fragile conditions of peripheral countries interfere with the possibilities of inclusion in essential subsystems, such as the economic system, legal system, political system, health system and education system. This is usually visible in peripheral societies where institutional problems generate exclusion, especially because of extractive elites,[125] who create obstacles to the realization of fundamental rights, private property, free markets and democratic legitimation of power. Under these conditions, there are situations where certain parts of some countries' population appear as "sub-citizens" or even "second-class citizens" (Neves 2007: 175-176).

More developed countries have achieved more growth-friendly institutions compared to poorer countries – rule of law, fundamental rights, democratic legitimation of power, checks & balances system, private property and free market are indispensable institutions for inclusion generation. The functional differentiation process was able to create and strengthen these institutions initially in Europe and the United States (18th and 19th centuries), but this process did not spread in the same way and at the same time around the world.

[125] Acemoglu & Robinson (2006, 2006b) emphasize the type of colonization and the origin of local elites for their relationship with institutions. Luhmann (2000: 428) and Neves (1992, 2007) speak about the instrumentalization of institutions (*e.g.* Constitution) by the "ruling elites". See also Acemoglu, Johnson & Robinson 2001.

In this context, regional differences remain a significant challenge to the effectiveness of functional differentiation and the solidification of modern institutions, both of which are essential for inclusion and development (Stichweh 2007: 7, Acemoglu 2007: 4).

Considering this situation of social transformation, I seek to point here to a central aspect for modern society: inclusion. This general change promotes human beings increasing inclusion through "inclusion waves", also reinforced by the human rights rise that have enshrined every human beings' rights to the realization of their "capabilities" (life, health, integrity, education, conscience liberty, cultural diversity, participation, etc.), which go beyond a merely economic sense of inclusion (Nussbaum 2003: 41-42, see also Sen 2005).

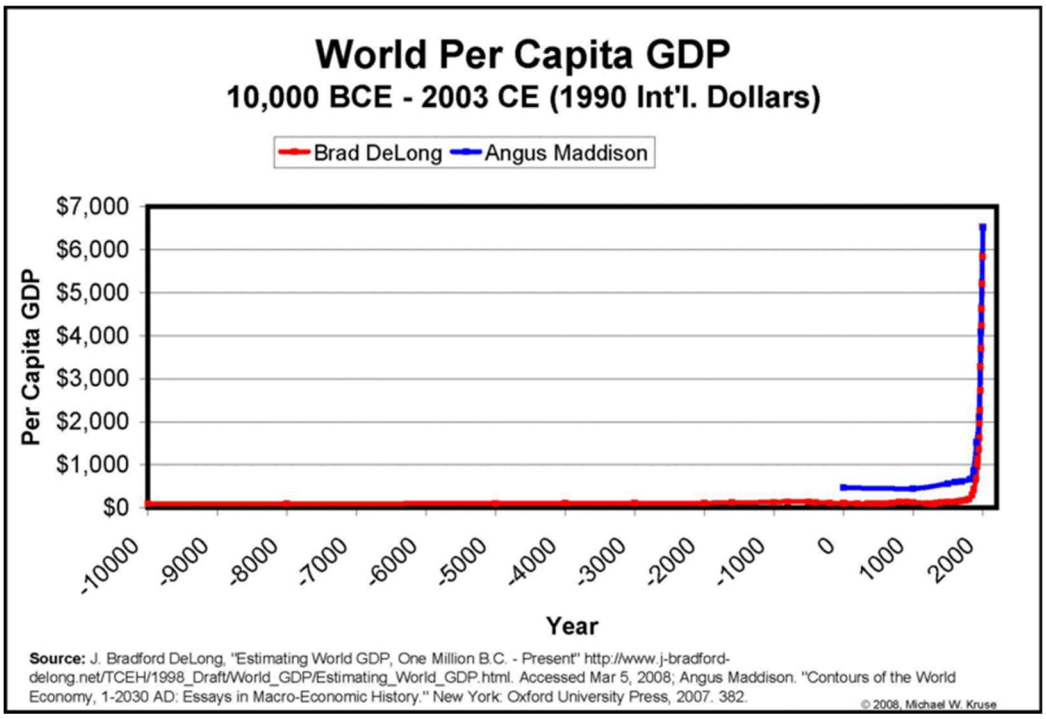
As Bora notes in his analysis, "in principle, there is full inclusion of all in society. However, this does not yet demonstrate in what way a functional system performs inclusion in a specific context. This graduation of inclusion comes through selections of individual functional systems and, above all, through levels of differentiation. Based on inclusion's general principle – human rights, freedom, equality, general legal capacity, economic freedom, compulsory schooling, etc. – set function system specific and level specific differentiated modes of inclusion" (Bora 2002: 71). Thus, by taking the conditions set forth as a basis, I will demonstrate, based on recent empirical research and data collection, how social subsystems (economics, education, health, politics, science, and law) promoted several inclusion waves around the world.

3.1. Wave of inclusion in the economic system

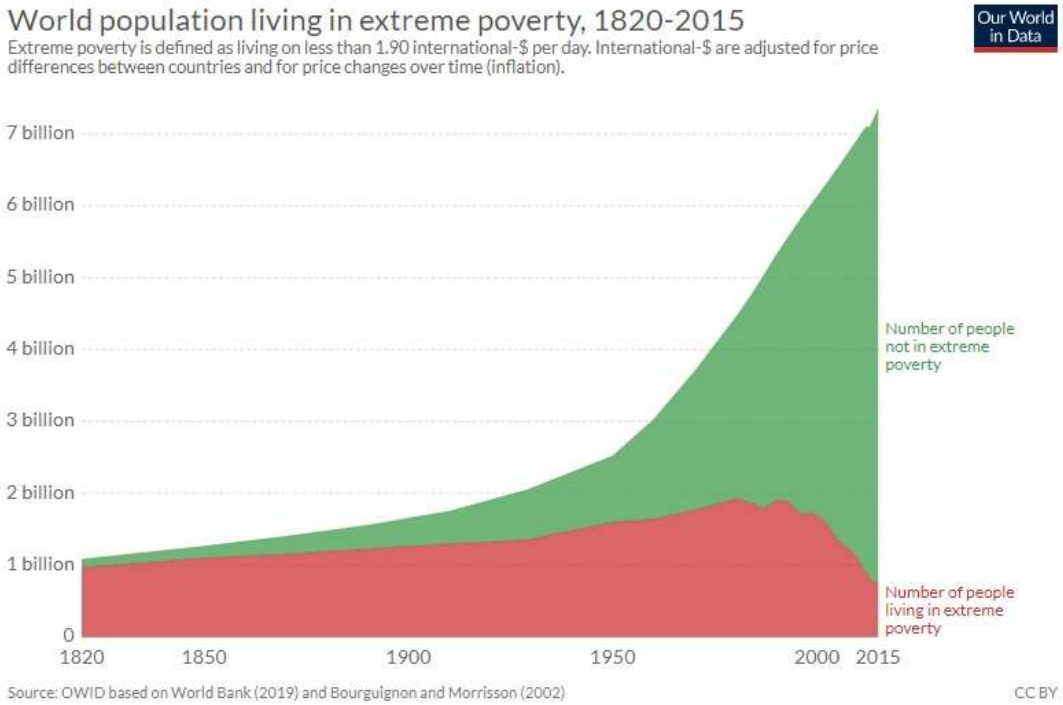
The economic system was one of the first social subsystems to establish progressive autonomization in relation to other social spheres such as religion and politics, especially on 14th and 15th centuries with the emergence of institutions and organizations that reinforced its autonomy (e.g. banks, stock exchanges and trading companies) (Stichweh 2000a: 245 ff.). Now economy is oriented primarily by the problem of scarcity and the allocation of land, capital

and labor (inputs) in order to produce goods and services efficiently (outputs). The development of "evolutionary acquisitions" (Luhmann 1983b: 153 ff., 1988, 1994b) of modern economy such as monetary system, private property, free market and price system autonomy enabled economy to move toward a growing spiral of wealth creation (McCloskey 2016: 2).

However, economic functional autonomy does not mean isolation from other social subsystems. In this way, economy was able to use institutional guarantees provided by the law system to promote private property's security, freedom and formal equality of individuals for creation and innovation, for example (Aghion, Antonin & Bunel 2021: 36). Through these "systemic interdependencies" (Luhmann 1990a [1981a]: 30), science and technology subsystems also played a crucial role in increasing economic productivity. The great enrichment "boom" occurred in the 19th century (McCloskey 2016: 2), largely because of industrial revolution impact, labor division, scale economies and trade comparative advantages. As shown in the graphic below, the world GDP per capita took off.



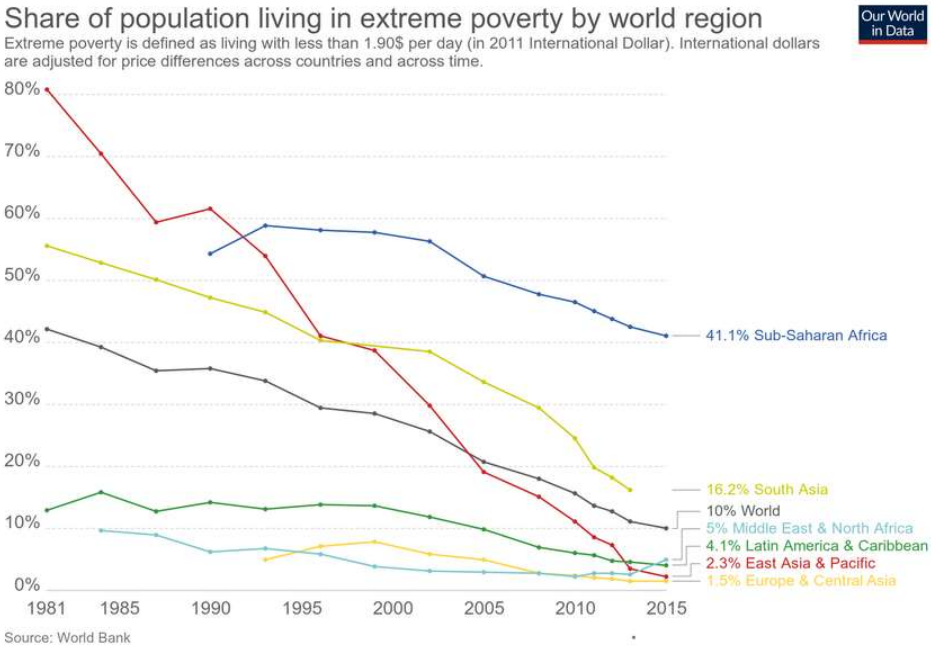
In premodern (or preindustrial) societies, poverty and economic exclusion in relation to access to money, goods and services was the rule, not the exception.[126] With the functional differentiation of economy, the dynamics of "inclusion" changed and became gradually universal (Luhmann 1997: 625), extending to all human beings of the world society. As Max Roser observed, "in 1820, only a tiny elite enjoyed higher standards of living, while the vast majority of people lived in conditions that we would call extreme poverty today. Since then the share of extremely poor people fell continuously. More and more world regions industrialized and thereby increased productivity, which made it possible to lift more people out of poverty: in 1950 two-thirds of the world was living in extreme poverty; in 1981 it was still 42%. In 2015 – the last year for which we currently have data – the share of the world population in extreme poverty has fallen below 10%" (Roser 2016: 2).



[126] "Much evidence suggests that there was little economic growth before the 18th century and certainly almost none before the 15th century. Maddison's estimates show a slow but steady increase in West European GDP per capita between 1000 and 1800. This view is not shared by all historians and economic historians, many of whom estimate that there was little increase in income per capita before 1500 or even before 1800". (Acemoglu 2007: 18).

There follows today a global trend of economic inclusion's increasing degrees. With productivity growth, people now have greater access to basic goods, food, hygiene and clothing (Roser 2017b).

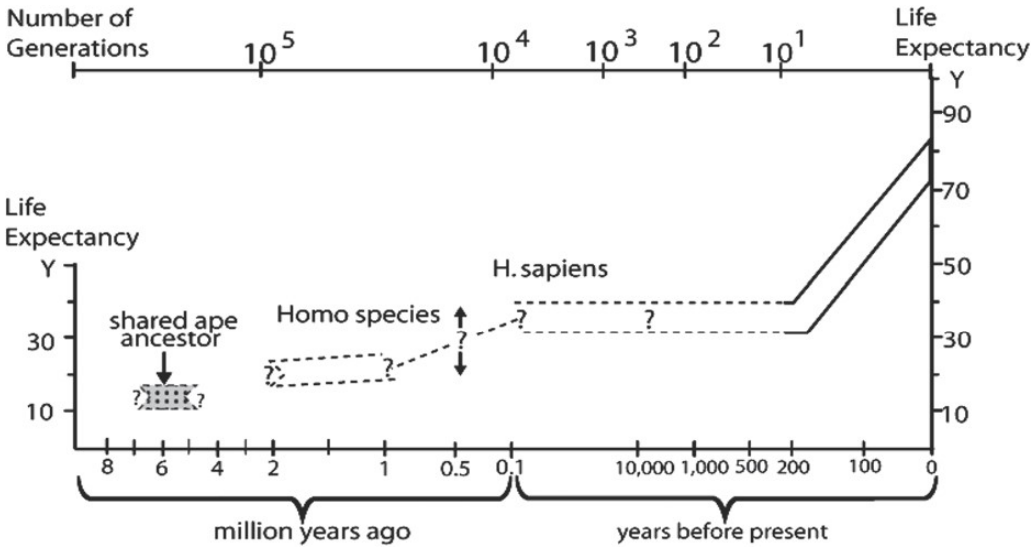
Despite the debate over persistent forms of economic inequality, recent research results point out that these are also being mitigated (Milanovic 2013: 200-201). "Between 2002 and 2008, global Gini decreased by 1.4 points" (Milanovic 2013: 200). As Luhmann (1993: 561) noted "it is likely economy with its mass production and market-oriented goods has done more to compensate for inequalities than a law politically directed for that direction". The declining percentage of population living in poverty in all world regions is largely due to the increasing inclusion of some countries in global markets, as is the recent case of many Asian countries (Milanovic 2013: 202).



3.2. Wave of inclusion in the health system

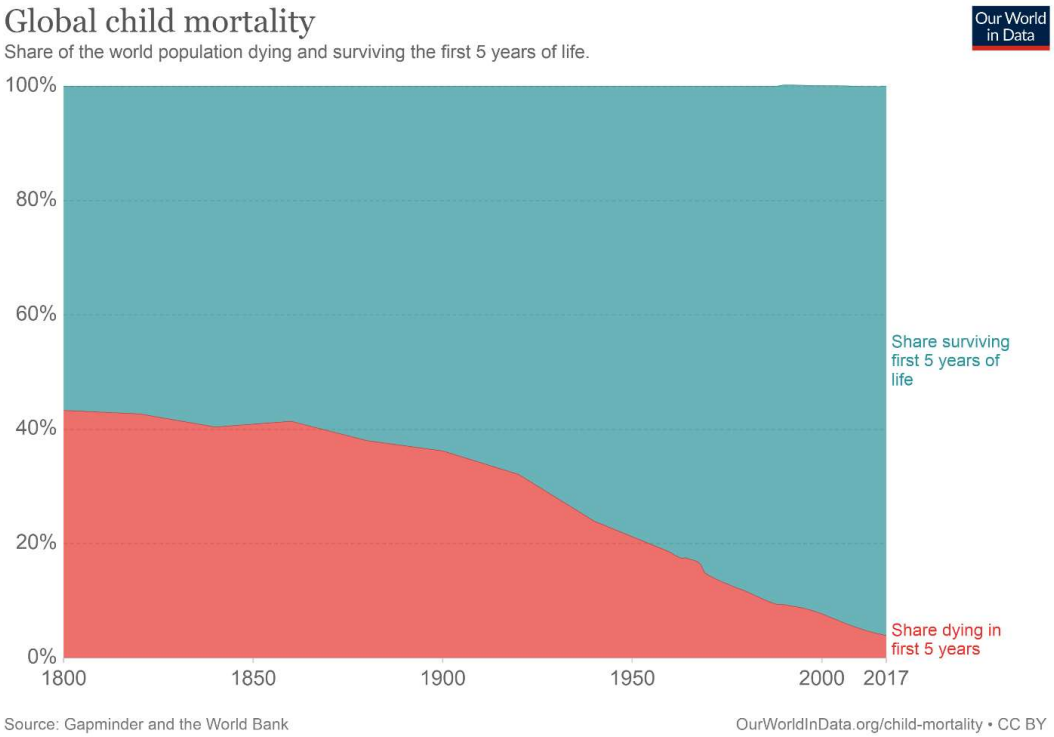
Empirical studies have shown that since the beginning of the industrial revolution in the 18th century, human life expectancy has increased steadily. In "pre-industrial era", human life expectancy was approximately 30 years due to

immunological and environmental vulnerabilities (Finch 2012: 9, see also Fogel 1999). With the process of functional differentiation, there were reciprocal "couplings" between the economic, scientific and health systems (Luhmann 1983a: 28ff.) that allowed the creation of vaccines and modern medicine. Thus, "since 1800, during industrialization and economic development, life expectancy doubled again, reaching 70-85 years in favored populations" (Finch 2012: 9).

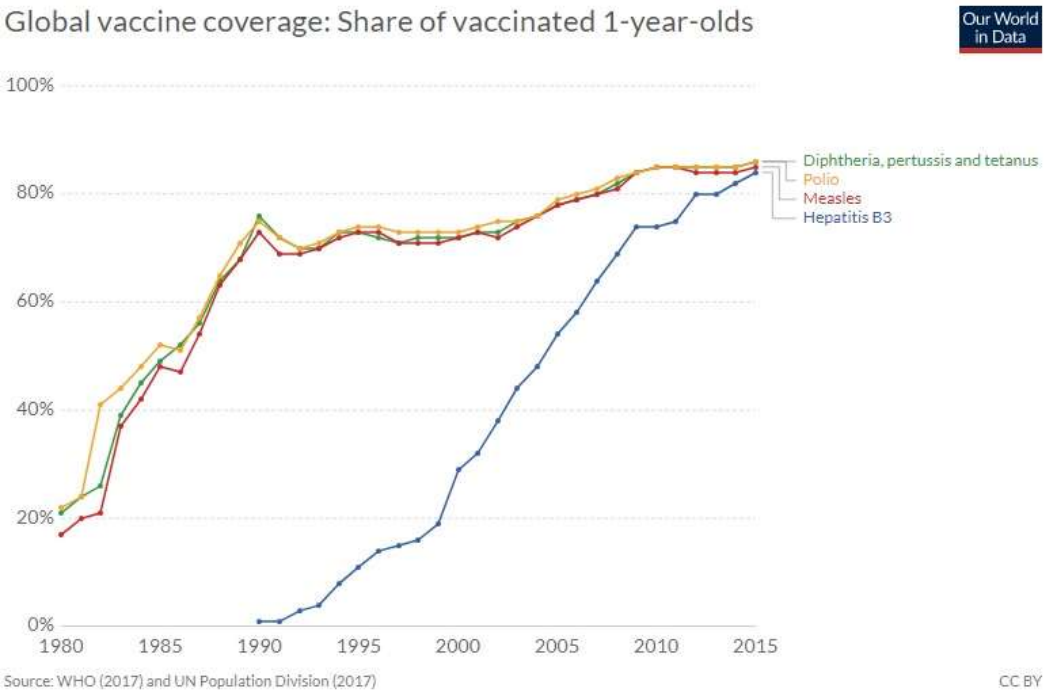


Source: Finch, 2012

Increasing health standards and inclusion in this system have started in Europe and North America, and this trend has gradually spread around the world, especially with the emergence of international sanitary rules and standards promoted by the WHO (1948), for example. "In 1800 the health conditions of our ancestors were such that around 43% of the world's newborns died before their 5th birthday". In 2015 "child mortality was down to 4.3% – 10-fold lower than 2 centuries ago" (Roser 2016: 5).



In addition to life expectancy's increase, it was found that child mortality rates also plummeted. At the same time, the number of people vaccinated against infectious diseases (e.g. diphtheria, pertussis, tetanus, polio, measles, hepatitis, etc.) has grown to more than 80% of world population (Roser 2017c).

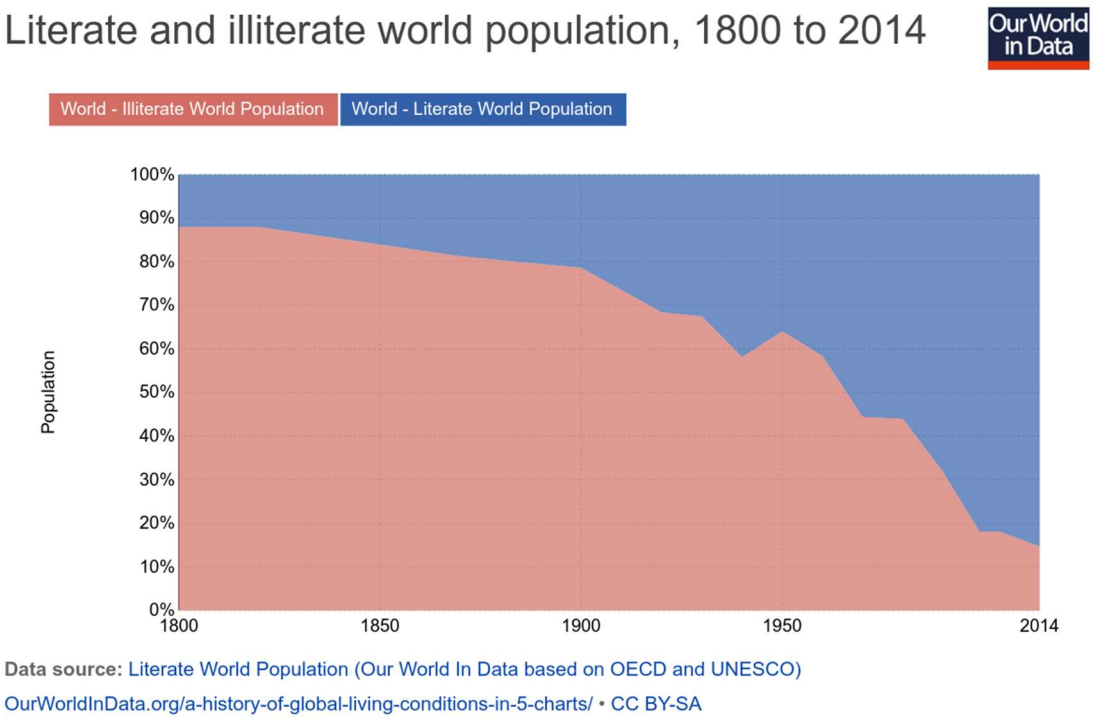


The benefits of inclusion in health system generated also positive externalities for other social subsystems, such as education (because healthier people can learn better) and economy (because healthier people are more productive, i.e., better human capital) (Becker 2007: 379 ff.).

3.3. Wave of inclusion in the educational system

In modern society literacy ceased to be an exclusivity of certain castes or elites, unlike in old aristocratic societies, when access to the educational system was conditioned by social status. Access and inclusion in the education system is decisive not only for the schooling of people, but also for the generation of positive externalities for other social subsystems in the form of couplings through organizations (Luhmann 1997: 826 ff.) such as schools, universities, hospitals, companies and research centers.

The data showed that in the last two centuries (especially since the end of World War II) literacy has reached a degree of universalization around the world, with an emphasis on the inclusion of women. "In 1820 only every 10th person older than 15 years was literate; in 1930 it was every third and now we are at 85% globally" (Roser 2016: 3, see also Roser 2017d).



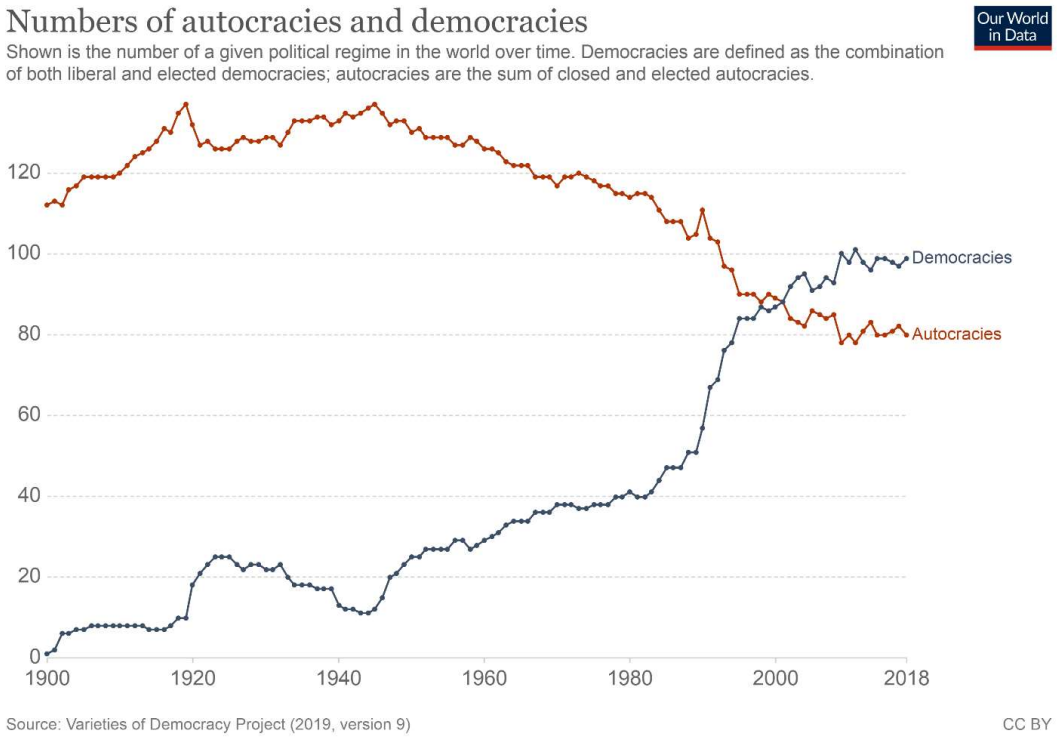
Empirical studies indicate that primary education is the most decisive stage in individuals and human capital formation (Heckman 2008: 289 ff.). Moreover, there are strong correlations between increased levels of education for the general population, poverty reduction, economic growth and technological and scientific development (Acemoglu 2007: 24).

3.4. Wave of inclusion in the political system

Premodern societies are characterized by the political primacy over other social spheres (Luhmann 1971a, 1972a: 168). As a rule, power was hierarchically organized and concentrated autocratically in a decision-center controlled by an oligarchy, caste, family or elite. In modern society, even under the primacy of functional differentiation, survival of autocratic regimes, or even the emergence of modern forms of autocracies such as dictatorships, is not rare (Acemoglu & Robinson 2006: 17 ff.). However, thanks to three great modern waves of democratization (Huntington 1991: 12 ff.), it has become the most common regime among the world countries. According to Acemoglu and Robinson (2006:

40-42), globalization has also positively influenced democratization process, especially because it makes dictatorships and coups increasingly costly and inefficient.

Today the majority of the world's countries governments are democracies. "The end of World War I led to the birth of many democracies. However, during the 1930s, many of these young democracies reverted to being autocratic. After World War II, the number of democracies began growing again. But it was the fall of the Iron Curtain circa 1989 that led to a more dramatic increase in the number of democracies" (Roser 2017e).



Democratization of political system places the power under the constitutional limitation (checks & balances). Democracy presupposes the existence of political parties, opposition and the guarantee of collectively binding decision-making (Luhmann 1981b:142 ff., 2000: 97). In addition, it is an inherent condition for democracies to include every citizen in the right to vote, which is known as universal suffrage (Dahl 1971). This means that in democratic regimes, there is more propensity to establish institutions that promote more

freedom and inclusion. For example, corroborating with the thesis of interdependencies between social subsystems, it is notable that democratic regimes were the first responsible for the universalization of education and health (Acemoglu & Robinson 2006: 64, Barro & Lee 2000). Recent studies based on empirical evidence show that "democracies seem to enact economic reforms that are conducive to growth. Democracies also seem to raise more taxes and invest more on public goods related to health and schooling, which may contribute to growth. In addition, democracy seems to reduce social unrest, which could also have a positive impact on economic growth" (Acemoglu, Restrepo, Naidu & Robinson 2019: 89).

Because of the spiral inclusion promoted by democratically and constitutionally delimited political system, the welfare state arises as a form of "evolutionary acquisition". The welfare state has emerged to mitigate exclusion effects in functionally differentiated modern society. Therefore, "the inclusion of all population is a functional necessity for the welfare state" (Luhmann 1981a (1990a): 98, 2000: 423).

The welfare state is responsible for implementing social rights and fostering positive externalities such as access to health and basic education, which promotes human capital formation, economic growth and technological development. However, it does not mean a panacea of inclusion, but only one of the effects (in the political field) of the emergence of a functionally differentiated society. The requirement for "inclusion" is a structural necessity for the maintenance of a functionally differentiated society and not just an imperative of a specific subsystem (Luhmann 1981a (1990a): 25, 1997: 625).

3.5. Wave of inclusion in the legal system

The wave of inclusion in the legal system is linked to the emergence of fundamental rights (life, liberty, property) and to the limitation of political power by a constitution (rule of law). The existence of a constitution (i) structures the division of powers (checks & balances system); (ii) allows the positivation of

rights; and (iii) enables democratization of politics (Luhmann 1993: 416). Constitution works as a structural coupling between legal and political systems (Luhmann 1990b, 1993: 470 ff.), so it is capable of institutionalizing power and limiting it *de jure* (Acemoglu & Robinson 2006: 326, Acemoglu 2010: 21).

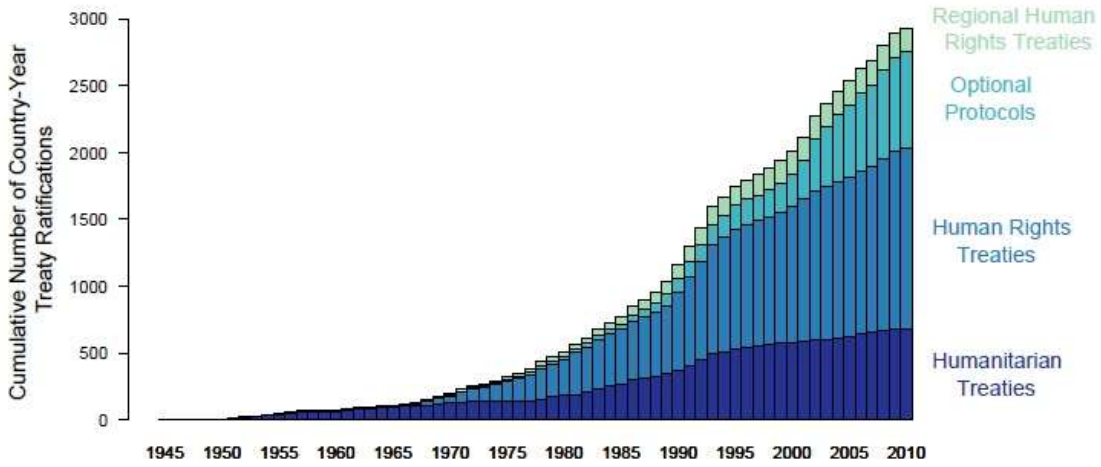
This new social framework breaks the class structure of aristocratic societies, and thus everyone becomes equal before the law (isonomy) (Luhmann 1993: 422; North & Weingast 1989: 803 ff.; North 1990, Acemoglu 2010: 12), especially with the emergence of the notions of "citizenship" (Marshall 1950, Parsons 1971, Luhmann 1997: 619 ff.) and "welfare" (Pigou 1912, Sen 1970, Luhmann 1981a, 1990) – that is to say, there is universalization of political and civil rights (Berlin 1958). Subsequently, due to "social issue" (*soziale Frage*), social rights have consolidated to guarantee the well-being of citizens and to ensure inclusion in essential services such as health and education (Luhmann 1993: 577). The wave of inclusion in the legal system of world society operates with the equalization of everyone, regardless of race, color, sex, language, religion, political opinion or social origin. For example, in this scenario, civil rights guarantee the integrity of human beings in the face of violence and arbitrary interference, and social rights guarantee access to opportunities for the personal development.

The greatest current manifestation of the universalization of rights to inclusion (Luhmann 1965: 94-95, 1993: 578) can be found in the treaties of human rights. They extend to all individuals what fundamental rights within the national states guarantee. Human rights enshrine the universal character of rights (individual, social, cultural, etc.) for all.[127] "More and more today, human rights are understood not only as rights of defense, but also as rights of provisions, especially in cases of blatant under-supply. The basis for this is an anthropological concept that ascribes a complex of partly material, partly non-

[127] Article 2. UDHR – "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

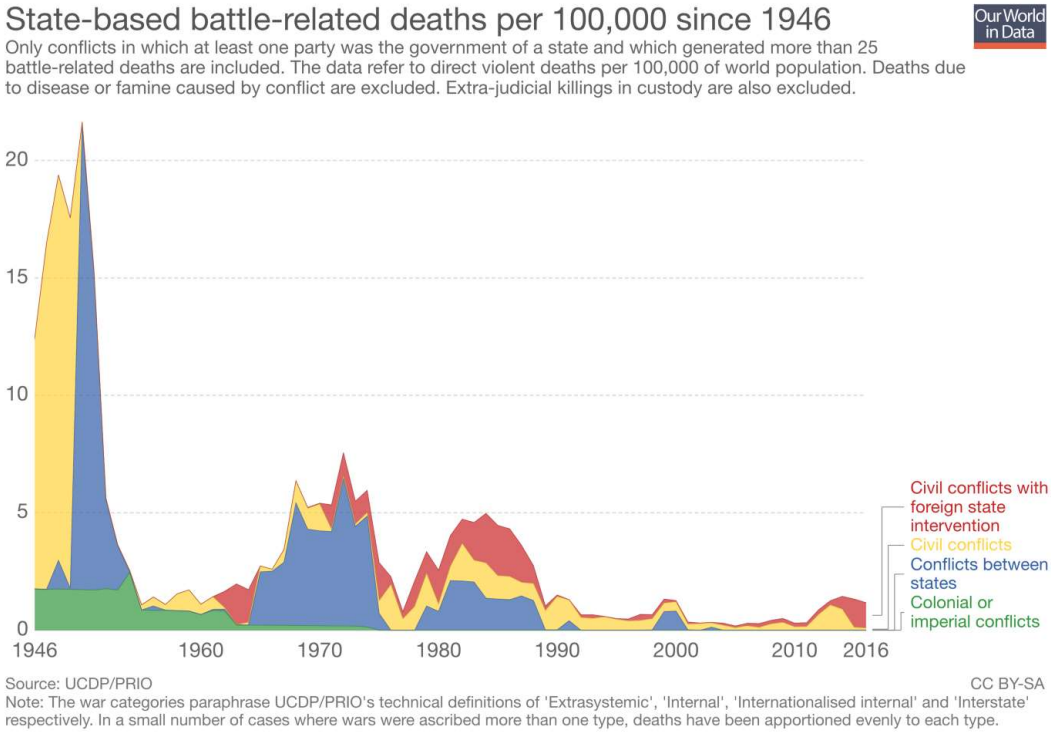
material needs and interests to the human being in general (independent of regional or cultural differences), i.e. as an interest in personal development and self-realization" (Luhmann 1993: 578). The human rights require access and inclusion of all human beings to the essentials for life, well-being and development of their "capabilities" (Sen 2005, Nussbaum 2003). Under human rights there is the imperative of including people in education, health, economic and political systems – it is a real wave of inclusion in modern society.

Human rights are the legal system's response to the problem of exclusion within the framework of world society (Luhmann 1993: 578 ff., Neves 2005). It is a structural requirement for maintenance of functional differentiation of modern society (Luhmann 1993: 582 ff.). In this sense, there is a tendency to adopt human rights agenda by national, international, supra-national and transnational players. That is, not only national states and international organizations conduct their governance respecting human rights, but also private organizations such as large companies. In addition, there are also independent international observers run by NGOs. The advancement of the agenda for inclusion through human rights can be noted with the increasing number of ratification and treaties and adoption of standards of good governance, transparency and accountability (Backer 2012, Fariss 2018: 73 ff.). The figure below shows all ratifications of UN humanitarian and human rights treaties of the past 65 years. It points to one of the many trends of human rights consolidation in world society.



All Ratifications of UN Humanitarian and Human Rights Treaties (Source: Fariss & Dancy, 2018)

One of the most important empirical indicators of the triumph of human rights is the reduction of violence in world society (Pinker 2018: 214 ff., Pinker 2011: 47ff.). For example, "the absolute number of war deaths has been declining since 1946. In some years in the early post-war era, around half a million people died through direct violence in wars; in contrast, in 2016 the number of all battle-related deaths in conflicts involving at least one state was 87,432" (Roser 2017f).



The law system of world society is now oriented toward universal inclusion and protection of the functionally differentiated society against totalitarian tensions that arise in face of the autonomy of the other social subsystems (Luhmann 1965, Luhmann 1993: 585-586, Teubner & Fischer-Lescano 2004, Teubner 2012) and against the threats to the physical and mental integrity of human beings (Teubner 2012: 145).

Conclusion

Society is the result of evolution – this means that the modern society is the product of evolutionary randomness, that is, there is no teleological process behind social evolution. Therefore, the structural change in society should not be interpreted as a constant increase in "human happiness" (Spencer 1881: 233-234) or as a consequence of the "general direction of human evolution" (Comte 1896: 249, esp. 257) in the sense of progress. Much less is it possible to affirm that history is moving towards a revolution that would result in a society full of emancipation in the form of an "association of free men" (Marx 1962 [1867]: 92-93). Instead of "progress", what emerges as an epigenetic product of evolutionary changes is "risk" (Luhmann 1991), which derives from the contingency and high complexity of modern society. However, this does not mean also that pessimistic theories of social development should be assumed, for example through a supposed "decline" of modern society (Spengler 1918) or catastrophism as a "Ricardian apocalypse" (McCloskey 2014: 82) in a world where extreme scarcity prevails (McCloskey 2014: 82).

Instead of starting from teleological or catastrophic postulates, one should only focus on changing of structural patterns of the modern society. The demand for the universal inclusion of the world population is much more a consequence of the society's structural change that ceases to organize itself in a hierarchical way according to the social status of each one and passes to the primacy of the functional differentiation of subsystems (economy, politics, education, health, law). This does not mean that there are no heterogeneities, regional asymmetries and forms of residual exclusion in world society. We can observe that there are extreme inequalities between world regions, but this does not mean that world society is still based on divisions of strata, stands and casts (Stichweh 2010: 7, see also Acemoglu 2007: 4, Milanovic 2013: 204-205). Instead of talking about a situation of class struggles, in modernity we are talking about the possibility of all human beings improving their conditions and skills and being included in social subsystems along with the rest of the population of world society. In

hierarchically structured pre-modern (or pre-industrial) societies, social mobility between strata was extremely restricted. Qualitative distinctions were common among people according to their social background, ethnicity, gender, or physical constitution. Today, in the world society characterized by functional differentiation and heterarchy between social subsystems, we know that this only happens if the opportunities, in terms of access to social subsystems (law, economy, health, education, politics), are restricted. However, we still recognize cases of massive exclusion of entire portions of population in places endowed with institutional and social peculiarities derived from the persistence of extractive elites and other political or religious aspects. These are contexts where groups of over-included (local elites) and under-included (ordinary citizens) may arise, or in other words, people who enjoy different status for access (or restriction) to basic benefits of social subsystems in the form of "over-citizenship" and "sub-citizenship" (Neves 2007: 175-176). Despite this, as has been shown throughout the article, the modernization's process and functional differentiation have been able to achieve ever-increasing inclusion levels worldwide, including in the poor countries.

Modern society has revolutionized the criteria for inclusion and exclusion of human beings in social subsystems – the need for inclusion has become universal, at the same time that the mechanisms for promoting inclusion have become increasingly effective in world society. The evidences have confirmed this – the "inclusion waves" of modernity are genuine "inclusion revolutions" (Stichweh 2018). Radical changes in the inclusion patterns in modern society have removed humanity from its original state of poverty, tyranny, and servitude typical of ancient societies, where an included minority held all privileges in the face of an excluded majority. The emergence of "citizenship", "human rights" and "welfare" notions universalized inclusion and reinforced the need for equal opportunities for the entire population to access social subsystems.

The data and empirical research point to a growing inclusion trend in all social spheres and in all localities of our planet, which allows us to conclude that the primacy of functional differentiation is in fact succeeding in establishing the

universal inclusion of all human beings to the benefits and opportunities provided by social subsystems.

References

Acemoglu, D and Robinson, J (2006). *Economic Origins of Dictatorship and Democracy* (Cambridge, UK, Cambridge University Press).

Acemoglu, D (2007). *Introduction to Modern Economic Growth* (Princeton, Princeton University Press).

Acemoglu, D (2010). *Political Economy Lecture Notes*. Link: economics.mit.edu/files/8753

Acemoglu, D, Naidu, S, Restrepo, P and Robinson JA A. (2019). "Democracy Does Cause Growth" 127(1) *Journal of Political Economy* 47-100.

Aghion, P, Antonin, C and Bunel, S (2021). *The Power of Creative Destruction* (Cambridge, MA, Harvard University Press).

Aristotle (1973) *Politik* (München, Deutscher Taschenbuch).

Backer, LC (2012) "The Structure of Global Law: Fracture, Fluidity, permeability and Polycentricity" 7 *Working Papers Consortium for Peace and Ethics*. Available at: http://ssrn.com/abstract=2091456.

Barro, RJ and Lee, J-W (2001). "International Data on Educational Attainment: Updates and Implications". 53(3) *Oxford Economic Papers* 541-563.

Becker, G (2007). "Health as human capital: synthesis and extensions". 59(3) *Oxford Economic Papers* 379-410.

Berlin, I (1958) *Two concepts of liberty* (Oxford, Clarendon Press).

Bora, A (2002) „‚Wer gehört dazu?' Überlegungen zur Theorie der Inklusion" in K-U Hellmann und R Schmalz-Bruns (hrgs), *Theorie der Politik* (Frankfurt am Main, Suhrkamp), 60-84.

Comte, A (1896) *The Positive Philosophy* (London, G. Bell & sons).

Dahl, RA (1971) *Polyarchy: Participation and Opposition* (New Haven, Yale University Press).

Deaton, A (2013) *The Great Escape: Health, Wealth, and the Origins of Inequality* (Princeton, Princeton University Press).

Eisenstadt, SN (2000) "Multiple Modernities". 129(1) *Daedalus* 1-29.

Fariss, C and Dancy, G (2018) "The Heavens are Always Fallen: A Neo-Constitutive Approach to Human Rights in Global Society" 81 *Law and Contemporary Problems* 73-100.

Finch, C (2012) "Evolution of the human lifespan, past, present, and future" 156 *American Philosophical Society* 9-44.

Fischer-Lescano, A and Teubner, G (2004) "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law". 25(4) *Michigan Journal of International Law* 999-1046.

Fogel, R (1999) "Catching Up with the Economy". 89(1) *American Economic Review* 1-21.

Friedman, M (1962) *Capitalism and Freedom* (Chicago, The University of Chicago Press).

Heckman, JJ (2008). "Schools, Skills, and Synapses". 46(3) *Economic Inquiry, Western Economic Association International* 289-324.

Huntington, S (1991) *The Third Wave. Democratization in the late Century.* (London, University of Oklahoma Press).

Huntington, S (1996) *The Clash of Civilizations and the Remaking of World Order* (New York, Simon & Schuster).

La Porta, R and Shleifer, A (2014). "Informality and Development". 28(3) *Journal of Economic Perspectives, American Economic Association* 109-26.

Luhmann, N (1965) *Grundrechte als Institution*. Berlin: Duncker & Humblot.

Luhmann, N (1971) "Die Weltgesellschaft". In: *Soziologische Aufklärung 2: Aufsätze zur Theorie der Gesellschaft*. Opladen:Westdeutscher Verlag, pp. 51-71.

Luhmann, N (1972) *Rechtssoziologie*. Hamburg: Rohwolt Verlag.

Luhmann, N (1981a [1990a]) *Politische Theorie im Wohlfahrtsstaat*. München/Wien: Olzog [English version: *Political Theory in the Welfare State*. Berlin: De Gruyter].

Luhmann, N (1981b) "Machtkreislauf und Recht in Demokratien". In: *Soziologische Aufklärung 4: Beiträge zur funktionalen Differenzierung der Gesellschaft*. Opladen: Westdeutscher Verlag, pp. 142-151.

Luhmann, N (1983a). „Anspruchsinflation im Krankheitssystem. Eine Stellungnahme aus gesellschaftstheoretischer Sicht". In: P. Herder-Dorneich & A. Schuller (Hrsg.). *Die Anspruchsspirale. Schicksal oder Systemdefekt?* Stuttgart: Kohlhammer. S. 28-49.

Luhmann, N (1983b) „Das sind Preise". In: *Soziale Welt*, 34 J., H. 2 (1983), S. 153-179. Baden-Baden: Nomos.

Luhmann, N (1988) *Die Wirtschaft der Gesellschaft* (Frankfurt, Suhrkamp).

Luhmann, N (1990b) "Verfassung als evolutionäre Errungenschaft". 9 *Rechts-historisches Journal 9*.

Luhmann, N (1991) *Soziologie des Risikos* (Berlin/New York, de Gruyter).

Luhmann, N (1993) *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main).

Luhmann, N (1994a) "Inklusion und Exklusion" in N Luhmann, *Soziologische Aufklärung 6: Die Soziologie und der Menschen* (Wiesbaden, VS-Verlag), 226-251.

Luhmann, N (1994b) „Kapitalismus und Utopie" 48(3) *Merkur*.

Luhmann, N (1995a) „Kausalität im Süden" 1(1) *Soziale Systeme* 7-28.

Luhmann, N (1995b) "Jenseits von Barbarei" in N Luhmann, *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft*. vol. 4 (Frankfurt, Suhrkamp), 138-150.

Luhmann, N (1997) *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp).

Luhmann, N (2000) *Die Politik der Gesellschaft* (Frankfurt am Main, Suhrkamp).

Luhmann, N (2008) "Zum Begriff der sozialen Klasse". A Kieserling (hrsg), *Ideenevolution* (Frankfurt am Main, Suhrkamp), 72-131.

Maddison, A (2001). *The World Economy: A Millennial Perspective* (Paris, OECD).

Malthus, T (1798) *An Essay on the Principle of Population* (London, J. Johnson, in St. Paul's Church-Yard).

Marshall, TH (1950). *Citizenship and social class and other essays* (Cambridge, Cambridge University Press).

Marx, KH (1962 [1867]). *Das Kapital.* Band I, in MEW Bd. 23 (Berlin, Dietz Verlag).

Marx, KH (1964 [1894]). *Das Kapital.* Band III, in: MEW Bd. 25 (Berlin, Dietz Verlag).

McClosey, D (2014). "Measured, unmeasured, mismeasured, and unjustified pessimism: a review essay of Thomas Piketty's Capital in the twenty-first century". 7(2) *Erasmus Journal for Philosophy and Economics.*

McClosey, D (2016) "The Great Enrichment: A Humanistic and Social Scientific Account". 40 *Social Science History* 1-16.

Milanovic, B, Lindert, PH and Williamson, JG (2011). "Pre-Industrial Inequality". 121(551) *The Economic Journal* 255-272.

Milanovic, B (2013). "Global Income Inequality in Numbers: in History and Now". 4 *Global Policy* 198-208.

Milanovic, B (2016) *Global Inequality: A New Approach for the Age of Globalization* (Cambridge, Harvard University Press).

Neves, M (1992) *Verfassung und Positivität des Rechts in der peripheren Moderne: eine theoretische Betrachtung und eine Interpretation des Falls Brasilien* (Berlin, Duncker & Humblot).

Neves, M (2005) "A força simbólica dos direitos humanos". 4 *Revista Eletrônica de Direito do Estado*.

Neves, M (2007) *A Constitucionalização Simbólica* (São Paulo, Martins Fontes).

North, DC and Weingast, BR (1989). "Constitutions and commitment: The evolution of institutions governing public choice in seventeenth-century England". 49 *The Journal of Economic History* 803-832.

North, DC (1990). *Institutions, Institutional Change and Economic Performance* (Cambridge, Cambridge University Press).

Nussbaum, M (2003). "Capabilities as Fundamental Entitlements: Sen and Social Justice". 9(2) *Feminist Economics* 33.

Okun, A (2015). *Equality and Efficiency: the big trade-off* (Washington D.C., Brookins Institution Press).

Organization for Economic Co-operation and Development – OECD (2014) „How was life?“ Link: http://www.oecd.org/statistics/how-was-life-9789264214262-en.htm

Parsons, T (1971) *The System of Modern Societies* (New Jersey, Englewood Cliffs).

Pigou, AC (1912) *Wealth and Welfare* (London, Macmillan).

Pinker, S (2011). *The Better Angels of our Nature: why violence has declined* (New York, Penguin Books).

Pinker, S (2018). *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress* (Chicago, Viking).

Roser, M (2016) "A history of global living conditions in 5 charts". Available at: https://ourworldindata.org/a-history-of-global-living-conditions-in-5-charts

Roser, M (2017a) *Our world in data*: about. Link: https://ourworldindata.org/about

Roser, M (2017b) *Our world in data*: global extreme poverty. Available at: https://ourworldindata.org/extreme-poverty

Roser, M (2017c) *Our world in data*: global health. Available at: https://ourworldindata.org/health-meta

Roser, M (2017d) *Our world in data*: literacy. Available at: https://ourworldindata.org/literacy

Roser, M (2017e) *Our world in data*: democracy. Available at: https://ourworldindata.org/democracy

Roser, M (2017f) *Our world in data*: war and peace. Available at: https://ourworldindata.org/war-and-peace

Rosling, H (2018). *Factfulness: Ten Reasons we're wrong about the world* (New York, Flatiron Books).

Sen, A (1970) *Collective Choice and Social Welfare* (San Francisco, Holden Day).

Sen, A (2005) "Human Rights and Capabilities". 6(2) *Journal of Human Development*.

Spengler, O (1918) *Der Untergang des Abendlandes. Umrisse einer Morphologie der Weltgeschichte*. Bd. 1 (Wien, Verlag Braumüller).

Spencer, H (1881) *Progress: its law and cause, with other disquisitions* (New York, J. Fitzgerald).

Stichweh, R (2000) *Die Weltgesellschaft* (Frankfurt am Main, Suhrkamp).

Stichweh, R (2007) *Weltgesellschaft (Spaltung der Welt, globale Asymmetrien)*. Available at: https://www.fiw.uni-bonn.de/demokratieforschung/personen/stichweh/pdfs.

Stichweh, R (2018). "Inclusion revolutions and the emergence of modernity". Keynote Lecture von Rudolf Stichweh beim 10th Annual Seminar of the Bielefeld Graduate School in History and Sociology ›Inclusion and Exclusion. New Perspectives in History and Sociology‹, Universität Bielefeld, 5.-7.7.2018.

Teubner, G (2012) *Constitutional Fragments: Societal Constitutionalism in the Globalization*. (Oxford, Oxford University Press).

UN General Assembly. (1948). *Universal declaration of human rights* (217 [III] A). Paris.

World Bank (2014). „Poverty". Link: http://data.worldbank.org/topic/poverty

World Health Organization – WHO (2015). „Infant mortality: situation and trends". Available at: http://www.who.int/gho/child_health/mortality/neonatal_infant/en/

16. Inclusion and exclusion in the Brazilian Housing Finance System: a reconstruction of the tensions between law and economy based on the systems theory[128]

Gabriel Ferreira da Fonseca

1. Introduction

The social right to housing formally stated in Article 6 of the Brazilian Federal Constitution is still far from being fully exercised by a large number of Brazilians, as one can draw from a brief analysis of the official statistics. The *housing deficit* in Brazil hits the sum of 6,355,743 households, which corresponds to 9.3% of the country's housing stock (FJP 2018). Moreover, one in ten Brazilians live in a situation of *inadequate housing* (IBGE 2018).

Given these facts, one can observe the roles of the state (center of the political system) and the courts (center of the legal system) through the theoretical framework of Luhmann's systems theory. These organizational systems have been responsible for the harmonization of seemingly contradictory objectives and interests, such as the workers' civil, political, and social rights – responsible for the fundamental equality's recognition; and the capitalist accumulation's development – based on freedom and legitimate social inequality (De Giorgi 2017: 53-57).

However, in the last few decades, some authors described a crisis of the welfare state based on the lack of resources' argument (Lange and Schimank 2004: 66-69). They direct attention to a crisis of "juridification" linked to the perception of welfare state's limits and the emergence of a "post-interventionist"

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law (Teubner 1986: 3-7).

Authors argue that neoliberal ideas have changed housing policies around the world, and this fact has been more catastrophic in countries that have not had a proper welfare state, such as Brazil (Maricato 2014: 7-11). According to some of them, the market's selective logic replaced the fundamental rights' universalistic discourse, including in countries without a history of social rights and citizenship's concretizations (Royer 2014: 13-18).

Nevertheless, the last international financial crisis brought back the discussions regarding the role of state and public banks, including in the reduction of private sector's failures. Also, contrary to what neoliberal guidelines recommend, historically, a public bank (*Caixa Econômica Federal*) has been the principal agent responsible for housing finance operations in Brazil, granting more than 70% of the housing credit concessions (Mendonça and Deos 2012: 163-167).

Furthermore, a new housing program created to reduce negative impacts of the global economic crisis in Brazil (*Minha Casa, Minha Vida*) was responsible for 3.6 million of housing finance contracts and an investment of R$ 225 billion *reais*, only from 2009 to 2014. Additionaly, 46% of the benefited families belonged to the population group receiving up to three minimum wages (Brazil 2014: 19-20). It represents a kind of "Keynesian strategy of economic growth and work opportunities creation" focused on the country's historical housing demand (Rolnik 2015: 301).

Thus, based on a case study of the Brazilian Housing Finance System (*SFH*), this article presents an answer to the following question: does the political and legal interventions' crisis in different spheres of social life, and especially in the housing area, lead to the replacement of the citizenship's and social rights' logic by the market's and consumption's logic as the way of social inclusion in Brazil?

The Sociology of Law's perspective can deal with that problem by observing the various visible responses in the functional, organizational, and interactional systems' operations and descriptions; and by seeking the implicit

blind spots in these responses, aware of its own blind spots. Systems theory has developed useful tools to achieve this goal, such as the idea of "second-order observation"; the distinction "inclusion/exclusion"; and the description of global society and its subsystems (Luhmann 2013).

Housing is a central point when it comes to social inclusion/exclusion, since slums' inhabitants, which generally live in inadequate households, face a vicious cycle in which "poverty, bad health, low educational standards, family disorganization, delinquency", and other social disadvantages are "mutually reinforcing" (Parsons 1965: 1038).

This work aims to observe and to describe the Brazilian housing problem focusing its relation with consumption, market, citizenship, and social rights. A case study on the *SFH* allows the identification, through qualitative evidence, of connections between economy and law; and changes in these systems' conversation (Hutter 1992: 265–293).

The research focuses on the tensions between the economic and legal systems within the Brazilian *SFH* but also seeks these systems' connections with the political system. Although the assumption is made that, at least to some extent, economy and law are autonomous (self-reproductive) systems, it is not possible to neglect the role of politics in the co-evolution of these autonomous systems (Hutter 1992: 265–293).

My hypothesis is: there are tensions between at least two important ways of achieving social inclusion. Some perspectives link social inclusion to the need for state support to social rights, namely the access to financial resources and primary needs, such as education, health, housing, etc. Other views connect inclusion to social rights' implementation using the economy, specifically through the access to the labor and consumption markets. In the latter case, social inclusion primarily depends on the ability to pay for having access to basic goods and services.

The semantics of the first model of inclusion relies on the participation of the so-called citizens in different social systems through the guarantee of workers' rights and state action. The semantics of the second model of inclusion

focuses on the participation of citizens mainly by guaranteeing the efficient functioning of markets, a goal that also requires some state actions.

At the global level, approximations and collisions between these two models can be identified, for example, in United Nations' and World Bank's statutes, standards, and guidelines. Also, at the local level, it is possible to identify convergences, but, above all, divergences between, for example, organized social movements and business associations.

This chapter shows that organizations focused on housing finance can be described as "polyphonic organizations". They have the potential to adopt the code of different functional systems, such as law, politics, economy, education, science, and mass media (Villadsen 2007: 68). Therefore, "different rationalities are brought together" and, in some cases, the inclusion assumes a hybrid form (Højlund 2009).

Thus, in section 2, I show the methodological selections of this work. Several sources can be used to examine the housing issue, in the context of contemporary society's consumption, market, citizenship, and social rights, such as national and international statutes, multilateral organizations' guidelines, specialized literature, legislative proceedings, documents, and interviews. This empirical material enables a theoretical reconstruction of the tensions between law and economy in that area.

Then, in section 3, I describe the economic system and its banks since these social systems are responsible for developing *SFH*'s financial operations. The article shows these operations as primarily related to economic function and banking activities. However, it also enlightens the political and legal systems' performances connected to *SFH*'s financial operations. The Brazilian case is the basis for this reconstruction, which situates the *SFH* in modern society's descriptions produced by the systems theory.

In section 4, I insert the discussion on housing finance in the context of the world society. The work shows discourses of global political-economic organizations and global political-legal organizations, which produce studies, guidelines, and norms on the international level. In one hand, there are

organizations such as the World Bank, the Organisation for Economic Co-operation and Development (OECD), and the Inter-American Development Bank (IDB) that focus their documents in the real estate as a profitable market. On the other hand, there are organizations such as the United Nations, the UN-Habitat, and the Organization of American States (OAS) that focus their discourses in the social right to housing as a human right.

In section 5, I return to the Brazilian *SFH*'s reality focusing on the tensions between law and economy in the business associations' and organized social movements' discourses. Here, it is possible to see how market efficiency's ideas and social right's arguments are mobilized at the national level, respectively, by local political-economic organizations and local political-legal organizations.

Finally, in section 6, I review the conclusions achieved by this research. The work shows there are, at the same time, two logics related to housing both in global and local levels. First, there are discourses of inclusion by social rights and citizenship, which one can associate to the welfare state. Second, there are discourses of inclusion by consumption and market, which are related to the neoliberal ideas. Reflections about the tensions between these two logics or discourses can contribute to the understanding of some potentialities, limits, risks, and dangers connected to the social inclusion's attempts based on access to housing.

2. Methodological selections

This work investigates the Brazilian *SFH* considering the tensions between two functional systems: law and economy. One can better observe the idea of *tension* in living and psychic systems, which operate in an "unstable equilibrium" with their environments. These systems and their environments work in a relation of oppositions, conflicts, frictions, pressures, and stresses. On the other hand, they also have some convergence and harmonization (Eliot 1944: 318-319).

By bridging the concept of tension with the social systems theory, it is possible to think in the evolutionary re-stabilization of society by variations and

selections of this social system. Thus, the idea of tension, which stays in the basis of social evolution, reflects conflict but also accommodation: variants and redundancies; instabilities and balances; rejections and acceptances of proposals of meaning (Luhmann 2007: 383-393).

From this perspective, it is possible to describe tensions between law and economy as self-destabilizations or self-irritations arising from the inevitable contact between these two social systems and the organizations and interactions associated with them. From the law's point of view, which is the primary reference for this work, the legislative process and the legal interpretation are two kinds of communicative operations responsible for the evolution of law.

Therefore, I reviewed the literature, documents, and norms related to the local and global dimensions of the Brazilian *SFH*. The work develops a sociolinguistic-inspired approach that identified social patterns in these materials (Bora and Hausendorf 2010; 2004). Moreover, I conducted semi-structured interviews with Brazilian lawyers, judges, project managers, and other local agents. The case study adopted a qualitative methodology based on multiple techniques and sources of information (Yin 2015: 123-127).

This approach has a critical potential since Sociology of Law can assume a second-order observer's position. Its aim is not to provide a "recipe for producing another society as object" but to shift "attention and sensibilities within society" (Luhmann 2013: 329).[129]

Systems theory can solve a gap in contemporary Sociology of Law. According to Paterson and Teubner (2021), this gap has two sides. First, empirical studies in law and society developed sophisticated methodologies, but they are, in general, "based on poor and rather ad hoc theorising". Second, theoretical research in the same area became "more and more philosophical and speculative relying, however, on poor and rather ad hoc empirical support."

Nevertheless, there are difficulties and challenges in attempts to mobilize systems theory to develop empirical research (Braeckman 2006: 83; Leydesdorff

[129] See, for a discussion of the critical potential of the systemic sociology as well as on the distinction between critical attitude and critical theory, Esposito (2017).

2010). This work requires a "constructive enlargement or amplification" of the theoretical systemic architecture, which is possible to realize through the use of *social position* and *discourse* ideas. These categories help to analyze "the *interior architecture* of society-organisation-interaction" and make visible a "large variety of social addressability" (Bora 2009: 1-8).

Organizations (such as states, courts, and banks) have particular relevance for this work. From systems theory's perspective, "organizations are the only social systems that can communicate with the systems of their environment." Functional systems, such as economy and law, need the formation of organizations to have "external communicative competence" (Luhamnn 2013: 151).

In the last decades, the contacts of legal operations and observations with economic facts, techniques, theories, and analyses have transformed the legal system, including in the reality of the Brazilian state, courts, and banks (Fonseca 2016). It leads to the need for empirical investigations of the social positions I named *political-economic organizations* and *political-legal organizations* both in *global* and *local* levels.

At the global level, I investigated guidelines, studies, etc. produced by the World Bank, the OECD, and the IDB. I also examined norms and guidelines edited by the United Nations, the UN-Habitat, and the OAS.

While at the local level, I studied contracts, guides to better practices, booklets, technical studies, etc. produced or prompted by business associations and organized social movements. At this last level, I also interviewed social actors connected to the Brazilian Association of Real Estate Developers (*Associação Brasileira de Incorporadoras Imobiliárias - ABRAINC*); the National Union for Popular Housing (*União Nacional por Moradia Popular – UNMP*); and the Movement of Homeless Workers (*Movimento dos Trabalhadores Sem Teto - MTST*). Finally, I interviewed public bank's managers and first-degree judges responsible for *SFH*'s cases.

Thus, this work analyzed primarily the communicated expectations related to the Brazilian *SFH* and their global context. I assumed the

understanding of semantics contributes to the comprehension of the social structures linked to the Brazilian *SFH* and the global society in general (Bora 2016: 630).

3. Housing finance as a source of inclusion/exclusion

The housing finance provides shelters for the physical and psychological survival of human beings. From the communication's point of view, these finance operations are one of the instruments that are responsible for the inclusion of people (communicative addresses) in the functional systems of economy and law, as contractors and owners. It is possible to interpret this kind of inclusion as the housing finance's declared function (Aragão 1999: 33).

However, the Brazilian case indicates that housing finance also shows some latent functions. It is possible to describe it as an instrument of combat and prevention of economic recessions through the construction sector's strengthening; a mechanism of political neutralization through the accessible housing's provision paid in long-term installments; and a tool to increase popular adhesion to the market economy system through the increase of the private property's owners (Aragão 1999: 73).[130]

These declared and latent functions of the Brazilian *SFH* show a close connection with the economic system, as it is possible to verify in their semantics: contractors and contracts; owners and private properties; economic recession and economic strengthening; payments and installments; market economy and economic sectors. Although it presents undeniable contacts with the political and legal systems, the economic semantics seem to be very present in the communication related to the housing finance.

The conclusion can also be applied, for example, to the social rent model, which is typical of countries such as the United States and France. This model

[130] Rodrigues (2009: 16) also points out the ecological consequences of housing finance, since it can avoid the construction and maintenance of informal housing, which degrades the environment and the population's health.

also incentivizes people's inclusion in the economic and legal systems, but as contractors and renters. Contacts with politics and law are also present in the social rent case, although they take different forms (Aragão 1999: 264-275).[131]

In both models, housing finance is associated with a social policy since it is assumed that private initiative tends to finance those who "offer greater returns and less risk", that is, "to prefer the rich – with sufficient income to pay the real estate credit [or the rent] and therefore with a lower probability of default" (Rodrigues 2009: 15-16).

In the Brazilian case, the Federal Law No. 4,380 of August 21st, 1964, which established the *SFH*, privileges the social interest since, according to its text, this type of housing finance should primarily be directed to the low-income population and, consequently, the financing's value should be compatible with the workers' salaries. The idea has been to offer credit to the citizens for the houses' acquisition and construction. The amount borrowed should be returned in an updated form, allowing the future participation of other citizens in this system (Figueiredo 1999: 19-20).

In the international level, the enlargement of social rights and citizenship is usually described in the transition's context from the liberal state to the welfare state. However, Brazilian urban and housing policies have assumed specific historical contours linked to state's attributes such as "authoritarianism, patronage, patrimonialism, and federal concentrations", which were accentuated during the military governments (Wanderley 1992: 53-54).

The "modernization in Brazil" shows characteristics that help to understand the country's *SFH*, which was established during the military dictatorship period. According to Villas Bôas Filho (2009: 310), "the marks of a recent slaveholding past", which produce the "naturalization of chronic exclusion", represent one of the fundamental elements of the Brazilian modernization process.[132]

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[131] One can verify the option of Brazilian legislation for the "own house" model in article 9 of the Federal Law No. 4,380 August 21, 1964.

[132] According to the Brazilian Institute of Geography and Statistics – *IBGE* (2018), 13% of the Brazilian population coexists with the presence of inadequacies in housing conditions. However,

The problem of chronic exclusion is directly related to the housing issue. As Kowarick (2009: 82-83) points out, "housing in the *metropolis of industrialized underdevelopment* is a major factor in the process of inclusion-exclusion in workers' lives." The lack and inadequacy of housing contribute to the production of a kind of "urban sub-citizenship" in Brazil (Kowarick 2009: 54-55). It has been developed, parallel to the formal or official city, a "non-city", "city of excluded or slum dwellers", or "illegal city" (Maricato 2000: 162-165).

Traditionally, the contracts of the Brazilian *SFH* present a loan agreement and a purchase agreement. The clauses of the contract are "unilateral, approved in part by the public authority (competent authority), and the rest […] by the financial agent." Thus, the borrower adheres to the contract previously established by the public power and the financial agent (Figueiredo 1999: 36-37).

According to Figueiredo (1999, p. 39-47), the financial agents decide about the offering of consumer products and services: the "credit-granting" (product); and "the approval of financing to the borrower in compliance with the *SFH*'s rules and the offering of a continuous service with a duration equivalent to the number of months of financing" (service).

Together, these activities show one of the dimensions of the banking system's self-selection and formation of boundaries since, for example, borrowers and financial agents have to meet specific conditions to participate in this system. The same is true for builders that want to negotiate under the *SFH*'s conditions (Luhmann 2007: 655-672).

However, one of the essential criteria established by law for the granting of housing credit has not been historically fulfilled since the lower-income classes of the population had been limited access to the *SFH*. On the other hand, some studies indicate the middle and upper classes have had greater access to the *SFH*'s credit operation. These studies show that the *SFH* helped to create and strengthen companies involved in the financing, production, and sale of housing,

this proportion rises to 15.8%, when considering only black or brown men, and 16%, when it refers only to black or brown women.

but it did not solve the problem of deficit and inadequacy of house in the country (Maricato 1987).

According to article 8 of the Federal Law No. 4,380 of August 21st, 1964, the finance operation is linked to "the construction and the acquisition of own house or habitation, especially by lower-income classes of the population." On the one hand, as mentioned above, there is an explicit "social scope" in this legislation, which seeks to include the neediest sections of the population. On the other hand, one can presuppose "the intention to promote the development of civil construction and, consequently, to stimulate the economy" and the labor market (Denardi 2009: 36-46).

It leads to the conclusion that the *SFH*'s operations are mainly related to the economic function: the production and regulation of scarce resources (capacity to pay) for supply and access to housing (Aragão 1999: 452-453). The *SFH*'s banks operate within the economic system and assume its function (Luhmann 2007: 667; 1993: 180-181). Nevertheless, the understanding of these operations also depends on the analysis of their contacts and tensions with the political and legal systems.

At least three characteristics of the Brazilian *SFH* indicate the importance of understanding the political resonances in these finance operations. First, a "strong and centralized state" established the Brazilian *SFH*. Second, this housing policy aims to reduce social inequalities by including people in the economic and legal systems, as contractors and owners (Bucci 2003: 65-67). Finally, the *SFH* has historically been subject of the social movements' struggles for affordable and adequate housing (Boulos 2015) and the economic sectors' pressures to increase profitability and efficiency (ABECIP 1995).

Concerning the legal system, the *SFH*'s operations maintain clear contacts with the law's periphery: legislation, regulation, etc. (Luhmann 2005: 520-538). In recent decades, the legislation answered demands of financial agents for legal protections, such as the guarantee of fiduciary alienation (fiduciary lien) for banks (Federal Law No. 9,524 of November 20th, 1997); the procedural rule that obliges the borrowers to keep paying the amounts not questioned in their actions

for contract review (Federal Law No. 10,931 of August 2nd, 2004); and the regulation of the amortization systems and the monthly capitalization of interest (Federal Law No. 11,977 of July 7th, 2009).

Nevertheless, at the same time, for example, the Amendment No. 26/2000 included the right to housing in the Federal Constitution as a fundamental and social right; and the Federal Law No. 11,977 of July 7th, 2009, created the already mentioned "*Minha Casa, Minha Vida*" (My House, My Life), which is a program for socially vulnerable groups with low incomes.

These legal programs are interpreted by lawyers and judges in judicial proceedings. The law's center (courts) needs also to deal with the social and economic problems connected to the Brazilian *SFH*, as it was possible to see, for example, in the lawyers and judges' answers to my questions on interviews. They try to take into account not only contracts and laws, but also facts, such as economic crisis, unemployment, diseases and deaths, decision's consequences to families and markets etc.

This work shows in section 5 more details about the *SFH*'s historical evolution in Brazil, which has direct connections with the inclusion/exclusion problems and the tensions between law and economy. However, before this description, the work presents, in the next section, some global organizations that produce discourses about the right to housing and the real estate market.

4. Housing finance and world society

Systems theory offers a description of the world society and observes "national cases" as "located at the level of organizations and organizational complexes" and "defined by global practices of comparisons and mutual references" (Dutra 2016: 77-78).

In this context, global organizations such as the World Bank, the Inter-American Development Bank (IDB), and the Organisation for Economic Co-operation and Development (OECD) publish studies regarding the housing problem. In general, these documents focus on the *SFH* as an economic sector

that can work more efficiently without the direct participation of the state. It is possible to identify in the discourses produced by those global organizations a clear relation with the logic and semantics of at least two function systems: politics and economy. Thus, this work categorizes the World Bank, the IDB, and the OECD as the social position of the *global political-economic organization*.

For example, the World Bank (1993: 1-2) published in the 1990s a study that aimed "the reform of government policies, institutions, and regulations to enable housing markets to work more efficiently". On that occasion, the World Bank concluded that governments should "abandon their earlier role as producers of housing" and "adopt an enabling role of managing the housing sector as a whole."

In 2004, the IDB (2004: 1) published a study directed to "the housing sector and the financial market for housing in developing countries, particularly in Latin America and the Caribbean." The document shows "the goal of reforming the housing sector and thus enabling it to function more effectively as a market. With such reforms, housing represents not only social welfare in terms of providing shelter, but also becomes a source of value for more citizens."

In a similar direction, the OECD (2013: 113) proposed recommendations for the Brazilian financial market in 2013. According to the OECD, one of the priorities for Brazil's growth is to "[i]mprove the efficiency of financial markets". To achieve this goal, the country should "[g]radually phase out mandated credit provisions to certain sectors, including agriculture and housing."

However, according to Rolnik (2014), who was the United Nations' Special Rapporteur on Adequate Housing from 2008 to 2014, this process of "commodification of housing, together with the increased use of housing as an investment asset within a globalized financial market, has profoundly affected the enjoyment of the right to adequate housing." According to her, "the social rights and citizenship's language was progressively replaced by the language of inclusion by consumption" (Rolnik 2015: 270-271).

Rolnik's view matches with the semantics of another kind of global organizations. The United Nations, the UN-Habitat, and the Organization of

American States (OAS) produce international legislations and commitments oriented to the social right to housing. These documents describe the house as a human right that requires the state's utmost efforts. Thus, it is possible to represent the United Nations, the UN-Habitat, and the OAS as examples of the *global political-legal organization*'s social position. The logic and semantics of the political and the legal systems are very present in the discourses of these global organizations.

For example, the United Nations (2015) listed 17 new "Sustainable Development Goals" in 2015. One of these goals is the Goal No. 11: "Make cities inclusive, safe, resilient and sustainable". To achieve this objective, the United Nations established some targets, including one related to the right to housing: "By 2030, ensure access for all to adequate, safe and affordable housing and basic services and upgrade slums".

Moreover, the United Nations' Universal Declaration of Human Rights (UDHR), in the Article 25, associates the housing with the right that "[e]veryone has [...] to a standard of living adequate for the health and well-being of himself and of his family". The same logic is present in the International Covenant on Economic, Social and Cultural Rights (ICESCR). In its Article 11, the United Nations recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."[133]

In the same direction, the UN-Habitat (2016) adopted a new urban agenda ("Habitat III") in the context of the conference on housing and urban sustainability held in Quito in 2016. In that opportunity, this United Nations' agency established commitments directed to the housing problem, including "to promoting the role of affordable and sustainable housing and housing finance".

[133] The Committee on Economic, Social and Cultural Rights, which is a body of experts of the United Nations, stated in the General Comment No. 4 that "the right to housing [established in the Article 11 of the ICESCR] should be ensured to all persons irrespective of income or access to economic resources" since the rights in the Covenant derive from "the inherent dignity of the human person": "Adequate shelter means [...] adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost" (United Nations,1991).

Finally, the OAS statues in its Charter's Article 34, with the amendment of the "Protocol of Washington" (1992), that the "[a]dequate housing for all sectors of the population" is one of the "basic goals" that the states "agree to devote their utmost efforts to accomplishing". One of the goals of these states is to achieve the "basic objectives of integral development", such as the "equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development".

The tensions between the semantics of these two types of global organizations (political-economic and political-legal) reflect concretely in the Brazilian reality. For example, the Brazilian politicians justified the inclusion of the social right to housing in the Federal Constitution mentioning the participation of the country in the activities of the United Nations and UN-Habitat.[134] Thus, it is important to check how these tensions between economy and law are present in the Brazilian reality.

5. Housing finance in the Brazilian reality

Social positions such as the *local political-economic organizations* and *local political-legal organizations* are in constant operation in the Brazilian *SFH*. These social positions' discourses represent well some of the tensions between the legal and economic systems in that area. As I show in this section, a relevant part of the inclusions and exclusions connected to the *SFH* can be understood by observing these tensions.

[134] In the justification of the constitutional amendment proposal, the Federal Senator Mauro Miranda mentions the Conference Habitat II, organized by the United Nations. He also points out the role of Brazil as rapporteur for the Habitat Agenda: "The active participation of Brazil in an important world event places us in a delicate position, especially when, in the midst of an eminently critical situation in Brazilian urban areas, there is a gap in the Federal Constitution itself, which does not recognize housing as a real right, such as health, leisure, work, etc. Brazil's situation is even more delicate because the 'homeless' in the whole country, aware of the Conference, are already well organized and threaten to 'engage the land occupations' on the peripheries of big cities - as it is possible to read in the most renowned newspapers of the country. The current housing conditions of millions of Brazilians are depressing and constitute a real 'social scourge' for most of the country's metropolises" (Brazil, 1996).

An interventionist state model appears in Brazil during the Government of Getúlio Vargas (1930-1945). In that period the social housing was observed "as an economic factor in the strategy of the country's industrialization" but also "as an element in the worker's ideological, political, and moral formation" (Bonduki 2017: 81).

Populist programs characterize that Brazilian housing finance's phase. The State initiated its direct interventions in the housing area, but the first actions were not enough to deal with the housing deficits. In some cases, the state interventions made the problem worse since they discouraged the private initiative in the area of rental housing, for example, by freezing the rental prices (Bonduki 1994: 113-141).

Authorities created plans for the rental and sale of houses, the housing finance, and mortgage loans. However, they did not establish criteria that directed subsidies to those who needed them most. Also, those plans have not guaranteed the return of the funds invested, as there were no mechanisms for the value correction. Thus, the populist logic has made it difficult to expand those programs.[135]

Only after the military coup of 1964, the picture changed. In that period, a robust Housing Finance System was effectively created. The declared idea was to offer loans with lower interest rates and longer repayments for lower-income families (BRAZIL, 1976, p. 113-132).

Unlike the previous ones, the new program established mechanisms for the value corrections. The program benefited the middle classes and entrepreneurs, in addition to creating jobs, but it did not solve the housing problem of the lower-income families, which corresponded to about 77% of the Brazilian population (Maricato 1987: 30-38). These facts have led some authors to argue that the program's social aspect was, in fact, an "instrument of economic

[135] See, for an analysis of the *Carteiras Prediais dos Institutos de Aposentadoria e Pensões* (Pension Portfolios of the Institutes of Retirement and Pensions), Bonduki (2017: 109-123). See, for an analysis of the *Fundação da Casa Popular* (Foundation of the Popular House), Azevedo and Andrade (1982: 19-54). These two initiatives were developed in the Brazilian populist period.

imperatives" (Kowarick 1971: 91-95). It has had a redistributive character more symbolic than effective.

According to Maricato (1987: 29-30), the program's economic success has been a result of "ignoring the lower-income sectors of the population" and "treating housing as a commodity to be produced and marketed in strictly capitalist ways." Only about 33.1% of 4.45 million houses financed by the *SFH* were allocated to lower-income families (1 to 3 minimum wages) from 1964 to 1986 (Royer 2014: 67-68).

Besides, 15.5 million houses were created in that period. So, 75% of the homes were not financed by the *SFH*, but self-financed and self-built (Royer 2014: 67-68). A considerable part of this self-solution represents the construction of a "clandestine universe" or a "space of misery" (Maricato 1987: 29-87). This informal housing provision has been allocated on distant peripheries and *favelas* (slums) in the cities' centers (Bonduki 2017: 289).

In parallel to this informal provision of housing, alternative mechanisms of conflict resolution and informal legal rules have been developed (Santos 2014: 342-350). To some extent, organized crime and dwellers' associations took up spaces left by the state, police, and judiciary in the Brazilian *favelas* (Junqueira 1993: 143-180).

Based on systems theory, it is possible to say the inclusion in the informal housing market and the informal legal system is a way of "inclusion into the exclusion" (Mascareño and Carvajal 2015: 137-143) or "under-inclusion" (Neves 2013: 130-131). In general, state organizations, financial agents, and builders have provided housing and promoted rights only for middle and upper classes, while the lower classes have remained in the informal sectors, which offer precarious solutions (Santos 2014: 344-350).

As a result, there are nowadays many social movements directed to urban and housing themes in Brazil, such as the *UNMP* and the *MTST*. The most significant movements organize themselves in national associations. I call them the *local political-legal organizations.*

To some extent, social movements have tried to decouple housing provision and market-oriented perspectives, seeking to participate in the construction of accessible housing and the evolution of urban and housing policies. They also have engaged in the development and diffusion of ideas connected to human and social rights.

I interviewed four lawyers who militate in these movements. They have reported constant participation in the evolution of *SFH*'s legislation and regulation, especially during the governments of the Workers Party (*Partido dos Trabalhadores*). According to them, the *UNMP* is known for producing self-managed housing and has historical participation in municipal, state, and federal councils, and also in international conferences, such as the UN's Habitat III.[136] On the other hand, the *MTST* is known for large occupations and street protests. This last organization maintains a relation more distant from institutional politics than the *UNMP*.[137]

Social movements such as the *UNMP* and the *MTST* have had an important role in the Brazilian *SHF*. These national movements, which are integrated by other small and medium movements, promote protests, but also participate in institutionalized counsels, meetings, etc., for instance, with federal and local governments, judges, and public banks.

Although authors such as Luhmann (2007: 674-675) argue that social movements are not systems of organization, the fact that these social movements constitute themselves in organizations can contribute to their participation in political and legal communications in the Brazilian *SFH*. The same is valid for business associations. Both groups assume some equivalent functions in the *SFH*, despite the evident differences of approaches and achievements.

The *ABRAINC* and the *SECOVI-SP* are examples of business organizations that have directed efforts to change laws, regulations, and practices in the Brazilian *SFH*. I call these groups *local political-economic organizations*. As it is

[136] See, for more details about the *UNMP*'s participation in institutional politics, Tatagiba and Teixeira (2016).
[137] See, for more details about the *MTST*'s history, challenges, and achievements, Boulos (2015) and Simões, Campos, and Rafael (2017).

possible to read, for example, in a technical study produced by them ("*O ciclo da incorporação imobiliária*"), both business organizations observe housing as a kind of merchandise and seek profits for their companies by promoting *efficiency* in real estate and housing finance markets. The document shows the sector's positive economic aspects, such as its participation on Brazil's GDP and job creation; and advocates, for example, for lower tax burdens, less bureaucracy, and more legal certainty.[138]

I interviewed four of the *ABRAINC*'s project managers. This organization was created by the most prominent construction enterprises, which were invited by the Workers Party's Government to reshape the Brazilian *SFH* in 2009. The idea was to produce houses for lower classes and stimulate this market and the economy, considering the period of international crisis. Also, one public bank (*Caixa Econômica Federal*) has had an essential role in this mission as the most significant Brazilian *SFH*'s financial agent (with more than 70% of the market share).[139]

Discourses regarding market efficiency were active in Brazil especially during the 1980s and 1990s. In that period the country had an important movement of privatizations connected to a neoliberal agenda. According to a former director for housing of the *Caixa Econômica Federal*, housing finance was in crisis, because of the banks' lack of incentives to offer credit in this area. However, changes in legislation and regulation between the 1990s and 2000s enabled a transformation in this framework.[140]

On the other hand, in the last years, it was common to describe a kind of "New State Activism" in Brazil, especially during the governments of the Workers Party (2003-2016). The central idea was that markets are necessary, but

[138] Ideas like those are present also in a technical study contracted by the ABRAINC and produced by the BOOZ & COMPANY: "*O custo da Burocracia no Imóvel*".
[139] One of the *ABRAINC*'s project managers interviewed is a former manager of this public bank who worked directly on changes in the Brazilian *SFH* in 2009.
[140] This diagnosis was presented by a former director for housing of the *Caixa Econômica Federal*, which I interviewed by e-mail. It is possible to read his perspective in the following article: Rezende (2017). I also interviewed a legal manager of this bank and the former manager mentioned in the last footnote.

not enough, for inclusive development. This perception increased after the international crisis of 2008 (Trubek, Coutinho and Schapiro 2012).[141]

In that period, the largest Brazilian construction and real estate companies were invited by the federal government to elaborate the *Minha Casa Minha Vida*, which would be a new *SFH* program directed to the lower-income population. This mission put the companies in close contact and, a few years later, they created a national business association: the *ABRAINC*.

There are many criticisms directed to the *Minha Casa Minha Vida*. One of the most critical problems is the long distances between houses and schools, hospitals, transportation, jobs, etc. However, in the last ten years, this social program was responsible for 5.31 million houses contracted and for 430 billion *reais* in investments (BRAZIL 2018: 42). Moreover, social movements were put in the center of the political system, participating directly in the construction of popular houses and the legislation and regulation of the sector (Tatagiba and Teixeira 2016).

From 2009 to September of 2018, about 89.77 billion *reais* were directed only to families with up to 3 minimum wages, which represents 1.8 million of housing contracts. Of this amount, 2.2 billion *reais* were used for 78,151 contracts of houses directly built by popular associations, including social movements.[142]

Although it did not solve the Brazilian housing problems, which have those large numbers mentioned at the beginning of this text, about 1.3 million of jobs were, direct or indirect, linked to the investments on that program in 2013. Those jobs represented 2.6% of Brazilian formal job positions in that period (Brazil 2014: 20). Additionally, from 2009 to 2013, the construction's GDP followed the growth trend of the country's GDP, with average growth rates of 5.9% and 2.5%, respectively (FGV 2016: 8-10).

[141] I do not analyze here the recent political context after the impeachment of 2016 and, especially, after the elections of 2018. These political events seem to represent, to some extent, a return of neoliberal ideas and a reduction of state activism in the country. Social movements have had less participation in the institutionalized politics in this new context.

[142] These numbers were collected through a petition for access to information to the Brazilian Ministry of Cities (No 80200001314201840), which was answered in November of 2018.

Following the Brazilian *SFH*'s tradition, *Minha Casa Minha Vida* facilitates the acquisition of houses by those who can afford the monthly payments and other expenses linked to an adequate housing, such as condominium, water, and electricity (Brazil 2014: 82-86). Financial agents, construction enterprises, and real estate companies are central participants of this program and, as typical economic organizations, they wait for profits.

Thus, some authors argue this program still answers more to the economic development objective than to the housing demand. Because of that, the houses produced for lower income families in many cases, as mentioned before, have been allocated on distant peripheries, without public services, such as education and health, or economic opportunities (Krause, Balbim and Lima Neto 2013). However, studies show there are improvements on those families' citizenship. Although benefited families show some criticisms regarding the new neighborhood's distance, they agree their life conditions are better in the new context (Brazil 2014: 85-100).

6. Conclusion

As I indicated in this paper, organizations such as the World Bank, IDB, and OECD are mainly connected to two functional systems: politics and economy. The logic of these systems explains discourses produced by the social position I named *global political-economic organizations*. It is possible to observe the same on national organizations such as *ABRAINC* and *SECOVI-SP*, which can be described as *local political-economic organizations*. They observe the *SFH* as an economic sector and the housing as a profitable product. Also, these social positions are aware of their political potential and try to produce impacts on this sector's legislation, regulation, and legal interpretation.

On the other hand, the United Nations, UN-Habitat, and OAS are examples of *global political-legal organizations*. The political and legal logics explain their discourses, which are connected to ideas such as human rights, social rights, citizenship, etc. The same is true for organizations such as *MTST* and *UNMP* at

the national level. These social positions also try to influence the *SFH*'s legislation, regulation, and legal interpretation.

The following table shows the social positions and some characteristics of them reconstructed by this article:

Table 1 – Social positions, levels, organizations and functional systems

Social position	Level	Organizations	Main functional systems	Secondary functional systems
Political-economic organizations	Global	World Bank, IDB, OECD	Politics and economy	Science, education, law, mass media
	Local	*ABRAINC, SECOVI-SP*		
Political-legal organizations	Global	United Nations, UN-Habitat, OAS	Politics and Law	Science, education, economy, mass media
	Local	*MTST, UNMP*		

Note: produced by the author.

As one can see in this table, political-economic organizations and political-legal organizations also produce discourses connected to science, education, mass media, etc. For example, they publish technical studies, didactic texts, and journalistic articles. However, one can observe mainly political, legal, or economic objectives in these documents' discourses.

The housing finance is a subject of constant disputes and accommodations between discourses oriented by economic logics (coupled to political logics) and legal logics (also coupled to political logics). Thus, I answer this work's main question by pointing that there is not a replacement of citizenship's and social rights' logics by market's and consumption's logics in the *SFH* area. On the other hand, one cannot deny there are significant changes in the relationship of these logics during the *SFH*'s history.

At least since 1964, the Brazilian *SFH* has been connected to the banks' economic activities, which are based on payments operations by borrowers or by

state. However, at the same time, housing finance has been a historic subject of disputes on political and legal arenas. Additionally, the Brazilian *SFH* was designed as a social policy, including in its new version after 2008.

As it was possible to observe in this article, there are tensions between economic logics and legal logics both in global and local levels. At the world society level, political-legal organizations' and political-economic organizations' discourses show tensions between economic globalization and legal globalization.

World Bank, IDB and OECD produce discourses that advocates reforms on social policies by development countries, such as Brazil. According to their general ideas, if the banking and real estate markets worked more efficiently than it would help poor people to have access to a house. On the other hand, United Nations, UN-Habitat, and OAS focus their discourses on human rights and state direct support to universalize adequate housing, including with private initiatives' partnerships.

At the national level, one can also observe tensions between economy and law. The *SFH*'s legislation shows conflicts between economic and social interests. Although the logics of inclusion by market and consumption would be reinforced during the neoliberal period (1980s and 1990s) and maintained during the new state activism's phase (2000s and 2010s), these logics were also present since 1930s (interventionist period) in the housing area, especially after 1964.

In this context, social movements, such as *MTST* and *UNMP*, dispute political spaces and public sources with business associations, such as *ABRAINC* and *SECOVI-SP*. These political-legal organizations and political-economic organizations produce discourses directed, for instance, to the state, courts, and public banks, contributing to the *SFH*'s evolution.

Thus, one can say there are, at the same time, two logics or rationalities both in global and local levels. On one hand, there are social positions and discourses oriented by the idea of inclusion by social rights and citizenship, which one can associate to the welfare state's model. On the other hand, there are social positions and discourses based on inclusion by consumption and market,

which are related to the neoliberal ideas. The tensions between them influence directly in the inclusion/exclusion processes connected to the Brazilian reality and its *SFH*.

References

ABECIP. Associação Brasileira das Entidades de Crédito Imobiliário e Poupança (1995) 'SFI: um novo modelo habitacional' *VIII Encontro da ABECIP* (Brasília, ABECIP).

ABRAINC; BOOZ & COMPANY. *O custo da Burocracia no Imóvel.* Available on: <https://www.abrainc.org.br/estudos/2014/04/04/o-custo-da-burocracia-no-imovel/>. Accessed on: 2 Oct. 2018.

ABRAINC; SECOVI-SP. *O ciclo da incorporação imobiliária.* Available on: <https://www.abrainc.org.br/estudos/2015/08/18/o-ciclo-da-incorporacao-imobiliaria/>. Accessed on: 2 Oct. 2018.

Aragão, JM (1999) *Sistema Financeiro da Habitação: uma análise sócio-jurídica da gênese, desenvolvimento e crise do sistema* (Curitiba, Juruá).

Azevedo, S and LAG Andrade (1982) *Habitação e poder: Da Fundação da Casa Popular ao Banco Nacional da Habitação* (Rio de Janeiro, Zahar).

Bonduki, N (1994) 'Crise de habitação e luta pela moradia no pós-guerra' in L Kowarick (org), *As lutas sociais e a cidade: São Paulo, passado e presente,* 2nd ed. (Rio de Janeiro, Paz e Terra).

Bonduki, N (2017) *Origens da habitação social no Brasil: arquitetura moderna, lei do inquilinato e difusão da casa própria,* 7th ed. (São Paulo, Estação Liberdade; FAPESP).

Bora, A and H Hausendorf (2004) *PARADYS - Participation and the Dynamics of Social Positioning. Final Report.* (Bielefeld and Bayreuth, European Commission).

Bora, A and H Hausendorf (2010) 'Participation and beyond: dynamics of social positions in participatory discourse' in A Bora and H Hausendorf (eds),

Democratic transgressions of law: governing technology through public participation (Leiden, Brill).

Bora, A (2016) 'Sociology of Law in Germany: Reflection and Practice' 43(4) *Journal of Law and Society*, 619-646.

Bora, A (2009) 'Systems Theory, Discourse, Positionality – Towards a better understanding of the interior architecture of functional differentiation in sociological Systems Theory' *Systems theory seminar* (Cork, Ireland).

Boulos, G (2015) *Por que ocupamos? Uma Introdução à luta dos sem-teto*, 3rd ed. (São Paulo, Autonomia Literária).

Braeckman, A (2006) 'Niklas Luhmann's systems theoretical redescription of the inclusion/exclusion debate' 32(1) *Philosophy & Social Criticism* 65-88.

Brazil. *Projeto de Emenda à Constituição nº 28/1996.* Available on: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=25007>. Accessed on: 01 July, 2018).

Brazil. *Emenda Constitucional nº 26, de 14 de fevereiro de 2000.* Available on: <http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc26.htm>. Accessed on: 01 Jul. 2018.

Brazil. Ipea - Instituto de Planejamento Econômico e Social (1976). *FGTS: uma política de bem-estar social* (ed by WJM Almeida and JL Chautard) (Rio de Janeiro, IPEA).

Brazil. *Lei nº 4.380, de 21 de agosto de 1964.* Available on: <https://www.planalto.gov.br/ccivil_03/leis/L4380.htm>. Accessed on: 26 Dec. 2016.

Brazil. *Lei nº 9.514, de 20 de novembro de 1997.* Available on: <https://www.planalto.gov.br/ccivil_03/leis/L9514.htm>. Accessed on: 26 Dec. 2016.

Brazil. *Lei nº 10.931, de 02 de agosto de 2004.* Available on: <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/lei/l10.931.htm>. Accessed on: 26 Dec. 2016.

Brazil. *Lei nº 11.977, de 07 de julho de 2009.* Available on: <http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l11977.htm>. Accessed on: 09 Apr. 2017.

Brazil. Ministério das Cidades. *Resposta ao Pedido de Acesso à Informação nº 80200001314201840.* Solicitante: Gabriel Ferreira da Fonseca. Sistema Eletrônico do Serviço de Informação ao Cidadão da Controladoria-Geral da União. Date: 26 Nov. 2018.

Brazil. Ministério das Cidades/Secretaria de Assuntos Estratégicos da Presidência da República (2014). *Pesquisa de satisfação dos beneficiários do Programa Minha Casa Minha Vida* (ed. By FG Freitas and EM Camargo) (Brasília, MCIDADES; SNH; SAE-PR; IPEA).

Brazil. Ministério do Planejamento. Secretaria de Desenvolvimento da Infraestrutura. *PAC. 7º Balanço (2015-2018).* Disponível em: <http://www.pac.gov.br/sobre-o-pac/divulgacao-do-balanco>. Acesso em: 20 set. 2018.

Bucci, MPD (2003) *Cooperativas de habitação no direito brasileiro* (São Paulo, Saraiva).

De Giorgi, R (2017) 'O futuro do trabalho e o seu direito' 11(1) *Revista Direito Mackenzie* 52-72.

Denardi, VL (2009) *Execuções judicial e extrajudicial no Sistema Financeiro da Habitação: Lei 5.741/1971 e Decreto-lei 70/1966* (São Paulo, Revista dos Tribunais).

Dutra, R (2016) 'Diferenciação funcional e a sociologia da modernidade brasileira' 15(34) *Política & Sociedade* 77- 109.

Eliot, TD (1944) 'Tensions' in HP Fairchild (ed), *Dictionary of Sociology* (New York, Philosophical Library).

Esposito, E (2017) 'Critique without crisis: Systems theory as a critical sociology' 143(1) *Thesis Eleven* 18-27.

Figueiredo, MAS (1999) *Cálculos no sistema financeiro da habitação* (Curitiba, Juruá).

Fonseca, GF (2016) *A interpretação jurídica no Estado Regulador: da legislação racional à administração/jurisdição eficiente.* Master Thesis (São Paulo, Pontifícia Universidade Católica de São Paulo).

Fonseca, GF (2019) *Inclusão e exclusão no Sistema Financeiro Habitacional: uma reconstrução das tensões entre direito e economia a partir da teoria dos sistemas.* Doctoral Dissertation (São Paulo, Universidade de São Paulo).

FGV. Fundação Getúlio Vargas (2016) *Caracterização, Mapeamento e Cenários para a Demanda Habitacional no Brasil.* Relatório Técnico contratado pelo Sindicato das Empresas de Compra, Venda, Locação e Administração de Imóveis Residenciais e Comerciais de São Paulo – Secovi-SP.

FJP. Fundação João Pinheiro, Diretoria de Estatística e Informações (2018) *Déficit habitacional no Brasil 2015* (Belo Horizonte, FJP).

Højlund, H (2009) 'Hybrid inclusion – the new consumerism of Danish welfare service 19(5) *Journal of European Social Policy* 421-431.

Hutter, M (1992) 'How the economy talks the law into co-evolution: an exercise in autopoietic social theory' in G Teubner and A Febbrajo (eds), *State, law and economy as autopoietic systems. Regulation and autonomy in a new perspective* (Milan, Giuffrè).

IBGE. Instituto Brasileiro de Geografia e Estatística (2018) *Síntese de indicadores sociais: uma análise das condições de vida da população brasileira* (Rio de Janeiro, IBGE).

IDB. Inter-American Development Bank (2004) *Reforming Latin American housing markets: a guide for policy analysis* (Washington, IDB).

Junqueira, EB (1993) *A sociologia do direito no Brasil: introdução ao debate atual* (Rio de Janeiro, Lumen Juris).

Kowarick, L (2009) *Escritos urbanos* (São Paulo, Editora 34).

Kowarick, L (1971) *Estratégias do planejamento social no Brasil* (São Paulo, CEBRAP).

Krause, C, R Balbim and VC Lima Neto (2013) 'Minha Casa Minha Vida, nosso crescimento: onde fica a política habitacional?' 1853 *Texto para discussão IPEA*.

Lange, S and U Schimank (2004) 'A Political Sociology for Complex Societies: Niklas Luhmann' in K Nash and A Scott (eds), *The Blackwell companion to political sociology* (Malden; Oxford; Carlton, Blackwell).

Leydesdorff, L (2010) 'Luhmann Reconsidered: Steps Towards an Empirical Research Programme in the Sociology of Communication?' in C Grant (ed), *Beyond Universal Pragmatics: Essays in the Philosophy of Communication* (Oxford, Peter Lang).

Luhmann, N (2005) *El derecho de la sociedad* (Ciudad de México, Herder e Universidad Iberoamericana).

Luhmann, N (2007) *La sociedad de la sociedad* (México, Universidad Iberoamericana, 2007).

Luhmann, N (2004) *Law as social system* (New York, Oxford University Press).

Luhmann, N (1993) *Risk: a sociological theory* (Berlin, de Gruyter).

Luhmann, N (2013) *Theory of Society II* (Stanford, Stanford University Press).

Mendonça, ARR and S Deos (2012) 'O papel dos bancos públicos e a experiência brasileira recente' in F Ferrari Filho and LF Paula (orgs), *A crise financeira internacional: origens, desdobramentos e perspectivas* (São Paulo, Editora Unesp).

Maricato, E (2014) 'Apresentação' in LO Royer, *Financeirização da política habitacional: limites e perspectivas* (São Paulo, Annablume).

Maricato, E (2000) 'As idéias fora do lugar e o lugar fora das ideias: Planejamento urbano no Brasil' in O Arantes, C Vainer and E Maricato (eds), *A cidade do pensamento único: desmanchando consensos* (Petrópolis, Vozes).

Maricato, E (1987) *Política Habitacional no Regime Militar: Do milagre brasileiro à crise econômica* (Petrópolis, Vozes).

Mascareño, A and F Carvajal (2015) 'Los distintos rostros de la inclusión' 116 *Revista CEPAL* 131-146.

Neves, M (2013) 'A Constituição e a esfera pública: entre diferenciação sistêmica, inclusão e reconhecimento' in R Dutra and JP Bachur (orgs), *Dossiê Niklas Luhmann* (Belo Horizonte, Editora UFMG)

OAS. Organization of American States. *Charter of the Organization of American States*. Available on: <http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp>. Accessed on: 23 Jun. 2018.

OECD. Organisation for Economic Co-operation and Development (2013) *Economic Policy Reforms 2013: Going for Growth*.

Parsons, T (1965) 'Full Citizenship for the Negro American? A Sociological Problem' 94(4) *Daedalus* 1009-1054.

Paterson J. and Teubner, G. (2005) 'Changing Maps: Empirical Legal Autopoiesis' in CF Campilongo, LF Amato and MALL Barros (eds), *Luhmann and Socio-Legal Research: An Empirical Agenda for Social Systems Theory* (New York, Routledge).

Rezende, TC (2017) 'É imprescindível preservar os marcos regulatórios do crédito imobiliário' 21(46) *Revista do SFI* 22-28.

Rodrigues, LBP (2009) *Crédito para habitação no Brasil: histórico e desafios*. Master Thesis (São Paulo, Pontifícia Universidade Católica de São Paulo).

Rolnik, R (2015) *Guerra dos lugares: a colonização da terra e da moradia na era das finanças* (São Paulo, Boitempo).

Rolnik, R (2014) 'Neoliberalismo reciente: la financialización de la vivienda propia y el derecho a la vivienda' 1(24) *Bitácora Urbano Territorial* 95-104.

Royer, LO (2014) *Financeirização da política habitacional: limites e perspectivas* (São Paulo, Annablume).

Santos, BS (2014) *O direito dos oprimidos: sociologia crítica do direito, parte 1* (São Paulo, Cortez).

Simões, G, M Campos and R Rafael (2017) *MTST 20 anos de história: luta, organização e esperança nas periferias do Brasil* (São Paulo, Autonomia Literária).

Tatagiba, L and ACC Teixeixa (2016) 'Efeitos combinados dos movimentos de moradia sobre os programas habitacionais autogestionários' 24(58) *Revista de Sociologia e Política* 85-102.

Teubner, G (1986) 'The Transformation of Law in the Welfare State' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin, de Gruyter).

Trubek, DM, DR Coutinho and MG Schapiro (2012) 'Toward a New Law and Development New State Activism in Brazil and the Challenge for Legal Institutions. *The World Bank Legal Review* 281-314.

United Nations. Committee on Economic, Social and Cultural Rights (1991) *General comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)* Available on: <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>. Accessed on: 04 May. 2018.

United Nations (2016) *Draft outcome document of the United Nations Conference on Housing and Sustainable Urban Development (Habitat III)* Available on: <http://habitat3.org/wp-content/uploads/Draft-Outcome-Document-of-Habitat-III-E.pdf>. Accessed on: 24 Dec. 2016.

United Nations (1966) *International Covenant on Economic, Social and Cultural Rights* Available on: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>. Accessed on: 04 May. 2018.

United Nations (2015) *Sustainable Development Goals: 17 goals to transform our world.* Available on: <https://www.un.org/sustainabledevelopment/cities/>. Accessed on 04 May. 2018.

United Nations (1948) *Universal Declaration of Human Rights.* Available on: <http://www.un.org/en/universal-declaration-human-rights/>. Accessed on: 04 May. 2016.

Villadsen, K (2007) '"Polyphonic" welfare: Luhmann's systems theory applied to modern social work' 17(1) *International Journal of Social Welfare* 65-73.

Villas Bôas Filho, O (2009) *Teoria dos sistemas e o direito brasileiro* (São Paulo, Saraiva).

Wanderley, LEW (1992) 'As políticas urbanas e lutas pela habitação' in LMM Bógus and LEW Wanderley (orgs), *A luta pela cidade em São Paulo* (São Paulo, Cortez).

World Bank (1993) *Housing: enabling markets to work* (Washington, World Bank).

Yin, RK (2015) *Estudo de caso: planejamento e métodos*, 5th ed. (Porto Alegre, Bookman).

17. A Reflection on Totalitarian Semantics and Gender[143]

Wanda Capeller

1. Introduction

This reflection aims to debate the nexus between totalitarian semantics, ideological rhetoric and gender, particularly related to a new phenomenon that emerged over the last decade in European countries: the will of young women to join IS (Islamic State) society. Indeed, since the mid-2010s, a significant number of Western women coming from many parts of the EU reached Syria via Turkey. This gave rise to a new political and legal problem, which produced a vast number of works trying to explain the motivations behind these women choosing to live under a patriarchal and totalitarian system (Auchter, 2012; Brown, 2014; Lahoud, 2018; Makanda, 2019; Khalil, 2019).

At the core of this issue, it is possible to identify the use of global websites by jihadism, permanently diffusing strong propaganda that has a huge impact on young Western women's desubjectification and auto-radicalization processes regarding European values. This totalitarian ideology allows them to adhere simultaneously to old forms of patriarchal violence against women and new forms of women's violence itself, according to the gender role assigned by radical Islamic society. To apprehend this issue, a large collaboration of knowledge is needed, and that is why my reflection was based on a pluralistic theoretical analysis going beyond the classical boundaries of Sociology of Law. That's why this includes the sociology of ideological languages (Bourdieu, 2001; Faye, 2003), Spivak's decolonial approach to the complex conditions of subaltern women's subjectivity in non-Western societies (1988), and Abu-Lughod's theory on the use of women's image to justify warfare (2002). All these theories will be

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associated with a psychoanalytic and sociological understanding of this phenomenon (Benslama and Khosrokhavar, 2017).

The transitional dimension (p. 11) between these multiple fields of knowledge allows us to elaborate the thesis as follows: Totalitarian semantics function as a dispositive of desubjectification of original cultural values and social identity, contributing to create a female-endorsed oppressed subjectivity, i.e. a kind of voluntary subalternity. I will argue this idea through two main points: (1) Totalitarian semantics, propaganda and female ambivalent subalternity; (2) Who has rights to Human Rights under the scope of French justice?

Regarding the methodological aspect of this reflection, it was essentially based on political and juridical discourse analysis, a method able to associate a linguistic model – essentially the analysis of enunciation – with the sociological approach concerning the political and social conditions of language.

2. Totalitarian semantics, propaganda and female ambivalent subalternity

The linguistic approach of ideological aspects of language is very important because language is a powerful tool for totalitarian systems (Faye, 2003). Its effects on the social field and the ontological dimension of human beings allows us to redefine social and political identities. This is why totalitarian semantics works as an important dispositive of ontological desubjectification processes of original cultural values, which contributes to create an endorsed subaltern subjectivity, as showed Orwell (1949; ed. 2018) in his dystopian novel *1984,* where a superstate creates a Newspeak not to enlarge but to restrain the limits of human thought (p. 349).

Totalitarian semantics use propaganda as an *apparatus* in a Foucauldian sense, i.e. a technological and powerful tool to rebuild new forms of subaltern subjectivity through ideological rhetoric. Agamben (2007) argues that the Foucauldian notion of *apparatus* refers to political machines producing subjectification processes through the exercise of pure violence. Nevertheless, in

his view, we are living today in the extreme phase of capitalism which also generates desubjectification processes. Yet, to provoke ontological change by capturing behaviors and opinions, political discourse needs to diffuse ideological rhetoric and propaganda which are dispositives of ontological changes. Agamben showed that, in the extreme phase of capitalism we are living in today, the Foucauldian *apparatus* also generate desubjectification processes (2007: 44).

Earlier, in the 20th century, Bernays (1928; ed. 2007) observed propaganda as an executive body of an invisible government which serves to manipulate mass communication and to create consent (p. 18-19). This author pointed out the existence of totalitarian logic in democratic societies (p. 17-19). Kemplerer also showed that, at the individual level, ideological language and war semantics anesthetise individual personalities, thoughts and wills (1996: 49). In this sense, Arendt argues that propaganda is essential to psychological war, considering the submission effects it produces on individual minds and social mentality (Arendt, 2002: 95). Even if ideological language generates ontological insecurity by its violent and hysterical side, it's easily naturalized in social fields because individuals seek more certainties instead of uncertainties. On his side, Faye (2003) insisted on the intersectional aspects of totalitarian language where the encounter of multiple narratives produces not only an "energy of language" but also a "credibility of language" (p.126).

2.1. Emotional propaganda and female jihadist subjectivity

Emotional propaganda and gender fit together to promote auto-radicalization processes everywhere, notably in Western countries. The Midterm Report "Who are the European Jihadis? From criminals to terrorists and back?" (2018) stressed that, in Europe, jihadi terrorism is a predominantly male phenomenon, with a male-to-female ratio of 87% -13% (p. 19). Social media and networks such as Twitter, Tumblr, LinkedIn, and ask.fm diffuse on a global scale the high ideological jihadist discourse which determines gender relations in terroristic social life. Through these *apparatus* young women are constantly being

informed on Jihad and Islamic life. These violent rhetoric virtual groups generate a radicalization process allowing female adherence to both kinds of violence i.e. patriarchal violence and political violence.

The female position in terroristic social life has been discussed not only by formal control agencies, but also by think tanks which focus on security issues[144]. Winter (2018) observed the evolution of the caliphate's female-focused propaganda, and pointed out the influence of political jihadist rhetoric on the constitution of IS's current life (p. 4). Permanently spread by social media, female-focused propaganda is mostly informing on current Jihad life and how to reach jihad territories. Brown (2014) stresses that idealized social jihadist life fascinates young European women willing to be "jihadi brides" to join their men who are already fighting for IS. According to this author, there is a great deal of romanticism in women's accounts about being part of this political project with a new version of a political Islamic "good life" built upon a particular idea of Islam and Sharia law. In addition, some families have received phone calls from Syrian men asking for their daughters' hands in marriage, but also male fighters have been requested by women wanting to be their wives.

The idea of jihadist women not fighting is a myth. It did not correspond to the war conditions in Iraq and Syria, where female engagement was required if military support was necessary, even if IS official press often raise the question of whether women can participate or not in war operations. Originally, Jihadi consensus stated women do not fight, but this has been re-evaluated under pressure from revisionist ideologues of the Palestinian Muslim Brotherhood, who joined al-Qaeda in the 1980s. For them, combat is a main duty for all Muslims, men or women, everybody must have a defensive role in Jihad to help the protection of Muslim territories (Winter, 2018: 5).

[144] GLOBSEC is a global think-tank based in Bratislava committed to enhancing security, prosperity and sustainability in Europe and throughout the world. Its mission is to influence the future by generating new ideas and solutions for a better and safer world. They believe they can change the world by putting together the right stakeholders at the right time for a free exchange of ideas. https://www.globsec.org/ consulted May 3th 2022.

Since the 2000's, terrorist groups, preceding IS, launched female martyr operations (p. 6) surprising the world when, in 2005, a woman "dressed like a man" blew herself up in front of the US military base in Iraq. For this she was commemorated as "a noble sister" who had acted "heroically in the name of her religion" (p. 6). This is the same semantic logic underlined by Kemplerer when this author showed how the word 'heroism' became essential to the Nazi rhetoric (1996: 25 ss).

T*he* main source of IS political and ideological discourse has become the Arabic-language A*l-Naba magazine which spreads* information about current Islamic life. The Europol Report on Islamic propaganda and gender (2018) affirmed that, more than other jihadi groups, IS's propaganda focused on female roles within terroristic society, mostly dealing with media control, moral issues, health and education sectors. Jihadist women have to act according to a pre-modern social pattern, supporting their husbands in *jihad combat and teaching their children to love it.*

Like all propaganda, the Islamic one is essentially emotional, but also very ambiguous: a 2015 manifesto defined the fundamental role of female Muslims as wives, mothers and housekeepers but with exceptions, because "if the enemy is attacking her country, the men are not enough to protect it, and the *ulama* have given a fatwa for it" (Winter, 2018:8). Later, IS's position was that women must be a reinforcement tol

combative jihad, but not protagonists in it. In 2016, *Al Naba* encouraged women to remain at home, but saying at the same time that combative jihad is necessary for women as it is for men " if the enemy enters [the woman's] abode" (Winter, 2018: 9).

The woman's role in jihadist society has been characterized as an ambivalent subalternity because of their power to run not only domestic spaces, but also other sectors of the community i.e. education, health and jihadist propaganda itself. Bigio and Vogelstein (2019) show that technological platforms have been used by female extremist propaganda, targeting messages to radicalize and recruit other women. In the virtual sphere, jihadist women have a relevant

operational role (p. 1). Their social position assumes their acceptance of old forms of patriarchal violence (even against themselves), and new forms of violence perpetrated by them.

Roynard (2021) argues that the complex conditions of female jihadist subalternity lead them to commit different kinds of violence, i.e. patriarchal (at home with the organization of sexual slavery concerning other discriminated women), and political (taking part in terroristic operations or on the battlefield). In 2016, women constituted 26 percent of those arrested on terrorism charges in Europe, up from 18 percent the year before; in 2017, the Global Extremism Monitor registered 100 distinct suicide attacks conducted by 181 female militants, 11 percent of all incidents that year (Bigio and Vogelstein, 2019). Analyzing the complex jihadist women's subalternity, some authors focused on different aspects: Lahoud (2018) discussed the question of empowerment or subjugation; Miller (2020) argued that jihadist women are both, victims and perpetrators, and Bigio and Vogelstein (2019) affirmed that they used to be, at the same time, perpetrators, mitigators and victims.

2.2 Postcolonial feminist theories

Postcolonial feminist theories have discussed the political and sociological conditions of subalternity, with the aim of surpassing the idea of a mere relationship between "dominant" and "oppressed". Those theoretical approaches stressed that subalternity deals with a radical exclusion from the sphere of representation. Revisited by Spivak in her article "Can the Subaltern Speak?" (1988), the concept of subaltern, itself coming from Gramsci's Marxist theory, reflects on power and resilience to power through the analysis of historical and ideological factors that obstruct the possibility of subalterns being heard, notably those living in periphery countries.

As political subjectivity is constructed, it is needed to observe the social position of voiceless people, if they are perpetrators and have or don't have access to the public space. For this reason, the concept of subalternity cannot

ignore its heterogeneity, and must consider that a homogeneous view of subalternity gives a universal key to the Western interpretation of non-Western female subjectivity. In this context, Spivak revisited the human rights debate[145].

The examination of multiple forms of oppression cannot be indifferent to ideological theories. On the contrary: we must mobilize the theories of ideology to analyze the geopolitical context of subalterns, and the micrological aspects of power, both producing an oppressed subjectivity. According to Spivak, there is not a "monolithic collectivity of women" able to develop a kind of unique subjectivity - allowing them to speak for themselves against a monolithic social system, either a "practical politics of the oppressed speaking for themselves", which is, at least, problematic (Williams and Chrisman 1994, p. 73).

Also Abu Lughod (2002) criticizes the Western view of Muslim women. At the time of the US invasion of Afghanistan, conservative feminist movements claimed to save non-Western countries on behalf of Women's Rights. This rhetoric of "rescue" of Muslim women is part of a political discourse aiming to justify warfare liberating Non-Western women (p. 783). For this author, Anthropology, which constitutes a Western knowledge itself, is unable to develop a critical approach on this matter. Nonetheless, it is important to note that Abu Lughod was not referring to Muslim women who adopted the radical ideology of Islam and joined terrorist groups.

Regarding jihadist women, the Western vision is ambiguous: either they are seen as deeply ideological or as victims of a totalitarian system, without taking into account the ambivalence of the female role in these organizations. This ambivalence is - at the same time - linked to the desubjectification of modern identity and the adoption of a pre-modern identity. Concerning the Western construction of feminism, the Jihadi political rhetoric has strongly criticized it, denouncing it as a plague that infected the minds of moderate Muslims all over

[145] In her article cited above, Spivak criticizes the historical School of Indian Subaltern Studies, and the post-structuralist French authors from the 1970, notably Michel Foucault and Gilles Deleuze, both coming from a Marxist tradition (p. 2).

the world (Winter, 2018: 8). This is the reason why this issue has become a challenge for neocolonial feminists who are worried about producing more knowledge in this field.

3. Who has rights to Human Rights under the scope of French justice?

In a relevant document "Women in Islamic State propaganda. Roles and incentives" (2019) Europol stressed that "women have become indispensable to IS, both in conflict areas and in the West (including in the EU). They play their role in the organisation's state-building enterprise, producing and disseminating propaganda and have seemingly been granted more proactive roles on the 'battlefield' (p. 5) But after IS's fall in 2019, the families of the European jihadist women detained in the refugee camps located in Kurdish territories are claiming the right for them to return to their countries of origin. It creates a problematic legal affair which raises a political paradox: Can people who voluntarily adhere to totalitarian system rules, thus renouncing their citizenship rights, claim these rights?

At a global level, terrorism and human rights constitute a complex equation. This is why, in April 2005, the Commission on Human Rights created a mandate of a Special Report on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Resolution 2005/80).[146] According to this Report, "incidents of terrorism continue the misuse of legislation and policies to combat terrorism have grown with an adverse impact on human rights and fundamental freedoms". Many countries are involved in this situation, not only European Countries (Germany, Belgium, France, Russia, Serbia, Switzerland, the United Kingdom and Turkey), but also Canada, the USA and Trinidad and Tobago. In other regions, more than 20 countries are concerned, such as Afghanistan, Saudi Arabia, China, India, Iran, Lebanon and Palestine.

[146] This mandate was extended by the Human Rights Council multiple times, most recently on 12th April 2022.

Also the African continent got involved, notably Algeria, South Africa, Egypt, Libya, Morocco, Senegal, Somalia, Sudan and Tunisia.

The UN's independent experts on human rights carefully observed this situation when concerning jihadist women: they showed that 64.000 people are living in Syrian camps, of whom 80% are women and children (UN Report, February 2021). Because of the increase in violence in the camps, poor conditions, torture and degrading treatment, the UN's experts are requesting "urgent action". Even when women and children manage to return, there is a negative effect on fundamental rights, to the point of mothers going to prison and children being placed in State institutions, far from their families.

3.1. Under the scope of French Justice

According to general public opinion in France, the presence of a Muslim population is problematic. It provokes an "islamophobia phenomenon", which is a social reaction that greatly results from the political use of fear (Boucheron and Robin, 2015), radicalizing the debate on security matters. A recent Statista Research Department Report **(2021) stated "**out of a total of 67.1 million French people, Muslims represent 8% of the French population, a proportion that is sometimes greatly overestimated by public opinion" (no p.). In this context, the image of Muslim women is used to legitimize not only social discrimination against women, but also legal penalization as shown by the law against the use of the burqa in France, which became the first European country to impose a ban on full-face headscarves in public spaces. The legal justification was based on the idea of protecting women's freedoms, hypothetically threatened by men, who imposed the respect of Islamic rules upon them (Decree N° 2010-1192). This Decree was later integrated into the 2015 Penal Code as a violation of human dignity, characterizing the penal response to social reactions against the Muslim population.

In this social climate the French government has adopted a "case-by-case" policy, suspecting women and even teenage boys, detained in refugee camps, of

being under ideological influence and linked with terrorist groups. In fact, jihadist women and their children are living in a "no man's land", a kind of "Guantanamo hors-sol", since the sovereignty of the Kurdish forces is not recognized internationally. Yet the French political position maintains that these women must be tried in those territories (Le Monde, 5th July 2022), which is contrary to International Law. According to this Law, the repatriation of its citizens is a matter of discretion of the States, but Paris has insisted that there is no legal basis that obliges the States to repatriation.

The French Ministry of Foreign Affairs presumes a sovereignty that does not exist in the Kurdish territory, saying that France is not responsible for human rights violations because the French State cannot exercise control over French citizens in Syria.

For some authors, this is a clear denial of justice and a legal attack on the principle of equity since, as French citizens, jihadist women are under French jurisdiction and must be the object of investigations by the National Antiterrorist Prosecutor's Office.

3.2. Under the scope of International and European Justice

In this troubled legal context, when fifteen French families, concerned by this issue, requested, in 2019, the repatriation of their daughters and grandchildren, the Committee on the Rights of the Child (which is part of the United Nations High Commission for Children's Rights) condemned France for violating its obligations under the International Convention on the Rights of the Child, signed in 1990. After these families exhausted all French internal legal procedures without obtaining satisfaction, they pleaded to the European Court of Human Rights (ECHR) asking for a decision on the admissibility of this matter by French Courts, based on the European Convention for the Protection of Human Rights and Individual Freedoms, which determines that "no one may be subjected to torture, or to inhuman or degrading treatment or punishment" (Article 3).

After a long-term juridical battle, which saw multiple refusals from the administrative French Justice system, the Council of State finally decided to review what the French government considered as a "prerogative" of the executive powers. On September 29th 2021 the Court examined this issue. Families insisted on repatriation arguing the obligation of the French State to exercise its consular protection in order to put an end to inhuman and degrading treatment (Merloz, 2021).

Under pressure, the French government has recently started to change its repatriation policy by performing a 180 degree turn. Breaking with the "case by case" policy it has become a "drawing of lots" repatriation policy (Dosé and Rivière, 2022). In effect, on 5th July 2022, 16 jihadist women (from 22 to 39 years old), and 35 children were repatriated: 8 women were arrested and received formal accusations: 8 women and a 17 year old adolescent have been put in preventive detention, interrogated by the DGSI - Département Générale de Sécurité Intérieure, after which they will be presented before a counter-terrorism magistrate; the other children have been separated from their mothers in order to be observed by State educational institutions. The UN's Convention on the Rights of the Child states that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child". (Article 9-§ 1) (Sallon and Ayad, 2022).

On 14th September 2022, the ECHR condemned France for not appropriately taking into account the requests from European families of jihadist women located in refugee camps. According to the ECHR's decision it falls to the French government to review, without delay, the requests made by the plaintiffs to assure the appropriate guarantees against arbitrary detention (Le Monde, 14th September 2022). The French State was also condemned for violation of human rights on the basis of Article 3 of the Convention, which prohibits member States from subjecting a person within their jurisdiction to torture or inhuman and degrading treatment, and Article 3 § 2 of Additional Protocol No. 4, which

provides that "no one may be deprived of the right to enter the territory of the State of which he is a national". Thus, the French government stated that new repatriations will be considered, whenever conditions allow.

As a matter of fact, since September 2021, a special structure, located in the women's quarter of the Rennes prison, was created by the French penitentiary system to receive ten women aged 25 to 50, who have committed attacks on French soil. The objectives of this program are to de-radicalize by allowing disengagement from violent action and social re-affiliation from totalitarian ideology. Through this re-subjectification process, the French penal system tries to promote a critical vision in regards to the ideological certainties these women have, by avoiding the feeling of being discriminated, even inside prison. In the Rennes prison, jihadist women benefit from the interventions of social workers, psychologists, and a religion mediator to reinterpret the rules of Islam. Women can exchange with other prisoners in a classroom, and attend academic conferences. Since the first year of its creation, one detainee has already been released and another has been transferred to ordinary detention (Recourt, 2022).

Final remarks

With this reflection, I have aimed to go further into the debate around the complex conditions that determine female subalternity. The case of European jihadist women, choosing to live in a totalitarian and pre-modern society, seemed to be emblematic. To better understand this phenomenon, I have expanded the epistemological boundaries of Sociology of Law by using a pluralistic theoretical view, which might be able to establish a nexus between language and power, totalitarian semantics and ideological propaganda, all of which consist of political and social apparatuses which can change subjectivities.

In the last two decades, European youth, in search of ontological and social certitudes, have been influenced by jihadist propaganda, giving them the illusion of an ideal society. The vision of Muslim women rooted in Western anthropology, seeing them as subalterns and victims of male oppression, seems

to be too inadequate to perceive the complex conditions of jihadist female subalternity. The adherence of these women to a totalitarian social system constitutes a challenge to both Western feminism and Human Rights.

I have observed two elements of further reflection: firstly, the fact that feminist theories show an epistemological and political gap between Western feminist ideals and real-life situations faced by non-Western women. Secondly, attention must be payed to renewing feminist security theories which, currently, only take into account political violence as a primarily male affair, relegating women to the role of passive security objects, mostly as victims.

Another issue concerns the recognition of Human Rights, which is a complex question regarding terrorism. This requires a clear legal position from the EU Justice system. All of these tensions inherent to political, juridical and social fields facing terrorist-threatened Western societies, challenge not only Western feminist theories, but also European legal systems.

References

Abu Lughod, Lila (2002) "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others", *American Anthropologist*, Vol. 104, No. 3, pp. 783-790.

Agamben, Giorgio (2007) *Qu'est-ce qu'un dispositif?*, Rivages Poche, Paris.

Arendt, Hannah (2002) *Le système totalitaire.* Les origines du totalitarisme, Gallimard, Paris.

Auchter, Jessica (2012) "Gendering Terror. Discourses of Terrorism and writing woman-as-agent", *International Feminist Journal of Politics*, 14:1, 121-139.

Benslama and Khosrokhavar (2017) *Le jihadisme des femmes. Pourquoi ont-elles choisi Daech ?* Seuil, Paris.

Bernays, Edward (2007) *Comment manipuler l'opinion en démocratie*, La Découverte, Paris.

Bigio, Jamille and Vogelstein, Rachel (2019) *Women and Terrorism*

Hidden Threats, Forgotten Partners, Council on Foreign Relations, Discussion

Paper May 2019.

Boucheron, Patrick and Robin, Corey (2015) L'e*xercice de la peur. Usages politiques d'une émotion*, Presses Université de Lyon.

Bourdieu, Pierre (2001) *Langage et pouvoir symbolique*, Fayard, Paris.

Brown, Katherine (2014) Analysis: why are Western women joining Islamic State? - *BBC News*.htm, Juin 2014.

CEDH 22 mars 2021, N 24384/19 et 44234/20, *AJ Pénal* 2021. 217 et les obs.

Dosé, Marie; Rivière, Ludovic. « Lettre ouverte à Éric Dupond-Moretti, Garde de Sceaux », « Collectif des Familles Unies », 7th October 2022. http://www.famillesunies.fr/, consulted 11th October 2022.

Europol Public Information (2019 - updated 2021), European Convention for the Protection of Human Rights and Individual Freedoms, https://www.europol.europa.eu/publications-events/publications/women-in-islamic-state-propaganda

Faye, Jean-Pierre (2003) *Introduction aux langages totalitaires*, Herman, Paris.

GLOBSEC (2018); The Midterm Report "Who are the European jihadis? From criminals to terrorists and back?" https://www.globsec.org/publications/who-are-european-jihadis-from-criminals-to-terrorists-and-back/, 11/09/2018, consulted Juin 27th 2022.

Journal Le Monde, 5th July 2022.

Journal Le Monde, 14th September 2022.

Khalil, Lydia (2019) *Behind the Veil: Women in jihad after the caliphate* https://www.lowyinstitute.org/publications/behind-veil-women-jihad-after-caliphate

Klemperer, Victor (1996) *LTI: la langue du IIIe Reich*, Albin Michel Paris.

Lahoud, Nelly, (2018) *Empowerment or Subjugation: A Gendered Analysis of ISIL Messaging*; UN Women.

Loi N° 2010-1192. Loi interdisant la dissimulation du visage dans l'espace public.

Makanda Joseph (2019) Terrorism and Subordination of Women in the ISIS, *GÉNEROS –Multidisciplinary Journal of Gender Studies* Vol. 8 No.2 June 2019 pp. 135-159.

Merloz, Florence (2021) "La question inédite du rapatriement des familles françaises de djihadistes devant la CEDH », *Civil Dalloz Actualité.htm*#.YrlivuzP21s, consulted June 27th 2022.

Miller, Elizabeth L. (2020) *An analysis of women and terrorism: perpetrators, victims, both?* Master's thesis, Faculty in Middle Eastern Studies The City University of New York, consulted June 27st 2022.

Orwell, George (2018). *1984*, São Paulo, Companhia das Letras, 37° ed.

Recourt, Glen (2022). Prison de Rennes. Quartier pour les femmes radicalisées : un an d'existence et des motifs d'espoir, *Reportage Ouest-France*, 09/09/2022. https://www.ouest-france.fr/bretagne/ille-et-vilaine/prison-de-rennes-quartier-pour-les-femmes-radicalisees-un-an-d-existence-et-des-motifs-d-espoir, consulted 29th September 2022.

Roynard, Romy (2021) Nadia Murad, ancienne esclave sexuelle de Daesh, *Entretien Newsletter National Geographic*. https://www.nationalgeographic.fr/actualites/nadia-murad-anciennes esclaves, consulted June 27th.

Spivak, Gayatri Chakravorty (1988) "Can the Subaltern Speak ?", In: Cary Nelson, Lawrence Grossberg (ed.) *Marxism and the Interpretation of Culture*, Chicago, University of Illinois Press, pp. 271-313,

Sallon, Helène, Ayad Christophe (2022) France repatriates 16 women and 35 children from Syria in change of policy, *Le Monde*, 5th July 2022.

Statista Research Departement (2021) https://fr.statista.com/themes/6482/l-islam-en-france/11 janv.

United Nations Human Rights Report (2021). Syria: UN experts urge 57 States to repatriate women and children from squalid camps, February.

United Nations Convention on the Rights of the Child (UNCRC), November 1989.

Williams, Patrick; Chrisman, Laura (1994). *Colonial Discourse and Post-Colonial Theory*, London, Routledge.

Winter, Charlie (2018) Report ISIS, *Women and Jihad: Breaking With Convention*, Tony Blair Institute for Global Change

https://institute.global/sites/default/files/articles/ISIS-Women-and-Jihad-Breaking-With-Convention.pdf posted on: 13th September 2018, consulted on 3 May 2022.

18. The recognition of asylum seeker and the Luhmannian panorama regarding modern society

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Introduction

Among the consequences of the globalized world, there was an exponential increase in the number of people migrating around the planet. Faced with the numerous reasons why people migrate, there is a search for study, employment, security and protection.

According to the United Nations High Commissioner for Refugees (UNHCR, S.d.), there are currently approximately 25.4 million refugees worldwide. It is a growing scenario, in which wars and armed conflicts are among the factors that most force people to seek protection in other countries.

In this sense, since 1948, the Universal Declaration of Human Rights provides in its article 14, that persons who are victims of persecution have the right to seek and enjoy asylum in other countries. Thus, considering that refuge is an institute that allows the granting of protection by a country to migrants, and given the high number of refugees, it is necessary to analyze how the process of requesting refugee status takes place.

The subject in question will be treated from the perspective of Niklas Luhmann's theory of autopoietic systems. In view of Luhmann's theoretical complexity, it is not intended to reconstruct all stages of Luhmann's thought, nor all the problems that surround it. However, it is intended to summarize some basic concepts of the Theory of Autopoietic Systems to later seek an approximation with the theme of the asylum request.

Thus, given the choice of Niklas Luhmann's systemic framework, it is necessary to make a digression through what the author understands about society under the law, especially in relation to Brazil. Therefore, this work seeks to present characteristics about the Law of Modern Brazilian Society, so that the nexus between the refugee's dignity and the sociologist's vision is possible.

In this area, the research problem is the analysis of the possibility of the correlation between the dignity of the asylum seeker and Niklas Luhmann's theory of autopoietic systems in modern Brazilian society.

Therefore, it is hypothesized that (i) it is possible to correlate the themes through inclusion and exclusion, even though Luhmann has not addressed the theme directly, or that (ii) the correlation is not possible, considering that Luhmann did not deal with the theme and, therefore, there are no elements of connection.

In this way, brief aspects about dignity, the process and the condition of refugees, as well as Brazilian legislation, will be addressed. Thus, even though Luhmann has not specifically addressed the issue, we seek to present considerations by the sociologist in order to relate the themes to Luhmann's thought.

Thus, in order to reach the main conclusions, the inductive method will be used, and the methodology will start from the analysis of primary sources (such as reports and documents from the United Nations High Commissioner for Refugees) and secondary bibliographic sources on the themes listed herein.

1. The autopoietic systems theory and Brazilian society

Considering that the system is the essential element of systems theory, it is essential to indicate what they represent for Luhmann. Systems, in the interpretation of Gonçalves and Villas Bôas Filho, "are able to organize and change their structures from their internal references, produce their elements and determine their own operations" therefore, they produce themselves (Gonçalves and Villas Bôas Filho 2013: 43).

In this sense, regarding the opening and closing of the systems, Luhmann presents that the closing is the condition of possibility of opening. Thus, it takes "difference" as the basis of the concept of "system," and, for that, it uses the concept of "form" by George Spencer-Brown, who understands that form is related to operation, with form being an operation of indicating and distinguishing, that is, indicating means simultaneously to distinguish, and distinguishing simultaneously means to indicate (Gonçalves and Villas Bôas Filho 2013: 44). Thus, it is understood that the inclusion indicates the internal side of the form, and the exclusion indicates the external side.

Faced with the idea that form is the border line that establishes the distinction between two sides, it appears that the condition of existence of either side is the existence and presence of the other. Thus, it is possible that the condition of existence is reciprocal differentiation.

Therefore, Luhmann works with two alternatives, as he operates and keeps both sides of the system/environment distinction active. In this way, the concept of system autopoiesis gains greater scope, and should be read from the point of view of the process of differentiation between the system and the environment.

Within systems, there are subsystems, which are operatively closed, as these operations are not determined by the environment. Thus, for Luhmann, society is an autopoietic system whose basic element is communication, and individuals are autopoietic systems whose basic element is consciousness, which are reciprocally external (Villas Bôas Filho 2009: 90).

Therefore, for Luhmann, modern society is characterized by functional differentiation, responsible for fragmenting the global social system into several self-referential and autopoietic functional subsystems (Villas Bôas Filho 2009: 82). Thus, through functional differentiation, modern society admits the autonomous subsystems that compose it. If the subsystems were not autonomous, the

dissolution of modern society could occur through the loss of priority of one of these over the others[147].

For Luhmann, one of the main indicators that there is a legal system in world society would be the violations of human rights, which today are understood not only as protection rights, but also as welfare rights, especially in cases of greatest need (Luhmann 2006: 651).

Regarding the problem of validating human rights at the international level, this is due to the fact that many countries are not democratic states under the rule of law. As a result, they refuse to promote human rights, excluding part of the population, on the most varied grounds, such as ethnic and political ones (Neves 2005).

In this sense, Luhmann understands that there are problems that can only be solved at the level of world society, and cannot be problematized in partial political systems except from a local point of view, thus, they can no longer be addressed in the form of law (Luhmann 1985: 154). In such cases, the legal texts themselves reject the idea of human rights as universal, aiming at preserving the constitutional hierarchy.

Luhmann understands that in the global context of interaction on a world scale, universal possibilities of communication and world peace are constituted, with periodic and regional exceptions (Luhmann 1985: 154). Thus, in Neves' interpretation, human rights only develop productively in today's modern society, through complex forms of institutionalization of procedures at a global or international level (Neves 2005).

With regard to law as a subsystem of modern society, given that modern society is characterized by fragmentation and polycentrism, it is necessary to understand how law imposes its self-descriptions to other subsystems, intending, in this way, to regulate them. Although the other subsystems also have

[147] "If each subsystem operates and observes both its interior and its exterior from its constitutive distinction that is carried out through a code (lawful/unlawful for law; true/false for science; government/opposition for politics; have/have not for economics, etc.), it is not possible for one of these subsystems to have preponderance or even any form of direct regulation over the others, since this would mean the superimposition of its code over that of the other subsystems, which, in turn, would cause them to become corrupted". (Gonçalves and Villas Bôas Filho 2013: 81).

their own codes to define their unity and reduce internal complexity, the aim here is to deal with the law subsystem in greater detail.

Thus, in the interpretation of Gonçalves and Villas Bôas Filho, the problem of law in a society characterized by its functional differentiation is intensified in terms of the possibility of legitimizing this right. This is because "it cannot find in any other instance but in itself the foundation for itself, and it cannot intend to intervene directly in other social subsystems" (Gonçalves and Villas Bôas Filho 2013: 81).

In this sense, law is part of the functionally differentiated modern society, as it is seen as essentially changeable and dynamic. For Luhmann, modern positive law is conceived as a self-referential and autopoietic subsystem of the global social system. To this end, it absorbs frustrations in the temporal dimension through sanctions, generalizes expectations in the social dimension through fictitious consensus, giving them immunities in the material dimension (Gonçalves and Villas Bôas Filho 2013: 97).

To illustrate how it works, Luhmann compares the law to an "immune system" of society. This is because an immune system does not require knowledge of its surroundings, but it has the need to record internal conflicts and develop solutions for conflicts that may arise (Luhmann 2006: 642). Thus, with regard to the affirmation of law, this can be understood as an essentially reflexive mechanism, where it starts to self-regulate its creation and change.

Modern society is marked by the close link between positive law and the process of functional differentiation. However, this link causes problems for the legal system, especially when it comes to the capacity for regulation and its legitimacy, since social differentiation prevents hierarchy between systems (Gonçalves and Villas Bôas Filho 2013: 101 et seq.).

The problem of legitimizing the law stems from the fact that it is not possible to base it on sources that have already been considered unquestionable, such as, for example, natural law, religion and morality (Gonçalves and Villas Bôas Filho 2013: 142 et seq.). Thus, with the social differentiation of a society, the functions that each subsystem performs are fundamental to the global social

system, causing a functional primacy to be established within the subsystem itself, not being institutionalized in the global system.

Given the fact that systems theory presents modern law as a self-referential subsystem, it must find its sources of foundation internally so that it can legitimize itself. Thus, as the law is not sustained in terms of arbitrary imposition, legitimacy is constructive. Therefore, for Luhmann, the problem of legitimizing the law is of a purely internal order to the legal system, presenting itself at the moment in which it is intended to generalize the normative expectations of a right given by legal decisions.

That said, when analyzing the law in Brazilian modernity, it is necessary to verify aspects of social exclusion and the implementation of the role of law. In this sense, it is derived from the understanding of the concept of inclusion and exclusion in Luhmann's theory, based on the differentiation between social systems, which underlie autopoiesis in communication, and psychic systems, which have consciousness as the basis of their autopoiesis (Villas Bôas Filho 2009: 336).

As seen, with the adoption of the term "form", Luhmann understands that inclusion indicates the internal side and exclusion indicates the external side. Thus, inclusion and exclusion refer to the way in which human beings are indicated in the context of communication, so that one can (or not) take them as relevant, or attribute them to the status or not of persons. Therefore, the inclusion of the human being is not the incorporation into society, in the same way that the exclusion is not the expulsion from this scope, that is, the human being can be included in the economic system, but not in the educational system (Villas Bôas Filho 2009: 343 et seq.).

In a society structured on the basis of differentiation, inclusion occurs with insertion in a certain segment, and exclusion occurs when transferring to another community. Thus, it is possible to reflect that, in this context, not being included in a segment can make life practically impossible. So, in modern society, inclusion and exclusion occur, without uniformity, relative to each functional subsystem,

where each one of these establishes internal criteria for inclusion or exclusion (Villas Bôas Filho2009: 343 et seq.).

In this field, the semantics related to this new form of social structuring is developed. In this sense, according to Luhmann, the constitution of the semantics of civil rights is observed, based on freedom and equality, through which premises devoid of discrimination are developed for access to subsystems that can be accessed by individual and free decisions. (Villas Bôas Filho 2009: 346 et seq.).

As a result, inequalities are only justified and legitimized in view of the internal criteria of each functional subsystem. That said, the systemic analysis related to inclusion and exclusion is larger and more complex, allowing an understanding of the relationship between inclusive semantics, correlated in modernity, and the high degree of social exclusion (Villas Bôas Filho 2009: 347).

This is due to the fact that people are always included as points of attribution of the communicative operations of the social system. However, the same does not apply to human beings located outside the environment of society, who may not receive the status of person within the scope of social communication (Villas Bôas Filho 2009: 348).

Luhmann justifies that, with the exclusion in a subsystem, there is the exclusion of others, leading to a kind of chain exclusion, which would lead to the reduction of the excluded to a condition of irrelevance as people, which makes humans beings no longer be considered as persons and be seen simply as bodies (Villas Bôas Filho 2009: 348 et seq.).

Thus, in terms of inclusion, there is no uniform regulation, because, as much as there is inclusion in a subsystem, inclusion in the others is not required, but the same does not happen with exclusion. In view of this, the effects of exclusion are heightened in contexts where, historically, there is a mass formation of excluded people, who are neither seen by others nor do they see themselves as people (Villas Bôas Filho 2009: 350).

Regarding the Brazilian reality, in the interpretation of Villas Bôas Filho (2009: 294 et seq.), inclusion and exclusion in modern Brazilian society preserves

and naturalizes the typical exclusion of traditional forms of social differentiation, having as its own selective form of modernization based on a high rate of exclusion.

Thus, communication has always existed, although structured in different ways with the evolution of society. For Luhmann, the key to evolution lies in social differentiation, given that social systems are functionally isolated, which makes them self-controlled and self-stimulated.

2. Refugee protection legislation

Before approaching legal aspects, it is important to point out that the reflection adopted claims that "human rights are an achievement of modern society, and it is also appropriate to characterize them as an "invention" of modernity" (Neves 2005: 06), however, it is not intended to deny, with this understanding, that there are no historical antecedents to human rights. In this sense, relating to Luhmann's teachings, human rights are connected with the "openness of modern society to the future" (Neves 2005: 06).

That said, within the idea of human rights, there is the notion of dignity, which is irrevocable, inalienable and intrinsic to the human condition itself, and therefore must be recognized, respected, promoted and protected, and cannot be withdrawn or violated (Sarlet 2009: 47). Therefore, the idea of protection and promotion of human rights refers to what people seeking refuge in other countries look for.

The global benchmark when it comes to refugees is the United Nations High Commissioner for Refugees (UNHCR), also known as the UN Refugee Agency. Created in 1950, after the Second World War to help the thousands of people affected by the war, especially on the European continent, the organization is still active to help and protect refugees around the world (UNHCR, S. d.).

Then, in 1951, an international instrument of protection was created, namely the United Nations Convention on the Status of Refugees, which in

addition to addressing aspects of protection, also defines what a person is. Over the years, new flows of refugees brought the need for new forecasts, which happened with the Protocol on the Status of Refugees of 1967, making people victims of other conflicts also receive protection.

In this sense, it is important to differentiate between refugees and migrants. Thus, migrants are those who choose to move, having as an incentive, for example, better living and working conditions. Refugees, according to UNHCR, are outside their country of origin due to fear of persecution that may be related to issues such as "race, religion, nationality, belonging to a particular social group or political opinion, as well as due to serious and widespread violation of human rights and armed conflict" (UNHCR, S. d.).

It is noted, therefore, that migrants, unlike refugees, do not face human rights violations that make them leave their country, and can move freely through their country of origin, in addition to continuing to receive protection from their government. Thus, according to the United Nations Convention relating to the Status of Refugees of 1951, the legal protection granted to citizens of other countries who are in a situation of danger is called refuge (UNHCR 1951).

Furthermore, the refugee must have their basic rights respected by other States, such as, for example, the right of refugees not to be expelled or returned to situations where their life and liberty are in danger (UNHCR 1951). The right of non-expulsion, provided for in art. 33 of the 1951 Convention is also known by the expression "non-refoulement".

Given this scenario, it is necessary to bring the reflection closer to Brazilian society. In this sense, it is important to know that Brazil ratified the 1951 Convention through Decree No. 50,215 of 1961 (BRASIL 1961) and the 1967 Protocol through Decree No. 70,946 of 1972 (BRASIL 1972). In Brazil, Law No. 9,474 of 1997 is responsible for defining mechanisms for the implementation of the 1951 Refugee Statute, establishing the procedure for determining, terminating and losing refugee status, rights and duties of applicants and refugees (BRASIL 1997).

Asylum can be requested directly by the interested person, without the need for a lawyer, and must take place at the Federal Police within the national territory or within its borders. Thus, it is not possible to take place outside the country, even in Brazilian consulates and embassies. The request can occur even if the entry into the country has not been regularized, as this is not an impediment to the recognition of refugee status. In addition to the rights provided for in international documents, refugees and asylum seekers have other rights in Brazil, such as the possibility of obtaining Brazilian documents such as the Work Card and Individual Taxpayer Registration (CPF), as well as attending schools and benefiting from the Unified Health System (SUS).

After the processing by the Federal Police, the National Committee for Refugees (CONARE) - linked to the Ministry of Justice and Public Security (MJSP) - is the collegiate body that brings together government, civil society and UNHCR representatives, in order to formulate the Brazilian policy on refuge, having, therefore, the analysis of requests for refuge made in Brazil (MJSP, S. d.).

If the asylum application is denied, the applicant may appeal against the rejection of the asylum application, and, for that, he can count on the assistance of the Public Defender's Office, for example (Chiaretti and Severo 2018: 85). The appeal must be substantiated, as well as demonstrate the reasons why the applicant believes he or she should have refugee status recognized by Brazil. The authority responsible for deciding the appeals of these requests is the Minister of Justice.

For the analysis of the request and the appeal, the 1951 Convention provides some criteria that must be analyzed, which are presented in "inclusion", "cessation" and "exclusion" clauses. Thus, for the application to be accepted, the applicant must meet the inclusion criteria and not have any of the criteria provided for in the exclusion clauses.

As inclusion clauses, there are situations of discrimination, of well-founded fear of persecution, threats to life or freedom or harmful actions on grounds of race, religion, nationality, social group or political opinions. For this,

it is necessary to demonstrate the refusal of the country of origin to offer protection or even justify the refusal of the individual to seek such protection.

Described in art. 1 C of the 1951 Convention, clauses on the cessation of refugee status include, for example, voluntary reacquisition of protection in the country of one's nationality, voluntary reacquisition of nationality, acquisition of a new nationality, voluntary re-establishment in the country of origin, among others (UNHCR 1951). Given these situations, it is understood that international protection should not be continued by the country that recognizes the refugee status.

Those who, even if they meet the inclusion clauses, are within the exclusion clauses, described in art. 1, items D, E and F, cannot benefit from the recognition of refugee status (UNHCR 1951). Thus, those who already have protection or assistance from the United Nations, those who believe they do not need international protection, those who due to the commission of crimes (of war, against peace or against humanity), or those who committed acts contrary to the purposes and principles of the United Nations.

3. The approach of Luhmann's perspective with the refuge institute

In view of what was discussed about dignity at the beginning of the preceding item, it is important to mention brief traces of Luhmann's thought on the subject. From Luhmann's point of view, the individual achieves dignity from a self-determined conduct and the successful construction of his own identity, that is, dignity is not something intrinsic to the human being, but a condition conquered through a concrete action, not being the task of fundamental rights to ensure dignity, but the conditions for this provision to be carried out (Sarlet 2009: 54).

In this sense, there is criticism that considers this conception of dignity as an equivocal provision, as it would not correspond to constitutional and cultural requirements, considering that what is not used by an individual is not necessarily disposable for another. It should be noted that it is not intended to

address the problem of criticism of this perspective completely. The aim is only to demonstrate that there are criticisms in this regard.

Thus, the problem of Luhmann's view would be related to the fact that the State's task "to protect the process of personality formation would remain unfeasible in attributing this protection only to the result and expression of identity construction" (Sarlet 2009: 54 et seq.). However, it is not possible to affirm that Luhmann has maintained that someone cannot have or can lose dignity because they are not in a position to build it by their own strength.

Therefore, the sense of dignity adopted by Luhmann, in the criticized sense, should not be taken to the extreme, as it jeopardizes the effective legal protection of the dignity of the human person. Therefore, dignity in its provisional perspective sustains a dual dimension, being at the same time an expression of the autonomy of the human person and the need for protection by the State (and the community), especially when it shows signs of fragility or absence of self-determination capacity.

That said, we follow the thinking of Marcelo Neves, who understands that with the conquest of new citizenship rights, the semantics of human rights appears in the sense of a "moral or evaluative requirement of the recognition and satisfaction of certain normative expectations that emerge in the society and are evaluated as essential for the integration of individuals and groups" (Neves 2006: 182 et seq.). In this sense, semantics assumes not only the development of universalist moral representations, but also the complexification and differentiation of society into autonomous spheres, where they must be oriented towards the construction of citizenship.

In this vein, Villas Bôas Filho interprets that, for Luhmann, the relationship between semantics and the structure of society does not operate in causal terms. In fact, the changes that have taken place in the social structure make it necessary to adapt its self-descriptive semantics. If this were not the case, there would be a deficit of reality and consistency in social self-descriptions, which would become separated from social reality (Villas Bôas Filho 2009: 193).

Therefore, as a result of the structural rupture arising from the emergence of modern society, the idea of human rights emerges, verifying that the semantics of human rights develops together with the structural transformations that lead to a conflicting plurality of expectations, values and interests between the systemic spheres.

Therefore, in suggesting that the discussion on human rights from the perspective of a global legal system should focus on the problem of flagrant and scandalous offenses or violations of human dignity, Luhmann adopts a restrictive semantics (Neves 2006). In this sense, Luhmann understands that:

> One can only speak of the nature of violations in relation to human dignity. Restrictions of human rights to freedom and equality - also considered as human rights - are so normal and necessary that one is obliged to grant a higher field of action to state legal orders (qua "legal reserve"). Basically, what is at issue here is not at all the unity of a norm (of an idea of a value), but the formal paradoxes of the distinctions freedom/restriction and equality/inequality, which can then be developed in various ways in particular legal systems. In other words, it is a question of future perspectives that converge in the indeterminable. Nevertheless, here, too, there would seem to be a globally applicable sensibility (Luhmann 2006: 658).

Therefore, when performing an interpretation of Luhmannian semantics, Neves understands that there are human rights violations that can imply an absolute social exclusion of some human groups, which "has also been seen as a blatant and scandalous violation of "human dignity" and, therefore, to human rights as a generalized legal inclusion" (Neves 2006).

In face of this, in view of the explanation of the clauses of inclusion and exclusion of refugees, we seek to bring the theme closer to what Luhmann understands by the distinction between inclusion and exclusion in functionally differentiated modern societies. The approach will be based on the article called "Inclusión y Exclusión" written by the author (Luhmann 1998: 167-195).

For Luhmann, the distinction between inclusion and exclusion is an internal distinction of the system, which means that it should only be applied within the scope of communication. Thus, as seen, inclusion represents the internal part and exclusion the external part, which makes it possible to speak of inclusion only if there is exclusion. On the subject, the author understands that the task of theory would be to relate the differentiation between inclusion and exclusion with the requirements of the formation of systems, and, especially, on the consequences of certain forms of differentiation that appear in the course of social evolution (Luhmann 1998: 171 et seq.). Therefore, to conceptualize an inclusive distinction, one must have what will be excluded, which can be referred to as the way to have them as relevant in the communicative context of human beings.

Thus, Luhmann explains that it is easy to recognize people as human beings, which makes their exclusion need legitimation (Luhmann 1998:172). However, exclusion can mean the exchange of subsystems, but also the separation in the strict sense of society from "vulnerable" individuals.

Given the above, it is noted that inclusion and exclusion depend on the internal devices of a society, which means that society must renounce a kind of uniform regularization, allowing each social system to have its own determination criteria.

Therefore, considering that generally exclusion in one social system can lead to exclusion in others, Luhmann considers that this can be recognized by the rupture of reciprocity (Luhmann 2006: 662 et seq.). In this wake, the author considers that human beings are no longer considered as people and become simply bodies (Villas Bôas Filho 2009: 349), causing the loss of the right to have rights (Arendt 1998: 330).

Final remarks

Given the above, it is possible to verify that human rights correspond to the social demands of autonomy of the subsystems, since the subordination of law and knowledge to politics is incompatible with human rights. Therefore, as

seen, the functionally differentiated society contains pressures for dedifferentiation, which makes possible the perception that this type of society causes inequalities and imbalance with the attempts of inclusion.

Therefore, if some other subsystem, such as the economy or politics, is expanded in non-differentiating proportions, the result is the rejection of the autonomy of law, which leads to the opposite direction to the affirmation of human rights. In this way, legal inclusion in the world society level occurs through human rights, because, given that all people are holders of human rights, there is the universalization of the right. Thus, being autonomous law, human rights can be seen as a means of inclusion of anyone in world society.

Therefore, the legal exclusion of refugees can be seen as the denial of human rights to this group, because if for Luhmann, the exclusion of a system means the probability of exclusion from other systems, it is possible to think that by denying the recognition of the condition as a refugee, one would also be denying access to politics, culture, for example.

So, in order to avoid exclusion, the mechanisms of Public International Law to host and protect these vulnerable groups must be analyzed. Thus, internationally, the development of social semantics is observed through the legal textualization of human rights in conventions and treaties, such as the Universal Declaration of Human Rights.

Therefore, with regard to the research problem, which sought to analyze the possibility of the correlation between the dignity of the asylum seeker and Niklas Luhmann's theory of autopoietic systems in modern Brazilian society, the hypothesis that stated it is possible to correlate the themes through inclusion and exclusion is confirmed, although Luhmann did not address the theme directly.

Finally, it is understood that the non-recognition of the refugee status of those who have no impediments, can be related to Luhmann's statement that with exclusion, human beings are no longer considered as people and are seen as simple bodies. This is because the non-inclusion of the refugee status is at the same time the exclusion of protection for that person, which causes, with the request denied, to lose the right to have rights, becoming a mere body.

References

Arendt, H (1998) *As origens do totalitarismo*, translation Roberto Raposo (São Paulo, Companhia das letras).

Brasil (1961) *Decree No 50,215, of 28 january1961.* Enacts the Convention relating to the Status of Refugees, concluded in Geneva on 28 July 1951.

Brasil (1972) *Decree No 70,946,* 7 august 1972. Enacts the Protocol on the Status of Refugees.

Brasil (1997) **Law No 9,474, 22 july 1997**. Defines mechanisms for the implementation of the 1951 Refugee Statute, and determines other provisions.

Chiaretti, D and Severo, F (2018) *Comentários ao Estatuto dos Refugiados* (Belo Horizonte: Editora CEI).

Gonçalves, GL and Villas Bôas Filho, O (2013) *Teoria dos sistemas sociais: direito e sociedade na obra de Niklas Luhmann* (São Paulo: Saraiva).

Luhmann, N (2006) *El derecho de la sociedad*, translation Javier Torres Nafarrate (México: Herder).

Luhmann, N (1998) 'Inclusión y exclusión' *in Complejidad y Modernidad: de la unidad a la diferencia* (Madrid: editorial Trotta) 167-195.

Luhmann, N (1985) *Sociologia do Direito II*, translation Gustavo Bayer (Rio de Janeiro: Edições Tempo Brasileiro).

Ministério da Justiça e Segurança Pública. *Conare.* Available: https://www.justica.gov.br/seus-direitos/refugio/conare. Acess 05 dez. 2020.

Neves, M (2005) 'A força simbólica dos direitos humanos' *Revista Eletrônica de Direito do Estado* (Salvador, Instituto de Direito Público da Bahia, nº 4, out/nov/dez) Available: www.direitodoestado.com.br. Access: 03 dez. 2020.

Neves, M (2006) *Entre têmis e leviatã: uma relação difícil: o Estado democrático de direito a partir e além de Luhmann e Habermas* (São Paulo Martins).

Sarlet, IW (2009) *Dignidade da pessoa humana e direitos fundamentais na constituição federal de 1988* (Porto Alegre: Livraria do Advogado).

United Nations High Commissioner for Refugees (1951) *Convenção relativa ao Estatuto dos Refugiados*. Available: https://www.acnur.org/fileadmin/Documentos/portugues/BDL/Convencao_relativa_ao_Estatuto_dos_Refugiados.pdf. Access 05 dez. 2020.

United Nations High Commissioner for Refugees. *Refugiados.* Available: https://www.acnur.org/portugues/quem-ajudamos/refugiados/. Access 05 dez. 2020.

Villas Bôas Filho, O (2006) *O direito na teoria dos sistemas de Niklas Luhmann* (São Paulo: Max Limond).

Villas Bôas Filho, O (2009) *Teoria dos sistemas e o direito brasileiro* (São Paulo: Saraiva).

Part IV. Legal process and legal organization

19. *Advocacia Popular* (People's Lawyering) and Transnational Legal Activism: Conceptual Contours in Light of the Epistemologies of the South[148]

Cecília MacDowell Santos

Flávia Carlet

1. Introduction

Several social organizations and movements in Brazil and Latin America have mobilized the law and justice systems at the local, national, and international levels as part of their strategies of social struggle. In recent years, various socio-legal studies on the subject have been developed. However, we observe a conceptual confusion regarding different legal and political practices of legal mobilization. The terms 'public interest lawyering' and 'strategic litigation' are commonly confused in the literature with practices of '*advocacia popular* (people´s lawyering)' and 'transnational legal activism'. We are concerned about the lack of clear criteria in the application of a concept to designate different practices. With respect to people´s lawyering, the literature has not paid sufficient attention to its interface with transnational legal activism. Moreover, the literature generally focuses on the strategies and impacts of legal mobilization, neglecting the epistemological dimension of struggles for justice. It thus fails to address the construction of knowledge about rights within these struggles and the unequal power relations among different epistemic

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communities (for exceptions, see Aragón Andrade, 2019a, 2019b, Carlet 2019, C. Santos 2018).

In this chapter, we propose to delimit and deepen the conceptual contours of people´s lawyering and transnational legal activism. Based on our research trajectories engaged in the sociology of law and the field of human rights, we are interested in contributing to a conceptual reflection on people´s lawyering and transnational legal activism, seeking to understand the specificities of these practices, as well as the forms and contexts in which they intersect. Furthermore, we are interested in understanding these practices in the light of the Epistemologies of the South framework proposed by Boaventura de Sousa Santos (2014).

The founding categories of the Epistemologies of the South, especially the 'ecology of knowledges' and 'intercultural translation', help us to clarify the conceptual confusion and omission that we have identified in the literature, allowing us to establish more precise criteria to distinguish and refine the conceptual contours of people´s lawyering and transnational legal activism, and, consequently, of other practices of legal mobilization aimed at legal, political, and social change. The metaphor of the ecology of knowledges sheds light on the plurality of experiences and legal and extra-legal knowledges, constructed by social struggles in different epistemic communities. Intercultural translation serves to distinguish legal practices based on dialogical and horizontal constructions of legal and extra-legal knowledges.

We include here a biographical note on each co-author to explain how our research has served as a source for this chapter. The first co-author, Cecília MacDowell Santos, has dedicated herself, since 2006, to the study of transnational legal activism, a term she coined to account for the practices of non-governmental organizations (NGOs), social movement actors, and victims/survivors of human rights violations who brought complaints against the state of Brazil to the Inter-American Commission of Human Rights (C. Santos 2007). Based on semi-structured interviews with various actors of civil society and the Brazilian state, observation in hearings, and participation in events organized by these actors, as

well as archival research on legal documents and reports of the Inter-American Commission on Human Rights (IACHR), Cecília Santos has published a series of papers and book chapters on cases related to the themes of domestic violence against women (Márcia Leopoldi and Maria da Penha cases), discrimination against black women (Simone Diniz case), political memory of the dictatorship (Guerrilha do Araguaia case), and violence against indigenous peoples (Xucuru case) (see, for example, C. Santos 2007, 2009, 2016, 2018). Between 2011 and 2016, she was part of the 'ALICE – Strange Mirrors, Unsuspected Lessons' project team, coordinated by Boaventura de Sousa Santos at the Centre for Social Studies at the University of Coimbra.

Flávia Carlet was a people's lawyer of the National Movement of Small Farmers. Since 2003, she has participated in the National Network of People's Lawyers (Rede Nacional de Advogados e Advogadas Populares - RENAP). For the last fourteen years, she has dedicated herself to the theoretical and empirical study of people's lawyering in Brazil, using the methods of participant observation, ethnography, and in-depth interviews with people's lawyers, *quilombola* communities[149], and rural social movements (see, for example, Carlet 2010, 2013, 2015, 2016). Her Ph.D. dissertation analyzed the experience of two non-governmental organizations focused on the defense of the collective rights of *quilombola* communities in Brazil and Ecuador (Carlet 2019). Based on the theoretical proposal of the Epistemologies of the South and on extensive fieldwork, she compared the practice of people's lawyering and public interest lawyering with respect to their work pedagogy and their relationship with the communities they serve. From 2018 to 2022, she was a member of the research project 'El Diálogo de Saberes y las Prácticas Jurídicas Militantes en América Latina', based at the Universidad Nacional Autónoma de México and coordinated by Orlando Aragón Andrade. The first co-author was also a member of this project.

[149] A *quilombola* community is composed of descendants from the black African population that was trafficked and enslaved in Brazil during colonial times and until the abolition of slavery in 1888.

In our research, we found specific characteristics of people´s lawyering and transnational legal activism that do not fit entirely into the concepts of public interest lawyering and strategic litigation, although they may be similar (in some respects) to these forms of legal mobilization. We also noticed specificities and intersections between the practices of people´s lawyering and transnational legal activism.

We argue that the specificities of people´s lawyering and transnational legal activism refer to the scales of action and the methodology of the use of law in the face of social struggles and marginalized groups. People´s lawyering generally operates at the local and national levels. Transnational legal activism refers to the use of law beyond the borders of the nation-state. Moreover, the methodology of people´s lawyering is distinct from that carried out by other forms of legal mobilization. It is a methodology constructed 'with' (not only 'for') communities and social movements, performing a cross-cultural translation between state and non-state legal practices and knowledges. Transnational legal activism is not characterized by this methodology, but it has the potential to include it if it is practiced in partnership with people´s lawyering. One of the challenges facing transnational legal activism, from the perspective of the Epistemologies of the South, is to promote the translation of legal knowledges between state and non-state actors, both locally and at the international scale of legal mobilization. Thus, depending on the degree of translation of mobilized legal knowledges, social movement actors can use the law not only to promote social justice, but also cognitive justice.

This chapter is divided in three parts, besides this Introduction. The first part addresses the concepts that we identified in the literature on different practices of legal mobilization aimed at legal, political, and social change. In the second part, we delve into the concepts of people´s lawyering and transnational legal activism in the light of the Epistemologies of the South, discussing these concepts as we applied them to three case studies. Finally, we present our main conclusions.

2. Legal mobilization practices: confusions and conceptual contours

In this section, we address four forms of legal mobilization referred to in the literature on the topic in Brazil and Latin America: public interest lawyering, strategic litigation, transnational legal activism, and people´s lawyering,. We do not intend to conduct a thorough review of the literature, but rather to demarcate the conceptual contours of legal mobilization practices that seek to promote legal, political, and social change.

We consider that these practices correspond to the broader category designated in the North American literature as 'legal mobilization'. It is not our purpose here to refer to the vast literature on the theme in the United States. But we build on it to point out that, from a broad socio-legal perspective and in line with Michael McCann (2008), legal mobilization can occur inside and/or outside the courts, through the initiative of state and non-governmental actors, in favor of individual and/or collective rights. It can also be guided by a liberal-individualistic and Eurocentric model of advocacy, hegemonic in capitalist and colonized societies. Or it can be practiced in an alternative way, as illustrated by the modalities of legal mobilization examined in the second part of this chapter.

2.1. Public interest lawyering

The origin of public interest lawyering dates to the 1960s in the United States, when a segment of legal professionals, dissatisfied with the situation of social inequality in the country, began to act either on behalf of poor citizens who could not access the justice system, or in support of social groups that sought to expand political gains through legal means (Sá e Silva 2015). Although it constitutes a North American experience, the term has been exported to the contexts of Latin America, Africa, Asia, and Eastern Europe, through a process of wide institutional propagation (Sá e Silva 2015).

In the Latin American region, this type of advocacy expanded in the 1990s to designate the practices of public interest legal clinics developed in law schools,

which – influenced by the U.S. legal clinics – used strategic litigation on human rights and public interest issues, such as the environment, indigenous rights, and the rights of migrants (Coral-Díaz *et al.* 2010). Since then, the concept has been adopted in the region to comprehensively designate a variety of experiences of legal mobilization in defense of individual and collective rights, which are distinct from so-called traditional lawyering and North American public interest lawyering.

We noticed, however, a profusion and confusion of concepts of public interest lawyering, as well as divergences as to its greater or lesser scope in relation to various legal practices. In the 1980s, Joaquim Falcão (1986) identified the specificities of the North American public interest lawyering, arguing that it should not be confused with the experience of legal services that he considered innovative in the Latin American context. Opting not to use the term, the author points out that public interest lawyering in the United States included lawyers whose professional profile was characterized by technical-legal training coming from law schools, and whose goal was to improve the functioning of the Judiciary and enforce the legislation. The 'innovative advocacy' in Latin America, on the other hand, was exercised by a profile of lawyers that transcended technical training due to their political-militant engagement, directed at defending the rights of socially and economically disadvantaged people, with the goal of transforming the structure of the Judiciary and the laws in force in favor of their claims (Falcão 1986: 17-19).

More recently, Fábio Sá e Silva (2012, 2015) also identified differences between public interest lawyering practices in the United States and in Latin America. But he kept the same designation for the two contexts. In his comparative analysis, he found that U.S. public interest lawyering supports social groups and individualized demands, using litigation as a significant component of its practice (although it also mobilizes education strategies and media campaigns). In Latin America, he found that public interest lawyering advises a 'larger scale clientele' (groups, communities, and social movements) and has as its main method 'impact litigation' in the domestic and international

spheres, 'always in close connection with non-legal strategies' (Sá e Silva 2015: 332-334).

Some authors define public interest lawyering as a practice exercised through law firms that provide free legal advice to individual cases and legal clinics in law schools (Rekosh *et al.* 2001). Also included in this category are human rights NGOs 'with preferential action of the advocacy or strategic litigation type focusing on the constitutional jurisdiction of the Supreme Court and international human rights bodies' (Almeida and Noronha 2015: 22).

The concept of public interest lawyering has also been used to frame people´s lawyering, concealing the specificities of the latter, as exemplified by the research entitled 'Public Interest Lawyering in Brazil', developed by the Brazilian Center for Analysis and Planning (CEBRAP) for the Secretariat for Judicial Reform (SRJ) of the Ministry of Justice (SRJ 2013).[150] For this study, public interest lawyering encompasses the experiences of civil society in defense of human rights, such as people´s lawyering, university extension programs at law schools, human rights NGOs, and *´promotoras legais populares'* (people's legal female advocates), in addition to the state's litigation bodies, such as the Public Prosecutor's Office and the Public Defender's Office. These experiences are considered expressions of public interest lawyering to the extent that '[...] they converge with respect to the target audience (low-income population, minority or discriminated social groups, and diffuse interests, for example), the thematic agenda (defense of certain rights), the ultimate goal (to promote social transformation), and the work method (client or issue-oriented, strategic litigation, etc.)' (SRJ 2013: 13).

Contrary to such generalization, a narrower conception of public interest lawyering clearly distinguishes it from people´s lawyering (Assis 2021, Carlet 2019, Manzo 2016). According to Mariana Manzo (2016), some of the aspects that

[150] The research was supported by the Secretariat for Judicial Reform, the United Nations Development Program, and the Brazilian Center for Analysis and Planning. It was conducted by the following team: José Rodrigo Rodriguez (coordinator), Evorah Cardoso, Fabíola Fanti, and Iagê Zendron Miola. The results of this research were also published in Cardoso, Fanti and Miola (2013).

differentiate the two modalities consist in the place that law and politics occupy in the practice of law, as well as the degree of engagement of the lawyers in relation to the causes in which they act. In public interest lawyering, the law plays a central role, so that greater emphasis is placed on judicial strategies – namely, strategic litigation – and strategies related to state institutions. In people´s lawyering, on the other hand, the use of legal strategies is combined with a broader political and social mobilization. Moreover, although public interest lawyers also represent marginalized social groups, they do not always participate or are directly engaged in their struggles, as people´s lawyers do (Manzo 2016).

Similarly, Mariana Prandini Assis (2021) states that people´s lawyering and public interest lawyering inhabit the legal field differently. First, they have different historical origins. While public interest lawyering is a transposition of a U.S. model to newly re-established southern democracies, people's lawyering is closely connected with the emergence of various social movements during the re-democratization in the 1980s (Assis 2021). They also establish different types of relationship with the individuals or groups they assist. Public interest lawyering reproduces a vertical and hierarchical relationship, whereas people's lawyering establishes a horizontal and dialogical relationship (Assis 2021).

Flávia Carlet (2019) adds that the pedagogy of work adopted 'with', and not 'for', the groups advised substantially demarcates the differences between people´s lawyers and public interest lawyers. People´s lawyers closely follow the struggle of the social movements and marginalized groups that they advocate for, valuing their knowledge, autonomy, and political decisions on legal and extra-legal strategies. In contrast, public interest lawyers are mainly focused on their own legal knowledge, and their legal strategies are normally not discussed and defined with the groups they advocate for (Carlet 2019).

2.2. Strategic litigation

Strategic litigation is a type of legal mobilization carried out by organizations and social groups that are active in the defense of human rights, by choosing cases that are considered paradigmatic and bringing them before the courts. This type of litigation – also called impact litigation – has as its main purpose '[...] to draw attention to human rights abuses and violations and to highlight the obligation of the State to comply with its national and international obligations' (Carvalho and Baker 2014: 467).

The purpose of achieving a high public impact can result from acting within different institutional fields: in the Judiciary, to obtain a sentence that directly compensates victims of human rights violations or prevents violations of human rights; in the Executive, to achieve public policies that help solve a case; and in the Legislative, to promote legislative changes on certain issues, such as women's rights, environmental law, and combating racial discrimination (Cardoso 2012, Cels 2008, Correa Montoya 2008, Duque 2014).

Strategic litigation includes the following essential procedures: (1) prior choice of cases considered paradigmatic, since they will be the tools to obtain the desired impact; (2) definition of the goals that one wants to achieve or of the advancements one wants to foster; and (3) bringing these cases to court (combined or not with political and social strategies). The selection of cases, as a rule, corresponds 'to the interests and agenda of the entity responsible for the litigation' and follows a strategic plan, with judicial and non-judicial techniques (Cardoso 2011: 367).

Strategic litigation can be conducted through the judicialization of cases at the national level, in domestic courts, or at the international level, before international human rights bodies. This type of litigation represents the main method used by public interest lawyers in Latin America, as they act primarily within state institutions and through the judicialization of cases, resulting in the prominence of legal and judicial strategy over social and political strategies (Manzo 2016). The goal is to generate transformative legal and judicial

precedents and make visible the social problems ignored by the justice system (Sá e Silva 2015).

Evorah Cardoso (2019) distinguishes strategic litigation from other legal practices based on what the author calls 'global agenda' and 'native practices,' considering the types of actors and the methods of each advocacy. The author includes in the global agenda the strategic litigation method, defined as issue or cause-oriented, practiced by human rights NGOs and legal clinics within universities. She also includes in this 'global agenda' *pro bono* lawyering, carried out by corporate law firms. Regarding 'native practices', the methods and social actors are the following: people´s lawyering, carried out by networks and groups of people´s lawyers and legal consultancies available at universities; free legal advice, carried out by legal programs at universities; legal aid, practiced by the Brazilian Bar Association (Ordem dos Advogados do Brasil, OAB), Public Prosecutor's Office, and Public Defenders' Offices.

In our view, this classification has the merit of distinguishing practices that are usually confused and amalgamated in the concept of public interest lawyering. Furthermore, it demarcates the difference between the legal practices of professionalized NGOs and people´s lawyering. However, the criterion of 'global agenda' *versus* 'native practices' seems mistaken to us, ignoring the historical background of public interest lawyering in Brazil and in Latin America, where one cannot separate the 'global' from the 'native'. The experience of strategic litigation, in turn, is not necessarily international. The terms 'global agenda' and 'native practices' denote a rigid separation between the global and the local, concealing the relationship between the two scales and the alliances created between different actors in the transnational and trans-local practices of legal mobilization. The actors are not static; they can change their legal strategies over time. As we have argued in this chapter, scales and methodologies of lawyering are key criteria for conceptualizing specific legal mobilization practices. But scales are not to be confused with 'global' or 'native' agendas. They refer to the levels of action at local, national, and international social and institutional spaces. The methodology criterion concerns the ways in which

different actors relate to each other and the knowledge they build in the process of mobilizing the law.

The Latin American literature often focuses on the use of strategic litigation in the international arena, especially within the Inter-American Human Rights System (IAHRS) of the Organization of American States (OAS) (see, *e.g.*, Cardoso 2012, Carvalho and Baker 2014, Duque 2014). Some international NGOs active in Latin America and the Caribbean, such as the Center for Justice and International Law (CEJIL), specialize in the practice of strategic litigation on an international scale, bringing paradigmatic cases of human rights violations to the IAHRS and mobilizing United Nations (UN) human rights bodies. CEJIL was founded in 1991 by a group of Latin American human rights defenders, with the goal of using international law and the IAHRS for the protection of human rights in the region. CEJIL has offices in several countries in Latin America.

In Brazil, in addition to CEJIL, the NGO Justiça Global (Global Justice), founded in 1999, specializes in strategic litigation at the national and international scales, also working in the areas of research, communication, and training for human rights defenders. The Gabinete de Assessoria Jurídica às Organizações Populares (GAJOP, Cabinet for Legal Consultancy to People's Organizations), an NGO founded in 1981 and headquartered in the city of Recife, created in 1998 a program specifically geared towards the mobilization of human rights at the international scale, using strategic litigation before the IAHRS and activating the UN through denunciations and campaigns (C. Santos 2007).

According to Par Engstrom and Peter Low (2019), CEJIL, followed by Justiça Global, are the two NGOs with the largest number of cases filed against the state of Brazil before the IAHRS between 1999 and 2014. In her research on cases concerning 'women's human rights,' Cecília Santos also noted that CEJIL appears as one of the petitioners in five of the ten cases against the state of Brazil identified by the author in the annual reports of the Inter-American Commission

on Human Rights (IACHR), published between 1969 and 2017.[151] Justiça Global was a partner with other NGOs in three cases concerning women's human rights.

The Latin American and Caribbean Committee for the Defense of Women's Rights (Comitê Latino-Americano e do Caribe para a Defesa dos Direitos da Mulher, CLADEM), a transnational and regional feminist network founded in 1993 with offices in several countries, has specialized in the use of strategic litigation, although it is not restricted to such a strategy of human rights mobilization. Cecília Santos identified three cases on women's human rights presented by CLADEM against the state of Brazil before the IACHR: the first in collaboration with CEJIL and one of the victims; the second together with the União de Mulheres de São (hereafter, União de Mulheres), a grassroots feminist organization created in the city of São Paulo in 1981; and the third in partnership with Themis – Gender, Justice and Human Rights, a feminist NGO created in Porto Alegre in 1993, and together with the Latin American feminist network Católicas pelo Direito de Decidir (Catholics for the Right to Choose), whose representation in Brazil is based in São Paulo. Themis presented a case on women's human rights before the IACHR, but without the participation of other NGOs. Geledés-Instituto da Mulher Negra, an NGO of black women created in 1988 in the city of São Paulo, with the objective of promoting the rights of women and blacks, fighting against forms of discrimination resulting from racism and sexism, presented a case before the IACHR, but without the participation of other NGOs. Finally, GAJOP presented a case on women's human rights, in partnership with the National Human Rights Movement, the Pastoral Land Commission, and the Margarida Alves Foundation for the Defense of Human Rights.

[151] Cecília Santos (2018) lists seven of these cases and analyzes two in her paper on the mobilization of women's human rights and cases against the state of Brazil presented to the IACHR.

2.3. Transnational legal activism

Transnational legal activism consists of a form of legal and political mobilization carried out by NGOs, social movements, marginalized social groups, and/or victims/survivors of human rights violations, among other civil society actors.[152] These actors constitute punctual networks for legal mobilization with the aim of protecting and promoting human rights, using international instances and mechanisms, such as the IACHR. For Cecília Santos, who defined the term in her article published in *Sur* journal in 2007, 'transnational legal activism' manifests itself when different social actors and grassroots organizations engaged in favor of human rights, whether local or international, make use of legal-political strategies at different scales of legality (local, national, and international). The objectives are varied: to bring about legal change and to pressure states to comply with or adopt domestic and international human rights standards and norms; to promote judicial precedents; to strengthen a cause and/or social movements; to recognize and repair the rights of victims/survivors (C. Santos 2007). From this perspective, transnational legal activism is broader than strategic litigation.

Cecília Santos (2007) formulated the concept of transnational legal activism to account for the increasing globalization of law and human rights, as well as the transnationalization of social and juridical-political struggles since the 1990s. The author was inspired, on the one hand, by the concept of 'transnational advocacy networks', as formulated by Margaret Keck and Kathryn Sikkink (1998). In this sense, transnational legal activism is characterized by '[...] the transnational dimension of alliances and networks formed by NGOs, social movement actors, and grassroots organizations engaged in human rights activism' (C. Santos 2007: 32). Furthermore, the concept of transnational legal activism is inspired by the 'law and globalization from below' approach proposed by Boaventura de Sousa Santos and César Rodríguez-Garavito (2005).

[152] Sectors of the state, such as public defenders, can and have also participated in transnational legal activism within the Inter-American System of Human Rights.

In this perspective, the counter-hegemonic use of law in a context of globalization, or what the authors call 'subaltern cosmopolitan legality,' requires the combination of legal and political mobilization, the connection between scales of mobilization (local, national, and international), and the emphasis on collective rights. Indeed, transnational legal activism connects different actors and scales of legal-political action across local, national, and international levels. Different actors may or may not prioritize political and non-judicial mobilizations of law, not necessarily restricted to litigation. The way the actors relate to each other, as well as to the knowledge constructed in their mobilizations is what will indicate whether transnational legal activism corresponds to a counter-hegemonic use of law.

In summary, transnational legal activism integrates three main characteristics: (1) a specific profile of social actors, that is, activists engaged in social, legal, and political struggles; (2) the local, national, and international scales that permeate the articulation between these actors; and (3) a strategy more or less based on a combination of legal and political practices of legal mobilization at a transnational level, with the aim of recognizing and promoting human rights (C. Santos 2007).

In Latin America, transnational legal activism has emerged as a strategy for acting on behalf of human rights, to the extent that international networks of lawyers and local non-governmental organizations have been formed with the aim of expanding their field of expertise within the international human rights bodies (López Pacheco and Hincapié Jiménez 2017). In the 1970s and 1980s, recourse to international forums for denunciations of torture and arbitrary imprisonment was used by various entities and collectives as an alternative to the closure of the state throughout the dictatorial periods (Engelmann 2006: 126).

However, only after the period of political re-democratization has there been a greater increase in the use of international institutions by human rights organizations in Latin America. In Colombia, this occurred in the early 1990s with the creation and expansion of organizations specialized in transnational legal activism, whereas in Mexico, in the late 1980s, NGOs specialized in strategic

litigation and political pressure began to interact with international organizations (López Pacheco and Hincapié Jiménez 2017). In Brazil, 'internationalized NGOs' in defense of collective causes expanded in the 1990s, in the context of a process of diversification of the public space and new uses of law (Engelmann 2006).

One of the challenges of transnational legal activism has to do with the limited compliance with international human rights norms by states and their judicial systems. There is a double perception on the part of several NGOs, social movements and marginalized social groups about the use of international bodies: on the one hand, they consider the visibility that the demands achieve through the use of international channels to be positive; on the other hand, they evaluate as negative the effectiveness of these bodies, either because of the slowness in processing complaints or because of the low degree of enforcement of their sanctions before the state (Gediel *et al.* 2012: 62). Despite these challenges, transnational legal activism has already had some positive impacts and political advances. In the Brazilian context, for example, the Maria da Penha case is considered an example of a positive impact of transnational legal activism in the context of the IACHR. This case contributed to the subsequent elaboration of norms and public policies aimed at confronting domestic violence against women, such as the enactment of Law No. 11,340/2006 (Barrozo 2017, C. Santos 2010, 2018).

Despite the increasing use of international legal instruments by human rights NGOs (local and international), some authors consider that transnational legal activism has been overlooked by most of the socio-legal literature in Latin America. As López Pacheco and Hincapié Jiménez (2017: 10) explain, it is a legal practice still considered recent in many countries in the Latin American region, namely because 'only a few years ago was it possible to strengthen the mechanisms of the inter-American human rights system to make its capacity to protect human rights in the hemisphere more effective.'

Concerning the studies on transnational legal activism in the context of Brazil and Latin America, we highlight, among others, those related to the issue of violence against women (García-Del Moral 2015, Hernández Castillo 2016, C.

Santos 2018); the right to territory of indigenous peoples and *quilombola* communities (Hernández Castillo 2016, Luz 2018, Rodríguez-Garavito and Arenas 2005, C. Santos 2016); as well as the right to memory and truth and transitional justice (Delarisse and Ferreira 2018, C. Santos 2009). These themes are analyzed, in general, under two focuses: (1) concept, characteristics, and strategies of transnational legal activism (Barrozo and Ferreira 2018, García-Del Moral 2015, López Pacheco and Hincapié Jiménez 2017, C. Santos 2007); and (2) advances, challenges, and impacts on the protection and enforceability of human rights (Barrozo 2017, Doin and Sousa 2009, Engstrom and Low 2019, Lima and Alves 2013, Luz 2018).

There is, however, a lack of studies that pay attention to the epistemological dimension of transnational legal activism, as well as of the other modalities of legal mobilization examined in this chapter. As we will address below, the works of Cecília Santos (2018) and Flávia Carlet (2019) are exceptions for incorporating the Epistemologies of the South framework in their respective analyses of transnational legal activism and people´s lawyering.

2.4. *Advocacia popular* (People´s lawyering)

People´s lawyering (*advocacia popular)* constitutes a particular segment of the professional field of Brazilian law. It is a legal practice that is politically engaged in the social struggles and demands of social movements and organized groups, conceiving the legal profession in much broader terms than traditional lawyering. Different experiences preceded and influenced the emergence of lawyers committed to the defense of social struggles. In the second half of the 19th century, abolitionist lawyers filed numerous freedom suits on behalf of enslaved people, such as the lawyer Luiz Gama, himself an enslaved man for most of his life, who used the law as his main weapon in his struggle to destabilize the policy of lordly domination and to undermine slaveholding ideology (Azevedo 2010). Between 1950 and 1960, the lawyer Francisco Julião defended the peasant leagues in the northeastern region of Brazil, becoming the 'lawyer of lost causes.' In the

decades from the 1960s until the 1980s, a period marked by the Brazilian civil-military dictatorship, progressive lawyers engaged in the defense of political prisoners and persecuted people, using the law to fight against the abuse of rights and violations of democratic freedoms practiced by the state.

Since the democratic transition in Brazil, groups and entities engaging with progressive legal work have emerged to train new lawyers and to advise unions and social movements on urban and rural demands for rights and justice.[153] In the context of the new democratic Constitution adopted in 1988, these initiatives stimulated a broad debate on the efficacy of social struggles within the judicial system and encouraged the use of the judicial channel as an alternative for the promotion of rights. In 1996, people's lawyers, who had already joined forces in defense of peasants in the struggle for agrarian reform, formed the National Network of People's Lawyers (Rede Nacional dos Advogados e Advogadas Populares, RENAP).[154]

In the last three decades a growing number of studies have emerged about the experience of people´s lawyering in Brazil. In general, these investigations state that, although there is no univocal concept about this legal practice, its main contours emphasize the target audience it advises, the objectives, the working methods, and the perceptions about law and the justice system.

People´s lawyering works primarily in causes of a collective nature, serving the demands for rights that come from organized grassroots actors, such as urban and rural communities and social movements (Alfonsin 2013, Junqueira 2002, Martins 2016, Sá e Silva 2011). People's lawyering is motivated by the commitment to strengthen and support the struggles of these groups, based on a

[153] Examples of these initiatives are the National Association of People's Lawyers (Associação Nacional dos Advogados Populares - ANAP), created in 1980; the Office of Legal Assistance to People's Organizations (Gabinete de Assessoria Jurídica às Organizações Populares - GAJOP), 1981; the Association of Lawyers of Rural Workers in the State of Bahia (Associação de Advogados de Trabalhadores Rurais no Estado da Bahia - AATR), 1982; and the Institute of Grassroots Legal Support Institute (Instituto de Apoio Jurídico Popular - IAJUP),1987.

[154] RENAP is today one of the most recognized and consolidated organizations in the practice of people's lawyering in Brazil, celebrating 28 years of operation in 2023. However, it was not the first group of lawyers created nationwide to defend social movements. Its predecessor was the National Association of People´s Lawyers (Associação Nacional de Advogados Populares - ANAP), created in 1980 (Tavares 2007).

political-ideological identification with their causes. In this sense, it follows an educational and pedagogical work methodology (Pazello, 2016) based on the collective construction of legal and political strategies, including a dialogue between technical legal knowledge and social movements knowledge, in a sharing of experiences and expectations, reflected in a work 'with' and not 'for' the assisted groups (Alfonsin 2013, Carlet 2019, Pivato 2010). Its actions are guided by a close relationship with the groups it advises, seeking to respect their autonomy and protagonist role in the struggles that such groups undertake. As Aragón Andrade (2019a, 2019b) warns, the challenge of people´s lawyers is precisely to legally advise the claims of communities and social movements, without appropriating their protagonist role, nor demobilizing their community struggle process.

People´s lawyering makes a strong criticism of the legal system, perceived as a conservative and authoritarian instrument that reinforces the *status quo* and maintains social injustices (Junqueira 2002). On the other hand, it does not despise the use of the legal and judicial system, insofar as this is combined with broader political strategies mobilized by the groups it advises. It also provides legal services that involve ´grassroots education workshops', legal guidance, denunciations, mediation, negotiation with the executive and legislative branches of the state, opinions, and advocacy campaigns (Pivato 2010, Ribas 2009).

In its day-to-day (judicial and extrajudicial) activities, people´s lawyering is carried out mainly at local and national scales. In some specific demands, it is articulated with transnational legal activism, preparing opinions, complaints, and petitions sent to international courts. Some examples are the cases of the *quilombola* community of Marambaia Island and the Xucuru indigenous people, whose complaints to the Inter-American Commission on Human Rights (IACHR) were prepared by NGOs specialized in international litigation with the support of people´s lawyers.

In the literature, there are references to the use of strategic litigation by people´s lawyering (Gomes, Sousa and Pereira 2013). The term has also been used

by some NGOs and collectives that adopt people´s lawyering as an action strategy. In this sense, some studies have alerted to the fact that strategic litigation has been increasingly cited in people´s lawyering publications, interviews, and workshops (Assis 2021). Although strategic litigation has relevance in the legal work of many NGOs committed to the struggle for human rights, the approach to people´s lawyering should be done with caution. This is because, as a rule, the provision of people´s lawyering services does not work based on the criterion of a preliminary choice of paradigmatic cases, as occurs with strategic litigation, but rather on the attendance of a diverse flow of demands waiting for an urgent solution (Carlet 2019). Moreover, many of the cases accompanied by people´s lawyers demand a defensive and not provocative performance from the courts, so that litigation is not always the priority strategy (Carlet 2019). Another important difference is the role that social movements and lawyers play in legal mobilization. In the practice of people's lawyering, social movements play a central role in this mobilization, being the protagonists of political and legal transformations (Assis 2021). In turn, from the perspective of strategic litigation, lawyers play the main role, being the drivers of social transformation projects, while social movements have a secondary role in this process (Assis 2021).

In addition to the distinction between people´s lawyering and strategic litigation, some studies have emphasized the relationship between people´s lawyering and public interest lawyering. The literature has been positioned on two opposing sides. The first understands the experience of people´s lawyering as a practice belonging to the field of public interest lawyering (SRJ 2013, Cardoso *et al.* 2013). The second argues that people´s lawyering should not be understood among the variety of experiences of public interest lawyering (Assis 2021, Carlet 2019, Manzo 2016, Vériz 2014). As we explained above in the item 2.1, although they may present elements in common, the differences between such practices are more prominent than the similarities, especially regarding the degree of engagement in relation to the causes in which they act, the role that law and

politics occupy within their practices, and the pedagogy of work adopted with the groups they advise.

3. Transnational legal activism and people´s lawyering in the light of the Epistemologies of the South

Having examined the conceptual contours of the different modalities of mobilization of the law, we turn our attention to transnational legal activism and people´s lawyering in the light of the Epistemologies of the South framework. Our goal is to highlight the elements that differentiate and bring them together, namely with respect to the relations between the actors and the knowledge they construct in the process of mobilizing the law, as well as the potentialities and challenges for promoting cognitive justice. This framework sheds light on the epistemic dimension of legal practices and on the construction of cognitive justice as a constitutive element of social justice. We restrict ourselves to the practices of transnational legal activism and people´s lawyering for illustrative purposes, and because they have been the subject of our respective research.

3.1. Foundations of the Epistemologies of the South

The theoretical proposal of the Epistemologies of the South, as formulated by Boaventura de Sousa Santos (2014), challenges the paradigm of modern rationality (including modern law and human rights) and its belief in a universally valid knowledge, seeking an alternative paradigm in the experiences, practices, and knowledges of the South (B. S. Santos 2014). The South, as the author argues, should not be understood in a geographical sense, in opposition to the global North, but as a metaphor to characterize social spaces of oppression, marked by historical systems of domination, such as capitalism, colonialism, and heteropatriarchy, which produce inequalities of class, race, gender, among other social categories. In spaces of oppression, there are collective knowledges and practices emerging from various social and political struggles, knowledges that

are, in turn, unknown, despised, and constructed as non-existent by modern rationality, which guides the modern Western state and law (Meneses 2016a, 2016b, B. S. Santos 2014, 2018).

To uncover and validate those knowledges and practices despised by modern rationality, the Epistemologies of the South are based on three methodological contributions: the sociology of absences and emergences, the ecology of knowledges, and intercultural translation. The sociology of absences aims to identify the diversity of experiences in the world, and to demonstrate that everything that is believed not to exist is in fact constructed as non-existent by modern Western reason. The sociology of emergences seeks to identify and verify the viability of concrete alternatives that emerge from practices and knowledges made visible by the sociology of absences (B. S. Santos 2014).

The research method that underlies the sociology of absences and emergences transcends conventional patterns, as it is based on an investigative stance engaged in the task of searching for and making visible historically silenced, albeit present, experiences, as well as highlighting the horizon of alternatives and the possibilities that emerge from them. As Maria Paula Meneses (2016a: 179) explains, the theoretical proposal of the Epistemologies of the South constitutes both a political and methodological project aimed at '[...] creating a plural and dynamic world of infinite cognitive possibilities, where the emphasis is centered on the translation of practices, struggles, and knowledges.'

To enable the sociology of absences and emergences to identify the diversity of experiences in the world and capture the alternatives they offer, it is necessary to uncover and understand these experiences, thus opening the field of intelligibility of practices and knowledges in the world. For this purpose, the Epistemologies of the South resort to the ecology of knowledges and intercultural translation. The central premise of the ecology of knowledges is that there is an infinite plurality of knowledges in the world. These knowledges, in turn, are not absolute. It is the recognition of the limits and incompleteness of each knowledge that produces the possibility of epistemological dialogue and inter-knowledge.

The ecology of knowledges does not intend to reproduce the dichotomous and hierarchical logic of the modern rational paradigm. In the ecology of knowledges, the credibility of non-scientific knowledge does not involve the discrediting of scientific knowledge. This, however, must be used in a counter-hegemonic manner (B. S. Santos 2014, 2018). In the process of inter-knowledge, all knowledges should have legitimacy to participate in epistemological debates. However, it is important to pay attention to how the different knowledges relate to each other, that is, to the possibility that such interaction takes place in a fair and dialogical way. As Meneses (2016b: 29) states, the challenge of the ecology of knowledges is '[...] to guarantee equal opportunities to different knowledges in increasingly broader epistemological disputes, with the aim of maximizing the contribution of each of them in building a more democratic, just, and participatory society.'

Intercultural translation corresponds to the possibility of comparing different knowledges and creating mutual intelligibility between them (B. S. Santos 2014). In the proposal of the Epistemologies of the South, the ecology of knowledges and intercultural translation go together, since, in the face of the multiplicity of knowledges among social groups – with distinct cultures, languages, and conceptions of the world –, it is necessary to exercise intelligibility among them and their struggles. This is necessary to detect the aspects that separate them or that bring them together, and to determine the possibilities and limits of the articulation between their practices and knowledges (B. S. Santos 2014). The work of intercultural translation concerns both the knowledge and the practices of the agents in contact.

In the context of the struggles for economic, social, and cognitive justice in the South, intercultural translation presents itself as a procedure to create spaces of alliance, union, and articulation between social movements, organizations, and groups at local, national, or transnational scales. As Boaventura de Sousa Santos (2014) points out, intercultural translation is not only an intellectual and cultural procedure (translation between knowledges, cultures, and world

conceptions), but also a political procedure since it is aimed at collective action to face and overcome certain social problems.

Bringing the theoretical contributions of the Epistemologies of the South to the conceptual delimitation of distinct practices of legal mobilization, the question of recognition of the knowledges and practices of marginalized social actors and social movements that fight for rights must be highlighted. The sociology of absences and emergences contributes to the visibility of multiple practices and conceptions of law(s) and justice(s). The ecology of knowledges and intercultural translation also serve to map such practices and knowledges, shedding light on the relations between different epistemic communities that mobilize state law and human rights at local, national, and international scales.

Building on the Epistemologies of the South, we highlight the following aspects that bring together transnational legal activism and people´s lawyering: (1) they constitute present and active experiences in the field of legal practices that fight against oppressions resulting from colonialism, capitalism and heteropatriarchy; (2) they are legal practices that, although present and important in the scenario of struggles for rights, often become invisible in the socio-legal literature by the building of generalizing categories or terminologies – for example, the predominant conception of public interest lawyering obscures the specificities of people´s lawyering; and the concept of strategic international litigation is confused with transnational legal activism; (3) they are legal practices that are premised on networking with partner organizations, maximizing the possibility of solidarity and success in the legal-political struggles they undertake. Among the aspects that differentiate these two practices, we highlight the following elements: objectives; locus of action; scale of mobilization; relationship between actors; methodology of work; and construction of knowledge (see summary table below). Below, we examine these elements with examples from our respective case studies involving practices of legal mobilization.

3.2. Transnational legal activism and ecology of knowledges: the Márcia Leopoldi and Maria da Penha cases

As mentioned in section 2.3, transnational legal activism aims to pressure domestic institutions to (1) create and/or implement public policies, statutes, and international treaties; (2) transform case law at the national and international levels; (3) and/or support a cause or social movement. The locus of its work are the state and inter-state human rights organizations, through the mobilization of law at an international scale.

In her studies on transnational legal activism, Cecília Santos (2007, 2016, 2018) notes that this type of legal mobilization builds – and depends - on punctual networks and alliances among heterogeneous social actors. It generally brings together different types of NGOs, social movement actors, and individual or collective victims/survivors of human rights violations. While some NGOs are specialized in strategic litigation, others have experience in the field of advocacy and others are embedded in grassroots movements. In the process of transnational human rights mobilization, especially when it comes to denunciations of cases considered paradigmatic, the strategy of impact litigation is negotiated among actors, not all of whom share the same views and expectations regarding state law and state and international justice systems (C. Santos 2018).

The relationship between NGOs specializing in international strategic litigation and social groups and individuals who have suffered human rights violations tends to be mediated by grassroots organizations, popular movements, and/or people´s lawyering. In addition to physical distance and the relationship mediated by actors from grassroots organization and social movements, there is also a temporal limitation that is restricted to the time of litigation (Rodríguez-Garavito and Arenas 2005). The working methodology of professionalized NGOs is characterized by a 'vertical', 'top-down' transfer of knowledge, through activities and workshops for training in knowledge of international human rights law and the use of legal mechanisms to defend them.

In her analysis of the Márcia Leopoldi and Maria da Penha cases brought against the state of Brazil before the IACHR concerning domestic violence against women, Cecília Santos (2018) examines, from the Epistemologies of the South perspective, the knowledges and power relations that emerged from transnational legal activism carried out by different types of human rights and feminist NGOs, grassroots feminist organizations, as well as survivors of violence and/or their families.

Márcia Leopoldi, a young middle-class white woman, was murdered in 1984, in the city of Santos, by her ex-boyfriend José Antônio Brandão Lago, known as Laguinho. Deise Leopoldi, Márcia's only sister, fought for justice before the local courts and actively engaged in legal, political, and social mobilization around the case, with the support of the grassroots feminist organization União de Mulheres de São Paulo, to which Deise turned and became a member in the course of her struggle for justice. Thanks to feminist mobilizations undertaken by the União de Mulheres, Laguinho was convicted in a second trial by the Jury Court. However, the warrant for his arrest was not executed, because Laguinho fled. Deise Leopoldi and União de Mulheres carried out several types of mobilizations around the case, using it and giving it visibility in the campaign 'Impunity is an accomplice of Violence', organized by grassroots feminist organizations in São Paulo and Santos. Due to the continued impunity, the case was referred to the IACHR in 1996. The internationalization initiative began to be studied by União de Mulheres and CLADEM-Brazil in 1994, during the first course of '*promotoras legais populares*' (people's legal female advocates) that the União de Mulheres organized. The petition to denounce this case was signed by the following organizations: CEJIL, Human Rights Watch, CLADEM-Brazil, and União de Mulheres de São Paulo.[155]

In addition to seeking justice for the specific case, these organizations had the common goal of pressuring the Brazilian state to create mechanisms to prevent and combat domestic violence against women. At the international level,

[155] Human Rights Watch later dropped the case because its office in Brazil was closed.

they intended to innovate the case law on human rights by applying the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known as the Convention of Belém do Pará, adopted by the OAS in 1994 and ratified by the Brazilian state in 1995.

It is important to note that, unlike the Maria da Penha case, the Márcia Leopoldi case is little known, although it was the first case on women's human rights brought against the state of Brazil before the IACHR. The IACHR took a decade and a half to decide on the case. It only assigned it a number two years after receiving the complaint (Petition No. 11,996). And only in 2012 did the IACHR finally publish a report on the case, ruling it 'inadmissible.' The IACHR considered that the case had lost its legal object, since Laguinho had been arrested in 2005.

The Maria da Penha case is widely known in Brazil. In 1983, Maria da Penha Maia Fernandes, a white, middle-class resident of the city of Fortaleza, suffered two murder attempts by her then-husband Marco Antonio Heredia Viveros, becoming paraplegic as a result of the first aggression. Viveros was sentenced by the Jury to ten years in prison. However, he filed a series of appeals, and the case was only judged by the Superior Court of Justice in 2001, on the eve of the statute of limitations. Maria da Penha describes her long struggle for justice in her book, *Sobrevivi... Posso Contar* (Fernandes 1994), whose first edition was published in 1994 by the Ceará State Council on Women's Rights (Conselho Cearense dos Direitos da Mulher). A representative of CEJIL learned of the case through this Council on a visit to Fortaleza, and thus was born the punctual alliance between Maria da Penha, CEJIL, and CLADEM-Brazil, which referred the case to the IACHR in 1998. The IACHR published its admissibility and merits report in 2001, holding Brazil responsible for human rights violations and determining a series of measures for symbolic reparations and compensation for the victim, as well as legal changes and improvements in the justice system and in the women's police stations, among other measures. This paradigmatic case of domestic violence against women is considered successful by all parties involved in the transnational legal activism in question. It is also cited as an example of

strategic litigation with a positive impact, having contributed, as already mentioned in the previous section, to the creation of Law No. 11,340/2006, named as 'Maria da Penha Law' by then President Luiz Inácio Lula da Silva as a form of symbolic reparation to Maria da Penha, who was invited by the government to the solemn act of presidential signing of the law (C. Santos 2018, 2010, 2007).

In her comparative analysis on these two cases, Cecília Santos (2018) highlights the plurality of knowledges, mobilization strategies, and visions of justice within the scope of transnational legal activism. She argues that the knowledges and practices of popular feminist organizations (such as União de Mulheres de São Paulo, in the Márcia Leopoldi case) and of the survivors (Maria da Penha and Deise Leopoldi) were essential to the construction of each paradigmatic case. But the legal knowledge, mobilization strategies, and visions of justice of professionalized NGOs specialized in strategic litigation (such as CEJIL and CLADEM in both cases) tended to prevail in the process of international legal activism. The author notes that professionalized NGOs hold technical-legal knowledge that is fundamental to transnational legal activism. This knowledge has the potential to be mobilized for counter-hegemonic purposes, as in the Maria da Penha case.

However, when there was a conflict of visions of strategies and justice between the parties, as in the Márcia Leopoldi case, the strategy and technical-legal knowledge of CEJIL and CLADEM predominated, to the detriment of the knowledge and practices defended by the grassroots feminist organization União de Mulheres and by Deise Leopoldi. For CEJIL and CLADEM, the case had lost its legal object because of Laguinho's arrest. The chances of the IACHR publishing an admissibility report were minimal and this would mean a failed strategic litigation. For Deise Leopoldi and União de Mulheres, it was important to pressure the IACHR and use the case to expose the inefficiency of the Brazilian judicial system, even after the Maria da Penha Law was created. Holding the Brazilian state accountable for the delay in Laguinho's arrest was also a matter of symbolic reparation for Deise Leopoldi. As a form of denunciation and of

building the memory of violence, struggle, and injustice, Deise Leopoldi, with the support of União de Mulheres, published a book about the case, following the example of Maria da Penha (Leopoldi, Teles and Gonzaga 2007). The book was sent to the IACHR, despite the objections of CEJIL and CLADEM. This was the only women's human rights case, among seven cases cited by Cecília Santos (2018), that the IACHR ruled inadmissible. Because it was a case considered unsuccessful, with no impact, from the perspective of state law, the very history of mobilization in this case has come to be silenced by professionalized human rights and feminist NGOs specializing in strategic litigation (C. Santos 2018).

Therefore, the predominance of technical-legal knowledge has consequences for the locus of action, the mobilization strategy, the work methodology and the knowledge constructed during the process of transnational legal mobilization. If the ecology of legal and non-legal knowledges and practices is ignored, and there is no intercultural translation, the knowledges constructed will be based only on state law, making subaltern cosmopolitan legality invisible and reproducing cognitive injustices. In our view, the counter-hegemonic potential of transnational legal activism will be more likely to be achieved if it adopts multiple working methodologies, allying with and learning from people´s lawyering.

3.3. People's lawyering and transnational legal activism: the case of the *quilombola* community of Marambaia Island

In her doctoral thesis, Flávia Carlet (2019) delimits the conceptual contours of people´s lawyering, based on extensive comparative empirical research and on the theoretical contributions of the Epistemologies of the South. According to the author, people´s lawyering creates a relationship of proximity with its clients, which is maintained throughout time. It employs a pedagogy of lawyering based on dialogue and on the intercultural translation of knowledge, by means of grassroots legal education workshops, meetings, and gatherings in the spaces of organization and community struggles (settlements, street protests, community

associations, etc.). The knowledge it builds is a legal-grassroots knowledge from a close and continuous interaction with the social movements and groups advised, performing, therefore, a counter-hegemonic use of law from below (Carlet 2019).

Carlet (2019) analyzes the specificities of the working pedagogy of people´s lawyering and its approach to transnational legal activism in the case of the struggles for territory of the *quilombola* community of Marambaia Island, in Rio de Janeiro. Made up of about 270 families, this community is composed of descendants from the black African population trafficked as slave labor to Brazil during the imperial period (1822-1889). In 1856, Joaquim de Sousa Breves, one of the largest coffee growers and owners of enslaved people of the period, purchased Marambaia Island to land enslaved from enslaved ships, to supply his farms and others in the Rio de Janeiro region. With the abolition of slavery (1888) and the consequent bankruptcy of Breves' business, Marambaia Island was abandoned. The former enslaved people and their descendants remained in the area peacefully, occupying the territory through subsistence agriculture and artisanal fishing. In 1905, the Island was acquired by the Brazilian state and, in 1981, transferred to the Armed Forces of the Brazilian Navy.

In 1990, the state initiated a legal process to expel the families who descended from former enslaved people and to guarantee the exclusive use of the site for military training. In the face of this offensive, between 1995 and 2015, the Marambaia's *quilombola* community resorted to the support of different organizations and institutions to demand the recognition of its *quilombola* identity and the right to collective titling of the historically occupied territory. Among the organizations that accompanied and strengthened these claims, the People's Legal Assistance Center Mariana Criola (Centro de Advocacia Popular Mariana Criola, hereafter cited as Mariana Criola) and the NGO Justiça Global stand out.

Mariana Criola is a people´s lawyering non-governmental organization focused on supporting urban and rural communities and social movements in the state of Rio de Janeiro. It is guided by a continuous and close work with the groups it advises. Its goals include sharing knowledge, translating the legal

language, and jointly building legal and political strategies for the defense of these groups' rights. Its practice involves working within the state institutions, but is not limited to them, as it favors networking with other lawyers and non-governmental organizations at local and national levels. Equally important, Mariana Criola members participate in meetings, workshops, and gatherings with the groups they serve, seeking to contribute to the process of community organization and strengthening.

The *quilombola* community of Marambaia sought support from Mariana Criola in 2006 in order to better understand the legal scenario of the dispute surrounding the titling procedure of the territory, which had been interrupted by a judicial determination, at the request of the Armed Forces. Through people's legal education workshops, the lawyers socialized the context of the ongoing judicialization and provided a reflective and critical analysis of the legal and political conjuncture to seek, together with the community, a solution to the problem. Throughout the activities, Mariana Criola built a relationship of trust with the people assisted, sharing responsibilities in the preparation of the activities, sharing knowledge and analysis according to their demands. On the other hand, it relied on the community's experience and knowledge for the preparation of the activities' content and for the analysis of the titling problem.

In 2009, due to the escalation of the conflict with the Brazilian state and the continued slowness of the titling process, the case was taken to international instances of human rights law. Through the legal assistance of the NGO Justiça Global, the community filed a complaint against the Brazilian state in the IACHR.

Justiça Global is a human rights NGO based in Rio de Janeiro, with operations in several states in Brazil, developing actions at national, regional, and international levels. It has specialized in strategic litigation, whether in the context of the IAHRS through the elaboration of denunciations of human rights violations before the IACHR, or in the United Nations' organs of human rights protection. It participates in hearings before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, and in the follow-up of reports for UN special procedures. It also acts through networking

with human rights defenders, representatives of the justice system, non-governmental organizations, and national and international human rights committees.

The complaint petition to the IACHR was drafted by Justiça Global and Mariana Criola, although the legal foundation and formalities were largely provided by Justiça Global due to its specialized knowledge and practice in strategic international litigation. Throughout the elaboration process, Mariana Criola and Justiça Global conducted site visits and meetings with the *quilombola* community in Marambaia to gather data. However, this close relationship between Justiça Global and the *quilombola* community was temporary, as contact became dependent on the processing of the complaint in the IACHR.

The complaint was signed by several organizations: Justiça Global, Mariana Criola, Marambaia Quilombola Association, Centre on Housing Rights and Evictions (COHRE, an international NGO based in Geneva), and the University of Texas Human Rights Clinic. The internationalization of the conflict guaranteed the immediate national and international visibility of the case. On the other hand, the slowness in the process of receiving the complaint by the IACHR – it took six years for the Brazilian state to be notified by the IACHR – caused the strategy to fizzle out at the international level, and ceased to have any impacts on the struggle in the following years. In 2015, through a Term of Adjustment of Conduct between the *quilombola* community and the Brazilian state, the collective property title was issued in the community's name. The *quilombolas* consider the outcome to be a historic achievement, although they recognize that to reach such an agreement, the community lost an important part of its territory.

The legal work carried out by Mariana Criola and Justiça Global in the case of Marambaia illustrates the particularities of people´s lawyering and transnational legal activism, as well as the interface between these practices of legal mobilization. Both organizations network with lawyers and other organizations to create their strategies and strengthen the claims of their clients. They contribute, in this way, to the construction of an ecology of legal and community knowledge, aimed at seeking alternatives and strengthening the

collective struggles for rights. As a specialist in strategic litigation in the field of human rights, Justiça Global favors legal mobilization at national and transnational scales, focusing on state institutions and international organizations. Mariana Criola carries out grassroots advocacy, working on an eminently domestic scale, developing strategies for mobilizing the law 'with', not only 'for', its clients.

In addition to the specificities, it is also important to highlight the contexts of the intersection between the two practices. When the Marambaia case required an advocacy strategy before the IACHR, Mariana Criola directly contributed to transnational legal activism, expanding the locus and scale of the impact of its work. Justiça Global, in turn, by working in a network and alongside the people´s lawyering undertaken by Mariana Criola, integrated into its action a local scale of mobilization, through dialogue with the *quilombolas*, even if this contact was temporary and conditioned to the procedural steps of the complaint before the IACHR.

The case of Marambaia also illustrates the specific contributions of the two organizations to the promotion of cognitive justice. The methodology adopted by Mariana Criola, guided by the purpose of working with the community and producing a dialogue between legal knowledge and quilombola knowledge, contributed to the organizational strengthening of the community and to its protagonist role in confronting the obstacles in progress. Justiça Global, oriented toward the protection and promotion of human rights at an international scale, opened a new front in the legal struggle by bringing together various organizations, the community, and distinct advocacy practices in a collective and transnational mobilization of law.

	Goals	*Locus of action*	*Scale of legal mobilization*	*Relationship with oppressed groups and/or individuals struggling for rights*	*Methodology or dialogue of knowledges between allied actors*	*Mobilized and constructed knowledges*
Transnational Legal Activism	To adopt or implement international treaties; transform case law; create public policy and legislation; support a cause and strengthen social movements	Institutional (judicial and extra-judicial)	Transnational	Mediated (by people´s lawyering and/or social movements)	Transfer of knowledge (top-down)	Legal
People´s Lawyering	To provide advice and socialize legal knowledge; to strengthen community building; to promote social transformation	Institutional and communitarian	Local/ national	Direct	Intercultural translation (horizontal)	Grassroots and legal

Comparative summary table between Transnational Legal Activism and People´s Lawyering
Source: the authors

4. Conclusions

Throughout this chapter, we have sought to identify and refine the conceptual contours of different practices of mobilizing law for legal, political, and social change, such as public interest lawyering, strategic litigation, transnational legal activism, and people´s lawyering. We highlighted some conceptual confusions and generalizations that end up making invisible the specificities of people´s lawyering practices and transnational legal activism. Public interest lawyering, for example, should be understood '[...] in the narrow sense of the term, within its own contours, as a specific mode of lawyering' (Carlet 2019: 72). If understood too broadly, it tends to produce equations

between very distinct experiences, leading to a homogenization of these legal practices and making their particularities invisible.

To consider people´s lawyering as an expression of public interest lawyering results in a mistaken identification between modalities of legal mobilization that have substantially different trajectories, meanings, principles, and pedagogies. Experiences of legal advice, deeply linked to people's legal work, should not be merged with all forms of legal mobilization under the risk of erasing their particularities, which are essential for the preservation of their identity and the plurality of legal practices currently underway in Brazil and in Latin America.

Reducing transnational legal activism to strategic litigation also hides the complexity of that practice of legal mobilizing, the multiple actors involved, the power relations between them, the heterogeneity of knowledge and practices mobilized, as well as the counter-hegemonic potential of using international human rights law.

In the wake of the Epistemologies of the South, we recognize and think of the South in its diversity, privileging multiple legal experiences in the scenario of social and political struggles for rights. Thus, the singularities of people´s lawyering and transnational legal activism should not be identified only in comparison with traditional liberal-individualist lawyering, nor through their generalization to other experiences, but rather in their contrast with specific modalities of legal mobilization.

In addition to deepening the conceptual contours of different practices of legal mobilizing, we added new criteria of differentiation based on the theoretical contributions of the Epistemologies of the South, which help us to pay attention to the epistemic dimension of struggles for justice. Based on our respective research on transnational legal activism and people´s lawyering, we highlighted the differences between these practices and their approximations. In our view, the following criteria should be used to deepen the conceptual contours of these two practices: (1) goals; (2) locus of action; (3) scale of legal mobilization; (4) relationship with oppressed groups and/or individuals struggling for rights; (5)

methodology or dialogue of knowledges between allied actors; (6) mobilized and constructed knowledges.

We showed how the Epistemologies of the South framework expands and enriches the conceptual contours of legal mobilization practices. This was illustrated by our respective research on transnational legal activism and people´s lawyering. Such an approach allows us to: (a) enhance the visibility and understanding of the plurality of legal and human rights mobilization experiences; (b) delineate the specificities of legal mobilization practices, especially their working methodologies and the interaction between different knowledges; and (c) identify when and how different practices of legal mobilization intersect and have the potential to promote not only social justice, but also cognitive justice.

We hope that our research and theoretical reflections will contribute to clarify and avoid conceptual confusions, stimulating new studies specifically focused on the interface between people's lawyering and transnational legal activism in Brazil and Latin America. In the context of neoliberalism and multiple forms of oppression, these practices of legal mobilization become even more necessary for the strengthening of counter-hegemonic social, legal, and political struggles from the South, with the aim of multiplying forms and strategies of resistance to the prevailing structures and ideologies of domination.

References

Alfonsin, JT (2013) 'Assessoria jurídica popular: necessidades, limites e perspectivas' in JT Alsonsin, *Das legalidades injustas às (i)legalidades justas: estudos sobre direitos humanos, sua defesa pela assessoria jurídica popular em favor de vítimas do descumprimento da função social da propriedade* (Porto Alegre, Armazém Digital), 9-32.

Almeida, F and R Noronha (2015) 'Advogando nas ruas: advocacia em protestos urbanos em São Paulo e no Rio de Janeiro (2013-2015)' 39 *Encontro Anual*

da ANPOCS – Associação Nacional de Pós-Graduação e Pesquisa em Ciências Sociais.

Aragón Andrade, O (2019a) *El derecho en insurrección. Hacia una antropología jurídica militante desde la experiencia de Cherán, México* (Morelia, México, Escuela Nacional de Estudios Superiores).

Aragón Andrade, O (2019b) 'Intercultural translation and the ecology of legal knowledges in the experience of Cherán, Mexico: elements for a new critical and militant legal practice' 15(1) *Latin American and Caribbean Ethnic Studies* 86-103

Assis, M P (2021) 'Strategic litigation in Brazil: exploring the translocalisation of a legal practice' 12 *Transnational Legal Theory* 360-389.

Azevedo, E (2010) *O direito dos escravos* (Campinas, Editora da Unicamp).

Barrozo, RP (2017) *A influência do ativismo jurídico transnacional na elaboração de normas e políticas públicas no Brasil: uma análise dos casos brasileiros no Sistema Interamericano de Direitos Humanos.* Master Dissertation in International Relations (Uberlândia, Universidade Federal de Uberlândia).

Barrozo, RP and MMA Ferreira (2018) 'O ativismo jurídico transnacional: conceitos e abordagem teórica. 3(7) *Revista Saberes da Amazônia* 216-240.

Brasil. Secretaria de Reforma do Judiciário (SRJ) (2013) Advocacia de interesse público no Brasil: a atuação das entidades de defesa de direitos da sociedade civil e sua interação com os órgãos de litígio do Estado (Brasília, Ministério da Justiça, Secretaria de Reforma do Judiciário). Avaliable at: https://www.academia.edu/14615946/Advocacia_de_interesse_p%C3%BAblico_no_Brasil_a_atua%C3%A7%C3%A3o_das_entidades_de_defesa_de_direitos_da_sociedade_civil_e_sua_intera%C3%A7%C3%A3o_com_os_%C3%B3rg%C3%A3os_de_lit%C3%ADgio_do_Estado Accessed on 10 March 2023.

Cardoso, EC (2011) 'Ciclo de vida do litígio estratégico no sistema interamericano de direitos humanos: dificuldades e oportunidades para atores não estatais' 5 *Revista Ambrosio L. Gioja* 363-378.

Cardoso, EC (2012) *Cortes supremas e sociedade civil na América Latina: estudo comparado Brasil, Argentina e Colômbia.* Doctoral Dissertation in Law (São Paulo, Faculdade de Direito, Universidade de São Paulo).

Cardoso, EC (2019) 'Pretérito imperfeito da advocacia pela transformação social' 10(1) *Revista Direito e Práxis* 543-570.

Cardoso, EC, F Fanti and IZ Miola (2013) 'Mobilização jurídica e sociedade civil: um panorama das entidades de defesa de direitos no Brasil' 37 *Encontro Anual da ANPOCS – Associação Nacional de Pós-Graduação e Pesquisa em Ciências Sociais*.

Carlet, F (2010) *Advocacia popular: práticas jurídicas e sociais no acesso ao direito e à justiça aos movimentos sociais de luta pela terra*. Master thesis in Law (Brasília, Faculdade de Direito, Universidade de Brasília).

Carlet, F (2013) 'Novos prismas para a análise da advocacia popular no Brasil no contexto da luta pelos direitos humanos' in OR Castro, FJI Serrano and ME Solorio (eds), *Educación y profesión jurídica: qué y quién detrás del derecho* (México, Universidad de San Nicolás de Hidalgo), 117-136.

Carlet, F (2015) 'Advocacia Popular: práticas jurídicas contra-hegemônicas no acesso ao direito e à justiça no Brasil' 6(10) *Revista Direito & Práxis* 377-411.

Carlet, F (2019). *Advocacias 'com' e 'para' comunidades negras rurais: diálogo de saberes e direito ao território no Brasil e no Equador.* Doctoral Dissertation in Sociology of Law (Coimbra, Centro de Estudos Sociais e Faculdade de Economia, Universidade de Coimbra).

Carvalho, S and E Baker (2014) 'Experiencias de litigio estratégico en elSistema Interamericano de Protección de los Derechos Humanos' 20 *Sur – Revista Internacional de Direitos Humanos* 469-479.

Centro de Estudios Legales y Sociales (CELS) (2018) *Litigio estratégico y derechos humanos. La lucha por el derecho* (Buenos Aires, Siglo XXI).

Coral-Díaz, AM, B Londoño-Toro, LM Muñoz-Ávila (2010) 'El concepto de litigio estratégico en América Latina: 1990-2010' 121 *Vniversitas* 49-76.

Correa Montoya, L (2008) 'Litigio de alto impacto: estrategias alternativas para enseñar y ejercer el Derecho' 7(14) *Opinión Jurídica* 149-162.

Delarisse, TM and MMA Ferreira (2018) 'Ativismo jurídico transnacional no Sistema Interamericano de Direitos Humanos: um estudo sobre a mobilização no Chile em torno da promoção da justiça de transição' 7(13) *Monções* 168-198.

Doin, GA and MCS Souza (2009) 'Ativismo jurídico dos direitos humanos: as organizações não-governamentais e o Sistema Interamericano' 7(11) *Revista Opinião Jurídica* 175-198.

Duque, C (2014) '¿Por qué un litigio estratégico en Derechos Humanos?' 35 *Revista Aportes Andinos* 9-23 Available at: https://revistas.uasb.edu.ec/index.php/aa/article/view/567/528 Accessed on 10 March 2023.

Engelmann, F (2006) 'Internacionalização e ativismo judicial: as causas coletivas' 69 *Lua Nova* 123-146.

Engstrom, P and P Low (2019) 'Mobilising the Inter-American Human Rights System: regional litigation and domestic human rights impact in Latin America' in P Engstrom (ed), *The Inter-American Human Rights System: impact beyond compliance* (London, Palgrave Macmillan), 23-58.

Falcão, J (1986) 'A manera de introducción. Democratización y servicios legales en América Latina' *Conferencia Regional de la Asociación Interandina de Servicios Legales*.

Fernandes, MPM (1994) *Sobrevivi... posso contar* (Fortaleza, Conselho Cearense dos Direitos da Mulher).

García-Del Moral, P (2015) *Feminicidio, transnational legal activism and State responsibility in Mexico.* Doctoral dissertation in Sociology (Toronto, University of Toronto).

Gediel, JAP *et alli* (2012 *Mapa territorial, temático e instrumental da assessoria jurídica e advocacia popular no Brasil* (Brasília, OJB, Dignitatis, Terra de Direitos).

Gomes, RP *et alli* (2015) 'Litigância estratégica no caso da Ferrovia Transnordestina: comunidades quilombolas e assessores/as jurídicos/as populares em interface na instrumentalização e apropriação da

(des)ordem jurídica' *4 Encontro Nacional de Antropologia do Direito (ENADIR)*.

Hernández Castillo, R (2016) *Multiple injustices: indigenous women, law, and political struggle in Latin America* (Tucson, University of Arizona Press).

Junqueira, EB (2002) 'Los abogados populares: en busca de una identidad' 26-27 *El Otro Derecho* 192-227.

Keck, M and K Sikkink (1998) *Activists beyond borders: advocacy networks in international politics* (Ithaca, NY, Cornell University Press).

Leopoldi, D, MAA Teles and T Gonzaga (2007) *Do silêncio ao grito contra a impunidade: o caso Márcia Leopoldi* (São Paulo, União de Mulheres de São Paulo).

Lima, RM and LS Alves (2013) 'A efetividade do ativismo jurídico transnacional no Sistema Interamericano de Direitos Humanos: uma análise a partir dos casos contra o Brasil' 10(2) *Revista de Direito Internacional* 237-248.

López Pacheco, JA and S Hincapié Jiménez (2017) 'Derechos humanos y activismo legal transnacional. Estrategias de las ONG en México y Colombia' 25(49) *Perfiles Latinoamericanos* 7-34. Available at: http://www.scielo.org.mx/pdf/perlat/v25n49/0188-7653-perlat-25-49-00007.pdf Accessed on 9 March 2023.

Luz, MR (2018) *Os movimentos sociais e o direito: contribuição do ativismo jurídico transnacional e da Corte Interamericana dos Direitos Humanos para o movimento quilombola (2005-2017)*. Master thesis in Law (Canoas, Universidade LaSalle).

Manzo, MA (2016) 'Identidades profesionales: el lugar que ocupa el derecho y la política en el ejercicio profesional de los abogados activistas en Argentina' 7(15) *Revista Direito e Práxis*, 175-212.

Martins, PJ (2016) ´O direito através do Espelho: contribuições da assessoria jurídica popular às lutas de movimentos populares em torno do direito à terra e ao território' 2(2) *Revista InSURgência*, 51-79.

McCann, M (2008) 'Litigation and legal mobilization' in KE Whittington, D Kelemen and GA Caldeira (eds), *The Oxford handbook of law and politics* (Oxford, Oxford University Press), 17-38.

Meneses, MP (2016a) 'A questão negra entre continentes: possibilidades de tradução intercultural a partir das práticas de luta?' 18(43) *Sociologias* 176-206.

Meneses, MP (2016b) 'Os sentidos da descolonização: uma análise a partir de Moçambique' 16(1) *Catalão* 26-44.

Pazello, RP (2016) ´A práxis da assessoria jurídica popular como vetor para o estudo da relação entre Direito e movimentos populares: ensaio sobre o Direito insurgente´ 4(2) *Caderno Eletrônico de Ciências Sociais* 94-117.

Pivato, L (2010) 'O Acampamento Elias de Moura e uma experiência de assessoria jurídica popular na defesa dos direitos humanos dos trabalhadores rurais sem terra' in D Frigo, F Prioste and AS Escrivão Filho (eds), *Justiça e direitos humanos: experiências de assessoria jurídica popular* (Curitiba, Terra de Direitos), 223-250.

Rekosh, E and KA Buchko (2001) *Pursuing the public interest: a handbook for legal professionals and activists* (New York, Public Interest Law Initiative in Transitional Societies).

Ribas, LO (2009) *Direito insurgente e pluralismo jurídico: assessoria jurídica de movimentos populares em Porto Alegre e no Rio de Janeiro (1960-2000).* Master thesis in Law (Florianópolis, Universidade Federal de Santa Catarina).

Rodríguez-Garativo, C and LC Arenas (2005) 'Indigenous rights, transnational activism, and legal mobilization. The Struggle of the U'Wa people in Colombia' in BS Santos and C Rodríguez-Garavito (eds), *Law and globalization from below: towards a cosmopolitan legality* (Cambridge, Cambridge University Press), 241-266.

Sá e Silva, F (2012) *Lawyers and governance in a globalizing context: stories of 'public interest law' across the Americas.* Doctoral Dissertation in Law, Policy and Society (Boston, Northeastern University).

Sá e Silva, F (2015) 'Hegemonia e contra-hegemonia na globalização do direito: a "advocacia de interesse público" nos Estados Unidos e na América Latina' 6(10) *Revista Direito e Práxis* 310-376.

Sá e Silva, F (2011) '"É possível, mas agora não". A Democratização da Justiça no Cotidiano dos Advogados Populares' 1567 *Texto para Discussão IPEA*. Available at: https://repositorio.ipea.gov.br/bitstream/11058/1336/1/TD_1567.pdf Accessed on: 10 March 2023.

Santos, BS (2014) *Epistemologies of the South: justice against epistemicide* (Boulder, Paradigm).

Santos, BS (2018) *The end of the cognitive empire: the coming of age of Epistemologies of the South* (Durham, Duke University Press).

Santos, BS and C Rodríguez-Garavito, César (eds) (2005) *Law and globalization from below: towards a cosmopolitan legality* (Cambridge, Cambridge University Press).

Santos, CM (2007) 'Ativismo jurídico transnacional e o Estado: reflexões sobre os casos apresentados contra o Brasil na Comissão Interamericana de Direitos Humanos' 5(7) *Sur - Revista Internacional de Direitos Humanos*, 28-59.

Santos, CM (2009) 'A justiça ao serviço da memória: mobilização jurídica transnacional, direitos humanos e memória da ditadura' in CM Santos, E Teles and JA Teles (eds), *Desarquivando a ditadura: memória e justiça no Brasil 2* (São Paulo, Hucitec), 472-495.

Santos, CM (2010) 'Da delegacia da mulher à Lei Maria da Penha: absorção/tradução de demandas feministas pelo Estado' 89 *Revista Crítica de Ciências Sociais* 153-170.

Santos, CM (2016) 'Legal dualism and the bipolar state: challenges to indigenous human rights in Brazil' 43(2) *Latin American Perspectives* 172-189.

Santos, CM (2018) 'Mobilizing women's human rights: what/whose knowledge counts for transnational legal mobilization?' 10(2) *Journal of Human Rights Practice* 191-211.

Santos, CM and F Carlet (2019) 'Advocacia popular and transnational legal activism: conceptual and methodological notes in light of epistemologies of the South'. *Conference Linking Generations for Global Justice*, International Institute for the Sociology of Law, Oñati, Spain.

Tavares, ACD (2007) *Os nós da rede: concepções e atuação do(a) advogado(a) popular sobre os conflitos sócio-jurídicos no Estado do Rio de Janeiro*. Master thesis in Sociology and Law (Niterói, Universidade Federal Fluminense).

Vértiz, F (2014) 'La politización del derecho. Una mirada sobre las prácticas profesionales de los abogados y abogadas populares' in MGG Gonzalez and MGM Marano (eds), La formación de abogados y abogadas. Nuevas configuraciones (La Plata, Imás), 237-260.

20. Mobilizing women's human rights: what/ whose knowledge counts for transnational legal mobilization?[156]

Cecília McDowell Santos

Introduction

Since the mid-1990s, international and domestic human rights non-governmental organizations (NGOs) in Latin America have increasingly engaged in transnational legal mobilization for the promotion of human rights norms in the region. In the past ten years, I have been studying this type of legal mobilization and its impacts in cases presented against the state of Brazil to the Inter-American Commission on Human Rights (IACHR) (C. M. Santos 2007, 2009). In 2012, while I was conducting research for a new project titled 'What Counts as "Women's Human Rights"? How Brazilian Black Women's and Feminist NGOs Mobilize International Human Rights Law', I was invited by the grassroots feminist organization União de Mulheres de São Paulo (hereafter, União de Mulheres), based in the downtown area of São Paulo, to make a presentation drawing on this research[157].1 I then showed a PowerPoint slide including all cases of violence and discrimination against women presented against the Brazilian state to the IACHR. I had identified these cases based on the reports published in the website of the IACHR and by contacting human rights and feminist NGOs. At the end of my presentation, Deise Leopoldi, a member of União de Mulheres, corrected my table and pointed out that the petition to initiate the case of Márcia Leopoldi dated from 1996, not 1998. Deise is the only

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sister of Márcia Leopoldi, who was assassinated by her ex-boyfriend in the early 1980s. Because this crime had been committed with impunity, the case of Márcia Leopoldi was sent to the IACHR by União de Mulheres and three regional NGOs: Center for Justice and International Law (CEJIL), Human Rights Watch/Americas, and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM/Brazil). This was the first case of violence against women presented to the IACHR against the Brazilian state.

Yet, until 2012, there was no information on the case of Márcia Leopoldi on the website of the IACHR. I was able to find out about it because I knew the feminist activist Maria Amélia de Almeida Teles (known as Amelinha), a founding member and leader of União de Mulheres. Amelinha had told me that the IACHR had assigned a number to their petition in 1998. However, Amelinha did not have a copy of the petition and was unclear as to its date. CLADEM/Brazil did not have a copy of the petition either. Human Rights Watch had closed its office in Brazil and abandoned the case. CEJIL was the only organization that had a copy of this petition. But its representative in Brazil claimed that disclosing this information could harm the litigation process. Because it would be difficult to trace all petitions initiated by NGOs, I decided to focus only on the cases that were made public on the website of the IACHR. Thus, I did not pay much attention to the case of Márcia Leopoldi and assumed that it had been initiated in the same year as the well-known case of Maria da Penha, which I had selected for analysis.

Besides correcting my slide, Deise gave me a pen drive with copies of all documents relating to the case of Márcia Leopoldi, including the petition sent to the IACHR in 1996. She also made herself available for an interview. Writing about this case would show that it existed and would give visibility to the difficulties facing women's human rights struggles for justice. Some difficulties related to the lack of, and unequal, access to, the IACHR. In order to access justice systems, at both national and international levels, it is necessary to learn about laws and rules of procedure, among other things. CEJIL and CLADEM/Brazil were important allies for their knowledge of international human rights law.

However, the delay of international justice became a critical issue. Moreover, despite these NGOs' position to give up on the case pending in the IACHR when the murderer of Márcia Leopoldi was arrested in 2005, União de Mulheres and Deise had a different vision of legal mobilization and continued to demand a response from the IACHR with the goal of shaming the Brazilian state for the ineffectiveness of its justice system.

The case of Márcia Leopoldi provides an example of what I have dubbed 'transnational legal activism', that is, an activism carried out transnationally by human rights NGOs and social movement actors who use international human rights law not only to seek individual remedies for the victims, but also to pressure states to make legal and policy changes, to promote human rights ideas and cultures, as well as to strengthen the demands of social movements (C. M. Santos 2007). In addition to professionalized human rights NGOs, diverse feminist and women's NGOs have engaged in transnational legal activism as a strategy to reconstruct and promote women's human rights discourses and norms. This type of legal mobilization clearly illustrates what Keck and Sikkink (1998) call 'transnational advocacy networks' (TANs). Indeed, the human rights and feminist NGOs involved in transnational legal activism create networks to communicate and exchange legal and other kinds of knowledge, forming transnational alliances to 'plead the causes of others or defend a cause or proposition' (ibid: 8).

Yet, contrary to Keck and Sikkink's original conceptualization of TANs as 'forms of organization characterized by voluntary, reciprocal, and horizontal patterns of communication and exchange' (1998: 8), the case of Ma´ rcia Leopoldi indicates that the relationship between actors involved in transnational activism is often contentious and asymmetrical, as researchers have pointed out (Mendez 2002; Farrell and McDermott 2005; Thayer 2010; Rodríguez-Garavito 2014). The emerging scholarship on transnational legal mobilization (e.g. Cichowski 2013; Holzmeyer 2009; Dale 2011; C. M. Santos 2007) tends, however, to overlook the relationship between NGOs centred on different issue areas (human rights and feminist advocacy networks, for example), or between NGOs and the

victims/survivors (or family victims) whose knowledge and experience serve as the basis for transnational legal mobilization practices. The few studies on the cases of women's human rights presented to the inter-American system (e.g. Gonçalves 2013) do not address such relationships either. Thus, an examination of the ways in which human rights and feminist NGOs, as well as victims/survivors of women's rights abuses, interact with each other might reveal who is considered a legitimate actor in the international human (and women's) rights field, and whose strategic visions on human rights, transnational legal mobilization and transnational justice become hegemonic within this field.

Drawing from research on transnational legal mobilization over cases of women's human rights presented against the state of Brazil to the IACHR, this article builds on the framework of 'epistemologies of the South' (B. de S. Santos 2014) to examine how human rights NGOs that specialize in transnational litigation, feminist advocacy NGOs, grassroots feminist organizations, and victims/survivors (or family victims) of domestic violence against women engage in transnational legal mobilization, negotiate power relations and exchange their knowledge/vision on human rights and justice. The article shows that the practice of transnational legal mobilization is contentious and involves unequal knowledge/power relations. The work of translating knowledge through transnational legal mobilization can both build and break alliances. Most importantly, the legalistic view on human rights held by the more professionalized NGOs tends to prevail over grassroots feminist organizations' and survivors' perspectives on human rights and justice.

In what follows, I will draw on two cases of domestic violence against women—Márcia Leopoldi v. Brazil and Maria da Penha v. Brazil—to illustrate these points. The article is divided into four sections, in addition to this Introduction and the Conclusion. First, I explain the approaches to transnational legal mobilization and human rights that inform my analysis. Then I briefly introduce the IACHR, its petition system and the types of cases on women's human rights that have been presented against the state of Brazil. This will be followed by the types of knowledge mobilized by the actors involved in the two

selected cases. The last section addresses the ways in which these actors exchanged their knowledge and built or broke alliances in the process of transnational legal mobilization.

1. Transnational legal mobilization as translation of human rights knowledge

The literature on transnational legal mobilization for human rights has expanded in the last decade. It builds on studies of legal mobilization, transnational human rights advocacy networks, and counter-hegemonic uses of law in the context of globalization. Michael McCann (2008) broadly defines legal mobilization as a practice of translating a perceived harm into a demand expressed as an assertion of rights. Litigation is one specific dimension of legal mobilization and refers to the translation of a harm into a 'complaint' (of a norm violation) presented to a court. In addition to litigation, legal mobilization can include other actions, such as lobbying, legal campaigns to change or create laws and policies, raising legal consciousness, and so on. In his review of law and social movement scholarship, McCann (2006: 25) praises 'process-based approaches' that emphasize 'various contextual factors'. The author points out that 'Opportunity structures, movement resources, and discursive terrains or legal consciousness are familiar categories for such analyses' (ibid.).

This broad conceptualization and multidimensional approach to legal mobilization is useful to uncover the relationships and types of legal knowledge exchanged between NGOs, social movement actors and victims/survivors of human rights violations. However, existing research on transnational mobilization for human rights usually adopts an institutional approach to processes of legalization, compliance, litigation and mobilization waged by NGOs at supranational and national governmental institutions (e.g. Cichowski 2013; Simmons 2009). This literature tends to overlook the discursive struggles within the nongovernmental terrain of human rights activism. John Dale's (2011) and Cheryl Holzmeyer's (2009) respective studies of transnational legal action in the case of the Free Burma movement are notable exceptions. Both authors

examine the legal strategies, identities and human rights discourses deployed by the Free Burma movement. Focusing on the relations between culture, structure and states, Dale (2011: 25) defines the 'transnational legal space' as 'a conceptual space of legal discourse that is shifting and contested'.

Going beyond the institutional approach to law and globalization, Boaventura de Sousa Santos and Cesar Rodríguez-Garavito (2005) propose a critical and sociopolitical framework that they call 'subaltern cosmopolitan legality' to make sense of the transnational, counter-hegemonic mobilization of law by social movement actors. 'Subaltern cosmopolitan legality' is characterized by four expansions of the conception of law and of the politics of legality. First, there must be a combination of political and legal mobilization. In fact, subaltern cosmopolitan legality is a form of political mobilization of law. It presupposes the politicization of the use of law and courts. Legal mobilization, in turn, may involve legal, illegal and non-legal actions. Second, the politics of legal mobilization needs to be conceived of at three different scales—the local, the national, and the global, so that the struggles are linked across borders. Third, there must be an expansion of professional legal knowledge, of the nation state law, and of the legal canon that privileges individual rights. This does not mean that individual rights are abandoned by subaltern cosmopolitan politics and legality, even though there is an emphasis on collective rights. Finally, the time frame of the legal struggle must be expanded to include the time frame of the social struggle that serves to politicize the legal dispute. This means that the social conflicts are conceived of as structural problems related to capitalism, colonialism, patriarchy, authoritarian political regimes, and so on (B. de S. Santos 2005: 30).

Besides the case of the Free Burma movement cited above, the legal defence of leaders and causes of social movements by 'popular advocacy' in Brazil is an example of the political mobilization of law. This can be illustrated by the struggles for agrarian reform and counter-hegemonic globalization waged by the Movement of Landless Rural Workers (B. de S. Santos and Carlet 2010). So-called 'strategic litigation' (litígio estratégico), carried out in Latin America by

human rights NGOs that specialize in litigation to defend a cause, is also an example of the political mobilization of law that can go beyond the limits of the nation state (Rodríguez-Garavito 2011; Cardoso 2012). The 'transnational legal activism' practices by NGOs and social movement actors that use the inter-American system of human rights to pressure states to promote legal and policy changes at the domestic level might also serve as an example of subaltern cosmopolitan legality (C. M. Santos 2007). However, while the counter-hegemonic law and globalization scholarship focuses on the legal discourses and strategies waged by social movement actors, it has not paid sufficient attention to the exchange of legal knowledge produced by these actors and the individual victims/survivors of human rights violations.

Transnational legal mobilization for human rights can be viewed as a 'politics of reading human rights' (Baxi 2006), that is, a discursive practice of translation that both includes and excludes the representation of varying forms of human rights violations, as well as different ideas and conceptions of human rights and justice. In her approach to the 'vernacularization' or cultural translation of global women's human rights ideas and frameworks into local settings, Sally Engle Merry (2006) refers to transnational activists as 'translators/negotiators' embedded in power relations between the global and the local. Millie Thayer (2010) also examines the transnational process of translating gender discourses as practices embedded in power relationships, but she goes beyond a global–local dichotomy, showing that 'local' actors, such as women rural workers in north-east Brazil, are not simply receivers of a global feminist or gender discourse; they are already embedded in global feminist discourses. Building on Thayer's perspective, I would add that the victims/survivors of human rights abuses are not isolated 'local' actors either. While the 'local' actors' visions of justice and legal and political strategies to pursue justice may differ from those of legal experts and professionalized human rights NGOs, they also embrace aspects of legalistic views on human rights and justice. Moreover, the victims can become 'human rights defenders' in the process of international litigation, as R. Aída Hernandez Castillo (2016) shows in

her analysis of human rights vernacularization and inter-legality between the Inter-American Court of Human Rights and indigenous women's demands for collective reparations in two cases of rape committed by soldiers of the Mexican army.

The 'epistemologies of the South' (B. de S. Santos 2014) framework provides further analytical insights to conceive of transnational legal mobilization as a practice of translation of diverse types of human rights knowledge beyond the global–local divide. The 'South' is understood in both geopolitical and epistemic senses. It corresponds to diverse types of knowledge produced by marginalized groups both in the global South and North (ibid.). This framework starts with the premise that an ecology of knowledges exists in different locales all over the world. 'The ecology of knowledges assumes that all relational practices involving human beings and human beings and nature entail more than one kind of knowledge, thus more than one kind of ignorance as well' (ibid: 188). It is necessary to acknowledge the incompleteness of all types of knowledge and reciprocal ignorance in order to avoid the domination of one type of knowledge over another.

Boaventura de Sousa Santos (2014: 188) claims that 'modern capitalist societies are characterized as favoring practices in which the forms of scientific knowledge prevail'. Because access to the production and distribution of scientific knowledge is unequal, interventions based on scientific knowledge tend to serve the social groups who have access to such knowledge. The monoculture of scientific knowledge makes invisible and renders as nonexistent other types of knowledge. 'Ultimately, social injustice is based on cognitive injustice. However, the struggle for cognitive justice will never succeed if it is based only on the idea of a more equitable distribution of scientific knowledge' (ibid: 189).

In addition to acknowledging the existence and reciprocal ignorance of an ecology of different types of knowledge, the 'epistemologies of the South' framework considers that intercultural translation is necessary to overcome hierarchical epistemic relationships and cognitive injustice. Implicit in this

perspective is the idea that intercultural translation 'may be useful in favoring interactions and strengthening alliances among social movements fighting, in different cultural contexts, against capitalism, colonialism, and patriarchy and for social justice, human dignity, or human decency' (B. de S. Santos 2014: 212).

Although Santos does not refer specifically to legal and human rights knowledges, his framework of 'epistemologies of the South' can be applied to his approach to counter-hegemonic uses of law in the context of globalization. The legal knowledge produced by the states and legal experts is based on scientific knowledge. Human rights norms established by global and regional intergovernmental institutions are the predominant sources of human rights knowledge. Yet transnational legal activism in the inter-American system involves an ecology of human rights knowledges and practices. While professionalized human rights and feminist NGOs may engage in litigation and promote legal advocacy within the framework of human rights norms, grassroots organizations may confront the limits of legality through non-legal knowledges and practices of human rights mobilization. Victims/survivors of human rights violations may approach legal mobilization and pursue justice based on their own experiences of suffering and vulnerability. In this perspective, it is important to ask how these actors exchange their knowledge on human rights and negotiate strategies to pursue transnational justice.

Combining the 'epistemologies of the South' with the 'subaltern cosmopolitan legality' frameworks, this article asks under what circumstances transnational legal mobilization practices correspond to a counter-hegemonic legal epistemology of (women's) human rights. As the cases of domestic violence presented against Brazil to the IACHR will illustrate, not all actors involved in transnational legal mobilization are viewed as legitimate transnational legal activists and equal producers of women's human rights knowledge. The legal knowledge of professionalized human rights and feminist NGOs tends to prevail over the popular feminist knowledge and practices of grassroots organizations and victims/survivors of human rights violations.

2. The Inter-American Commission on Human Rights and cases of women's human rights against Brazil

A brief background of the inter-American system of human rights within the Organization of American States (OAS) is necessary to situate the cases of women's human rights addressed in this article. The OAS was created by the states of the Americas in 1948 to promote peace, justice and solidarity in the region, as well as to defend the sovereignty and independence of the states (Article 1 of the OAS Charter)[158]. Since its inception, the OAS has established a series of regional human rights norms. The American Declaration of the Rights and Duties of Man, adopted by the OAS in 1948, was the only regional human rights instrument until the American Convention on Human Rights (hereafter, American Convention) was adopted in 1969, entering into force in 1978. Among other subsequent instruments, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known as the 'Convention of Belém do Pará', was adopted by the OAS in 1994, entering into force in March 1995.

The American Convention empowered two bodies to ensure the promotion and protection of human rights: the Inter-American Commission on Human Rights (IACHR or the Commission), a quasi-judicial organ that had already been created by the OAS Charter[159]; and a new judicial organ, the Inter-American Court of Human Rights (IACtHR or the Court). Both organs can decide on cases of human rights violations, but only the Court's judicial decisions are binding. The competence and procedure to submit a case are not the same for the two organs. A case can be sent to the Court only after the procedure before the Commission has been exhausted. Only the Commission and states parties to the American Convention that have recognized the jurisdiction of the Court can

[158] The Charter of the OAS entered into force in 1951. The history and development of the inter-American human rights system can be found on the website of the OAS at http://www.oas.org/en/iachr/mandate/Basics/intro.asp .

[159] The Inter-American Commission on Human Rights is composed of seven members elected by the OAS General Assembly. Candidates are nominated by state members. They are not judges and, once elected, they must represent all of the OAS state members.

submit a case to the Court. Yet not only victims but also any individual or group of persons, as well as any NGO legally recognized in one or more member states of the OAS, can lodge petitions to the Commission denouncing or complaining about a violation of the American Convention by a state party (Article 44 of the American Convention). This possibility of direct access to the Commission by victims and other civil society actors makes it an important legal and political site of transnational human rights mobilization.

In the 1990s, the democratization process and the national adoption of regional human rights norms in most countries in Latin America created new legal opportunities for transnational legal activism (C. M. Santos 2007) and strategic litigation in the inter-American system (Cardoso 2012). Brazil ratified the American Convention in 1992. Three years later Brazil ratified the Convention of Belém do Pará. In 1998 Brazil recognized the jurisdiction of the IACtHR.

Since the early 1990s the main petitioners in cases against Brazil in the IACHR are international and domestic professionalized human rights NGOs[160].4 The NGOs select 'paradigmatic cases' to show that the human rights violations are endemic and require both individual remedies and domestic policy changes. They form transnational alliances with local grassroots organizations, social movement actors and victims to advocate for the rights of various individuals and groups who have been marginalized and subjected to various forms of violence and discrimination. These include indigenous communities, prison inmates, rural workers, human rights defenders, children living in the streets, Black women facing racial discrimination, victims/survivors of domestic violence, family members of disappeared persons, and so on (C. M. Santos 2007).

As mentioned in the Introduction, since the mid-2000s I have been studying transnational legal mobilization in the IACHR (C. M. Santos 2007). In

[160] According to Par Engstrom and Peter Low (2018), the IACHR annual reports and its petition data from 1999 to 2014 indicate that 67 per cent of the petitioners in cases against Brazil opened for investigation by the IACHR involve human rights organizations. The authors point out that the top five human rights organizations involved in these cases are CEJIL, Justiça Global, Projeto Legal, Comissão Pastoral da Terra, and Fundación Interamericana de Defensa de los Derechos Humanos.

the earlier stage of this research agenda, my approach built on Keck and Sikkink's work on TANs and Santos and Rodríguez-Garavito's approach to subaltern cosmopolitan legality. While I focused on the discourses and legal strategies pursued by NGOs, I did not pay attention to the relationships between NGOs and victims/survivors of human rights abuses. I began to focus only on the cases of women's human rights once I was invited to contribute to the project on 'epistemologies of the South' coordinated by Boaventura de Sousa Santos at the University of Coimbra, from 2011 to 2016. For this project, I build on my previous research, focusing on what counts as 'women's human rights' and what and whose knowledge counts for transnational legal mobilization. This research is based on archival and interview methods. Besides collecting documents on the cases, I rely on old and new interviews conducted with human rights activists and the victims/survivors I have been able to contact.

Drawing on the IACHR annual reports, I have compiled a database of the 'cases' presented against the state of Brazil to the IACHR, from 1969 to 2012[161]. Among over 80 cases, the IACHR's reports on admissibility and inadmissibility show that only seven cases concern women's human rights, focusing particularly on violence and/or discrimination against women. As Table 1 indicates, petitioners include international and domestic NGOs, as well as victims. Various types of NGOs are part of the legal mobilization process, including international and domestic human rights and feminist NGOs, NGOs fighting against racism, and grassroots feminist and social movement organizations. Given the small number of cases and the year of the first petition (1996), it is clear that the IACHR

[161] The 'cases' refer to the complaints that the IACHR has accepted for investigation and has published in its annual reports. Thus, the number of complaints sent to the IACHR is larger than the number of cases. In the context of authoritarian rule in the Latin American region, the inter-American system did not recognize the responsibility of the states in most cases. During Brazil's military regime (1964–1985), the IACHR did not consider that the Brazilian state was responsible for the alleged human rights violations with the exception of two cases (C. M. Santos 2007). In the 2000s, in the context of redemocratization, it is clear that the IACHR has changed. As Table 1 indicates, among the seven cases of women's human rights violations presented against Brazil and opened for investigation by the IACHR, from 1969 to 2012, only one was considered inadmissible.

is a new terrain for all of these actors' engagement with transnational litigation over women's human rights.

Based on the types of complaints and the norms invoked by the litigants, I classified the seven cases on women's human rights as follows: cases of gender-based violence (four cases); cases of racial discrimination against Black women (two cases); and cases of class-based violence against rural women workers (one case). Among the cases of gender-based violence, three relate to domestic (intimate partner) violence against women and one refers to sexual violence perpetrated by a medical doctor against a female teenager who was his patient. Table 1 summarizes each case by year of the initial petition, names of petitioners, norms invoked to frame the complaints, and type (admissibility or inadmissibility) and year of the respective report published by the IACHR.

Gender-based violence is usually equated with 'violence against women'. It can be perpetrated by both private citizens and state actors. The Convention of Bele´m do Para´ asserts that 'violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere' (Article 1). In 1999, the UN Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee) established in its Recommendation No. 19 that 'Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.

Except for the case of Márcia Leopoldi v. Brazil, all of the IACHR reports on the cases listed in Table 1 resulted in the admissibility by the IACHR of most or all alleged violations. However, the IACHR reports do not tell us how litigators have developed and negotiated their legal strategies. What role does each actor play in the process of mobilizing women's human rights? Are all types of NGOs and the victims viewed as legitimate actors in the transnational practice of mobilizing women's human rights? Can they all knock on the door of the IACHR? Two cases of domestic violence – Márcia Leopoldi v. Brazil and Maria da Penha v. Brazil – help to shed light on these questions.

Type of case	Year of petition	Petitioners	Complaint	Norms	IACHR report/year
Márcia Leopoldi Case (domestic, partner violence)	1996	CEJIL; CLADEM; União de Mulheres de São Paulo	Assassination of Márcia Leopoldi by ex-boyfriend	American Convention on Human Rights; Belém do Pará Convention	Inadmissibility (2012)
Simone Diniz Case (racial discrimination)	1997	Simone Diniz; CEJIL; Sub-Committee of Human Rights of Blacks at São Paulo Bar Association; Father Batista Institute of Blacks	Racial discrimination in the hiring of a domestic worker	American Convention on Human Rights; Additional Protocol to American Convention on Human Rights in the area of Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; ILO Convention No. 111	Admissibility (2006)
Maria da Penha Case (domestic, partner violence)	1998	Maria da Penha; CEJIL; CLADEM	Attempted murder by husband, victim became paraplegic as a result	American Convention on Human Rights; Belém do Pará Convention	Admissibility (2001)
Márcia Barbosa de Sousa Case (domestic, partner violence)	2000	CEJIL and National Movement of Human Rights	Assassination of Márcia Barbosa, perpetrated by ex-lover, a Congressman	American Convention on Human Rights; Belém do Pará Convention	Admissibility (2007)
Margarida Maria Alves Case (classbased violence against rural women workers)	2000	GAJOP-Cabinet for Popular Legal Assistance; CEJIL; National Movement of Human Rights—MNDH; Land Pastoral Commission—CPT; Margarida Maria Alves Foundation for the Defense of Human Rights	Assassination of Margarida Alves, union leader of rural workers	American Convention on Human Rights	Admissibility (2008)
Samanta Nunes da Silva Case (sexual violence)	2003	Themis	Sexual violence perpetrated by a medical doctor	American Convention on Human Rights; Belém do Pará Convention	Admissibility (2009)
Neusa dos Santos and Gisele Ana Ferreira Case (racial discrimination)	2003	Gelede´s—Institute of Black Women	Racial discrimination in the hiring of a domestic worker	American Convention on Human Rights; Additional Protocol to American Convention on Human Rights in the area of Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; ILO Convention No. 111	Admissibility (2006)

Table 1. Cases of women's human rights presented to the IACHR against Brazil (1969–2012)

Source: Data compiled by author from the annual reports published on the website of the Inter-American Commission on Human Rights http://www.oas.org/en/iachr.

3. Knowledge mobilized and strategies of legal mobilization

Márcia Leopoldi, a young, white, upper middle class, heterosexual woman, was assassinated in 1984 by her ex-boyfriend, José Antônio Brandão Lago (also known as Laguinho), in the city of Santos, near the city of São Paulo. Deise Leopoldi, the only sister of Márcia, then began to struggle for justice in the Brazilian courts. In this process, she found and joined the grassroots organization União de Mulheres de São Paulo. The case of Márcia Leopoldi was sent to the IACHR in 1996. As noted at the beginning of this article, this is the first case on women's human rights presented against Brazil. The petition was signed by CEJIL, Human Rights Watch/Americas, the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM/Brazil), and União de Mulheres de São Paulo.

Maria da Penha Maia Fernandes is a white, middle class, well educated, heterosexual, disabled woman who lives in the city of Fortaleza, in the north-east of Brazil. She survived attempted murder committed in 1983 by her then husband, Marco Antonio Heredia Viveros, and became paraplegic as a consequence of this aggression. Viveros was found guilty by the jury in a second trial and sentenced to ten years in prison. However, he appealed and, until 2001, the case was pending in the Superior Tribunal of Justice. The case of Maria da Penha was sent to the IACHR in 1998. This is the second case of domestic violence presented to the IACHR against the state of Brazil. The petition was signed by Maria da Penha Maia Fernandes, CEJIL, and CLADEM/Brazil. Both petitions, on the Márcia Leopoldi and the Maria da Penha cases, address violations of the American Convention on Human Rights and the Convention of Belém do Pará.

Drawing on interviews with the NGO representatives and the victims, I identified the following types of knowledge mobilized by the petitioners: (1) human rights legal knowledge; (2) feminist legal advocacy knowledge; (3) feminist popular knowledge; (4) corporeal knowledge[162]. These types of

[162] The interviews were conducted over the past ten years for my ongoing research on transnational legal activism and cases of human rights violations presented to the IACHR by

knowledge illustrate an ecology of women's human rights knowledges. It is important to note that the knowledge and practices of actors involved in transnational legal mobilization are not clearly separated. But it is possible to identify some forms of knowledge that stem from their experience and inform their legal practices and strategies of legal mobilization.

Human rights legal knowledge relies on a legalistic framework of human rights. It is used by professionalized NGOs engaged in strategic litigation within and across borders. CEJIL embodies this type of legal mobilization, specializing in litigation in the inter-American system of human rights. Founded in 1991 by a group of human rights defenders, CEJIL works with the system to strengthen it and to promote human rights and democracy in the state parties of the OAS[163]. CEJIL has consultative status before the OAS, the United Nations, and the African Commission on Human and Peoples' Rights. Its headquarters are located in Washington DC, where the IACHR is also located. But CEJIL has offices in different countries throughout the Americas. In Brazil, CEJIL's office is located in the city of Rio de Janeiro. The office includes one director, who is an experienced human rights defender, and one administrative assistant. CEJIL is a major legal actor in the cases presented against Brazil to the IACHR. Par Engstrom and Peter Low (2018) have identified CEJIL as the top single human rights organization filing the petitions against Brazil cited in the IACHR annual reports from 1999 to 2014. As Table 1 indicates, CEJIL is one of the petitioners in five of the seven cases on women's human rights brought to the IACHR. CEJIL selects and mobilizes its cases in partnership with local NGOs. The victims are also involved in the selection and preparation of the cases. One of the criteria used by CEJIL to select a case includes the victims' authorization to file a complaint and their willingness to cooperate with the legal action, providing all

human rights NGOs against the state of Brazil. This research has benefited from multiple grants awarded by the Faculty Development Fund at the University of San Francisco. Besides interviews with Deise Leopoldi and Maria da Penha Maia Fernandes, this article draws on interviews conducted with representatives of the following organizations: União de Mulheres de São Paulo, CLADEM/Brazil, and CEJIL.

163 Further details on the history and work carried out by CEJIL can be found on their website: https://cejil.org/en/what-we-do (referenced 2 June 2016).

information needed to support the case. It is also necessary to count on local NGOs and/or attorneys to follow up on the legal case in the domestic court system and to help with the mobilization of the case outside of courts. These are important conditions to guarantee the 'success' of the case. A 'good case' is one that exemplifies a pattern of human rights violations and that can be used to establish a judicial precedent and promote domestic policy and/or legal changes. A successful case does not necessarily mean that the IACHR publishes a report on the merits of the case and holds the state accountable for the alleged violations. An agreement between the petitioners and the state can be settled in the course of the legal dispute. But it is necessary that the case be admitted, so it can be used as a weapon to pressure the state in question[164]. Thus, CEJIL is concerned about framing the cases according to the procedural and material normative requirements for admissibility. CEJIL's strategic legal use of international human rights norms is counter-hegemonic as it confronts state and non-state anti-human rights discourses and practices. Yet the legalistic perspective of CEJIL may also be viewed as hegemonic vis-à-vis non-legal subaltern cosmopolitan mobilization practices.

Feminist legal advocacy also relies on a legalistic framework of human rights. It is used by both domestic and international professionalized feminist NGOs engaged in legal advocacy to change national and international policies and laws relating to women's human rights, and/or to disseminate and implement international women's human rights norms at the domestic level. CLADEM, a regional network of feminist legal experts established in 1987, carries out this type of transnational feminist advocacy work. It is important to use cases to hold states accountable for the protection of women's human rights. Like CEJIL, CLADEM has offices in different countries in Latin America. In Brazil, CLADEM has had its offices based in different cities over the years, and has been represented by established feminist law professors, feminist attorneys,

[164] Other human rights NGOs based in Brazil, such as Justic¸a Global (Global Justice) and GAJOP – Gabinete de Assessoria Jurídica Popular (Cabinet for Popular Legal Assistance) use the same criteria to select their cases.

and/or feminist activists. In contrast with CEJIL, CLADEM focuses only on women's human rights and seeks to promote legal and policy changes from a gender perspective. Moreover, CLADEM does not specialize in transnational litigation and does not centre exclusively on the use of the inter-American system, although CLADEM has begun to develop a 'global legal programme' dedicated to transnational strategic litigation both in the bodies of the inter-American system and to the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee)[165]. Like CEJIL, CLADEM also mobilizes on the cases in partnership with local NGOs. In addition to the two cases of domestic violence presented to the IACHR, CLADEM/Brazil has presented to the CEDAW Committee one case against the Brazilian state regarding violation of women's human rights. Similarly to CEJIL, the legal feminist perspective embraced by CLADEM, based on advocacy work and litigation, can be viewed as counter-hegemonic since it challenges sexist practices and ideologies promoted by both state and civil society actors. Yet, this feminist legal perspective can also be viewed as hegemonic in relation to grassroots and marginalized forms of feminist activism.

Feminist popular knowledge is mobilized by grassroots organizations like União de Mulheres de São Paulo. These are voluntary associations working to educate women about their rights, using women's human rights discourse and laws to empower women. They also seek to change cultural norms and stereotypes about gender, and to change state institutions and political cultures. They use human rights norms as a legal and political tool to strengthen their causes and promote women's rights. They work both against and with the legal system, organizing campaigns against impunity and protests to have domestic violence policies and legislation established and implemented. Created in 1981, União de Mulheres is one of the oldest and most active feminist grassroots organizations in the city of São Paulo.[166] Since 1994, União de Mulheres has

[165] See more details on this programme on the website of CLADEM, https://www.cladem.org/eng/what-we-do/litigation (referenced 13 May 2018).
[166] For more details on the history of this organization, see União de Mulheres de São Paulo (2011).

offered courses on feminist popular legal education (promotoras legais populares)[167]. Feminist law professors and legal professionals give classes in these courses. Members of CLADEM/Brazil and other feminist NGOs have also contributed to these courses. Even though União de Mulheres has provided legal advice and emotional support to women who have been subjected to gender-based violence, this organization does not initiate legal cases either locally or internationally. The case of Márcia Leopoldi is an exception. While União de Mulheres shares CEJIL's and CLADEM's goals to promote human rights, justice and policy changes through transnational legal mobilization, its approach to the state and to domestic and international legal systems is not legalistic. União de Mulheres approaches legal mobilization from a critical, oppositional perspective. Legal mobilization is an additional weapon that must serve social and political struggles. The objective is not to strengthen the inter-American system of human rights, but rather to use it to strengthen the demands of the women's movements. Thus, the engagement of União de Mulheres with legal mobilization, both locally and internationally, can be viewed as a practice of subaltern cosmopolitan legality. And its approach to women's human rights illustrates an epistemology of the South.

Finally, the victims of human rights violations bring to transnational legal mobilization a distinct experience and type of knowledge that I dub corporeal knowledge. Not all victims may gain consciousness of their rights and fight for justice. But the victims or family victims engaged in legal mobilization share a common knowledge rooted in their bodily experience of physical, psychological and emotional harm. The search for justice is sparked by a distinct experience of indignation that starts with the act of violence and is then transformed into a type of corporeal knowledge that might drive a reaction or a struggle for some kind of justice. The survivors (or family victims) of domestic violence, such as the sister of Márcia Leopoldi and Maria da Penha, have gained consciousness of their rights and have learned about the legal system in the process of fighting for

[167] Details on this project can be found at http://promotoraslegaispopulares.org.br (referenced 10 June 2016).

justice, which started before they met their NGO allies. Their corporeal knowledge, their personal experience learning about law and facing an unjust legal system, their representation of the double act of violence (interpersonal and institutional) through the oral and written narration of their stories, all of these accumulated types of corporeal and legal knowledge were crucial for the transnational legal actions that they initiated in alliance with the human rights and feminist NGOs that crossed their paths in search for justice. These victims became subjects of rights, they gained consciousness of their human rights as women, they taught and learned from the NGOs, they became activists and actors in the field of women's human rights and transnational legal mobilization, even if temporary legal mobilization actors and not necessarily joining a human rights and/or feminist NGO.

From this perspective, the cases of Márcia Leopoldi and Maria da Penha illustrate that cosmopolitan and local actors learn from each other's knowledge of harm, rights violations, and collective and individual histories, as well as legal and political repertoires of action, resources and strategies. These actors' subjectivities and identities may be transformed in the process of transnational legal mobilization. However, this process is charged with not only alliances, but also tensions and conflicts. The actors may produce what I dub a 'convergent translation' of their knowledge, building alliances and a common strategy to pursue justice. Yet, a 'divergent translation' and conflicting views on the use of law may also lead to breaking alliances in the process of legal mobilization.

4. Convergent and divergent translations, building and breaking alliances

Coming from an upper class family, Deise Leopoldi was able to hire well-known attorneys to assist the public prosecutors in charge of the case of Ma´ rcia Leopoldi. In the second trial that took place in the early 1990s, the jury found Lago guilty. He was sentenced to 15 years in prison. However, he ran away and was not arrested by the police until 2005. This arrest was made possible thanks to Deise's appearance in the popular TV show *Mais Você*, broadcast every

morning by the network *Rede Globo*. Deise was interviewed on this show to talk about domestic violence and then took the opportunity to display Lago's picture on national television.

At that time, Deise had become a feminist activist and was member of União de Mulheres. She had heard about this organization through one of the lawyers who assisted her (Deise Leopoldi interview with the author, 20 May 2013). In 1992, she contacted União de Mulheres in search of support. The same year she joined the organization. She actively participated in the campaign 'Impunity is Accomplice to Violence' that was at that time created by União de Mulheres. The case of Márcia Leopoldi served well for the purpose of that campaign. As noted by Amelinha, 'this was an emblematic case that we used to launch our campaign in a national meeting of women's popular (grassroots) organizations that we organized in 1992 to confront violence against women' (Maria Amélia de Almeida Teles interview with the author, 3 March 2006). União de Mulheres actively mobilized on this case, organized a protest in front of the court when the second trial was held, made a poster with Lago's picture, and even publicized the case and took this poster to the Fourth World Conference on Women, held in Beijing in 1995.

In 1994, the feminist organizations CLADEM/Brazil and Uni~ao de Mulheres began to discuss the idea of sending this case to the IACHR. This discussion took place when União de Mulheres offered the first course on popular legal education for women. The following year Brazil ratified the Convention of Belém do Pará, as noted above. CLADEM/Brazil members thought then that the case of Márcia Leopoldi was ideal for testing the application of the Convention and for pressuring the Brazilian state to establish domestic violence laws and policies. During that time, Brazil had created over 200 separate women's police stations throughout the country. But there was no comprehensive legislation and national policy to effectively confront the problem of domestic violence against women. Feminist members of CLADEM/Brazil had drafted a proposal for a domestic violence bill, but their allies in Congress were unable to introduce this bill (C. M. Santos 2010). CLADEM/Brazil and União de

Mulheres then sought the support of CEJIL to take the case of Márcia Leopoldi to the IACHR. CEJIL had not yet mobilized on a case of women's rights, so this was an opportunity to expand its issue areas, using the Convention of Belém do Pará to provoke a 'boomerang effect' (Keck and Sikkink 1998) while setting a judicial precedent on gender-based violence for the whole Latin American region. Thus, all actors learned and benefited from this alliance around the case of Ma´ rcia Leopoldi. Deise was hopeful that justice was going to be finally achieved.

However, the IACHR did not open the case immediately. It took two years to assign a number to the petition (Petition No. 11,996). There was no 'case' number and no decision on this case until 16 years after the petition was filed. In March 2012 the IACHR finally published its report on the case, considering it inadmissible (IACHR 2012). The IACHR considered that the case had been resolved and lost its objective because Lago was arrested in 2005.

CEJIL and CLADEM/Brazil agreed with the IACHR's position. In fact, after Lago's arrest, their representatives in Brazil had a discussion and disagreement with Deise Leopoldi and União de Mulheres over whether they should continue to pressure and request the IACHR to admit the case. Deise and other members of União de Mulheres considered that Lago had been arrested thanks to their mobilizing efforts, not those of the Brazilian state. They wanted to use the case to show that the Brazilian state was negligent and did not protect women from violence. As explained by Deise:

> CEJIL was afraid of losing the case. But we wanted to pressure the Commission to make a decision. I told Amelinha that we should prepare a petition and that I wanted to actively participate. I told her, 'we don't know international law, but we know about the substantive right of my sister, based on national laws that were not enforced'. In January of 2005, we prepared a draft of our petition and sent it to CEJIL. They also sent us their draft. They used all of that language of international law, the Convention. But we didn't agree. We went to Rio to discuss the

> case with them. (Deise Leopoldi interview with the author, São Paulo, 20 May 2013)

CEJIL was concerned about losing the case because the very object of the complaint – to arrest Lago – had been accomplished (B. Affonso interview with the author, Rio de Janeiro, 17 August 2006). Representatives of CLADEM/Brazil were also concerned about the legal prospects for the case, although they recognized Deise's work and understood how important it was to continue fighting for an admissibility report in the IACHR. Vale´ria Pandjarjian, a member of CLADEM/ Brazil, followed the case from the beginning to end and was very ambivalent. In her words:

> Deise deserves all the credit for the arrest of Laguinho. The Commission and the Brazilian state did not help at all. The Commission did not respond to this case as it did in the case of Maria da Penha. Once Laguinho was arrested, the Commission requested information from us. And now, are we going to continue to litigate? We know this was important for Deise. We know the victims are the ones who need reparation, who must feel there was justice, if it's sufficient or not. But we had a lot of difficulty, because we did not face a favourable situation. Because the most substantive aspect of impunity, the reason that had sparked our use of the Commission, was over. Despite moments of tension, each one of us had a role in this case. And CEJIL is making an effort, searching for a legal interpretation to support this case. But I don't know if we can make any progress, we run the risk of not having the case admitted. (Valéria Pandjarjian interview with the author, São Paulo, 31 August 2006)

The disagreement between Deise and the NGOs was not resolved and culminated in the breaking of their alliance. In 2007 Deise and other leaders of União de Mulheres published a book on the case of Márcia Leopoldi (Leopoldi et

al. 2007). This book provides a detailed history of Deise's and União de Mulheres' struggle for justice. The book also recounts the NGOs' conflicting strategies to pursue justice in the IACHR (ibid: 117). Bypassing CEJIL and its assigned role as the primary interlocutor with the IACHR, Deise and União de Mulheres sent a copy of this book to the IACHR in 2010 and requested that the case be admitted. This was a final move to break their alliance with CEJIL and CLADEM/Brazil. União de Mulheres continued to work in collaboration with these NGOs in other instances of mobilization. But the transnational alliance that had been forged with the family victim was broken by the time the IACHR published the inadmissibility report in 2012.

Despite the IACHR's dismissal of the case, the subjectivity and the identity of the victim – in this case, a family victim – were clearly transformed in the process of transnational legal mobilization. Deise moved to the city of São Paulo, joined a feminist grassroots organization, and became a feminist activist fighting to change the legal system and to end domestic violence against women. CEJIL and CLADEM/Brazil members, however, do not consider this to be a 'successful' case. Although this case is cited in the website of CLADEM, neither CLADEM/Brazil nor CEJIL made efforts to bring it to public attention. CEJIL omits the case of Márcia Leopoldi from its website.

The case of Maria da Penha, on the other hand, is easily found on the websites of both CLADEM/Brazil and CEJIL. On the website of CEJIL, the case of Maria da Penha is an example of successful litigation with an 'impact'. Indeed, the legal mobilization on this case contributed to promoting domestic legal change, legal consciousness of women's human rights, and public awareness about the issue of domestic violence against women in Brazil. In addition, this case illustrates a 'convergent translation' of different types of knowledge and a process of building alliances among all actors involved from beginning to end of the legal mobilization process. It also contributed to empowering the victim, who became an activist and joined an organization, though at first she did not join a feminist or human rights NGO.

As noted above, the case of Maria da Penha was sent to the IACHR in 1998, two years after the case of Márcia Leopoldi. The petition was signed by Maria da Penha, CEJIL, and CLADEM/Brazil. As in the case of Ma´ rcia Leopoldi, I interviewed all petitioners.[168] A sign of CEJIL's role as gatekeeper to the IACHR was that only CEJIL had a copy of the petition. A representative from CEJIL visited Fortaleza in 1998 in search of paradigmatic cases on violence against women. She learned about the Maria Penha case through the State Council on Women's Rights of Ceará. In 1994, the Council had published the first edition of Maria da Penha's book, *Sobrevi… Posso Contar* ('I Survived... I Can Tell My Story') (Fernandes 1994). The book narrates Maria da Penha's corporeal and legal knowledge of violence and injustice. It shows how she became a survivor of domestic violence, describing her search for justice and denouncing the ineffectiveness of the legal system and the impunity of the perpetrator.

When I visited Fortaleza in 2008 to interview Maria da Penha, I was very impressed with her involvement with different activities relating to domestic violence against women. She was then the president of the NGO Associação de Parentes de Vítimas de Violência – APAVV (Association of Relatives of Victims of Violence). She was also a member of the State Council on Women's Rights. She had then just received reparations from Ceará State, as recommended by the IACHR report on the merits of her case published in 2001 (IACHR 2001). She knew all of the institutional agents working for the network of services that had been created in the city of Fortaleza, as mandated by the then newly-created domestic violence statute, Law No. 11,340/2006, also known as 'Maria da Penha' Law. This law was named after Maria da Penha by then President Luiz Inácio Lula da Silva as a form of symbolic reparation to the victim, as recommended by the IACHR. The president invited Maria da Penha to the ceremony held on 6 August 2006 in Brasília, the nation's capital, for the signing of this law. This ceremony was widely publicized in the media.

[168] I interviewed Maria da Penha twice: the first interview was conducted over the phone (Maria da Penha Fernandes interview with the author 3 April 2007); the second interview was conducted in her house in Fortaleza (Maria da Penha Fernandes interview with the author 19 February 2008). I also interviewed Maria da Penha's attorney in Fortaleza, 21 February 2008.

The significance of this case for Maria da Penha and for the women's movements in Brazil should not be underestimated. Maria da Penha felt honoured by the symbolic reparation she received during the signing of the law, even though she also considered 'very important that those using corporatism to delay justice be held responsible' (Maria da Penha Fernandes interview with the author 3 April 2007). She has become a well-known women's rights advocate and promoter of the Maria da Penha Law in Brazil. The victory in the IACHR also helped feminist NGOs in their campaign for the passing of the new legislation on domestic violence in 2006. In a document prepared by CEJIL, CLADEM/Brazil, and AGENDE – Action in Gender Citizenship and Development, presented to the CEDAW Committee in 2003, these organizations stated: 'The extreme relevance of this case surpasses the interest of the victim Maria da Penha, extending its importance to all Brazilian women... This was the first case in which the Convention of Belém do Pará was applied by an international human rights body, in a decision in which a country was declared responsible in a matter of domestic violence' (CEJIL et al. 2003).

Conclusion

The cases of Márcia Leopoldi and Maria da Penha illustrate that transnational legal mobilization involves a work of translation of different types of human rights knowledges. Even though international human rights NGOs based in the global North tend to have more knowledge of the norms regulating transnational litigation and operate like gatekeepers to access the IACHR, they also share this legal knowledge with domestic human rights NGOs in the process of transnational legal mobilization. Human rights NGOs have also expanded their issue areas and have made alliances with international and domestic feminist NGOs. However, 'local' grassroots NGOs and especially victims/survivors are not necessarily perceived as legitimate legal mobilization actors and members of transnational human rights advocacy networks.

Transnational legal mobilization has the potential to produce not only material and direct effects on the adoption and implementation of domestic laws and policies. As noted by Holzmeyer (2009), increasing the organizational capacity of transnational advocacy networks and promoting diverse actors' rights consciousness are some of the indirect effects that deserve further attention from transnational legal mobilization practice and theory. In addition, as this article has shown, victims/survivors are important actors in transnational legal mobilization practices and can become activists. Thus, research and legal advocacy on human rights and women's human rights must pay attention not only to material impacts of legal mobilization, but also to the interactions between the actors involved and to their subjective experiences, broadening the generally accepted view on who counts as human rights advocates.

Ignoring and devaluing certain forms of knowledge in the mobilizing practices of human rights endangers the very work of promoting global justice. The languages and cultures of human rights need to go beyond a legalist perspective on the needs and rights of individuals and groups. Otherwise, epistemic justice will not be achieved and this will hinder the work for global justice. Mobilizing women's human rights through transnational legal mobilization can make invisible the practices and knowledge of actors who are also fighting for justice. The cases of Márcia Leopoldi and Maria da Penha illustrate that the history of struggles carried out by grassroots organizations such as União de Mulheres and victims/survivors (and family victims) of domestic violence, such as Deise Leopoldi and Maria da Penha, are essential for promoting global justice. They have not only learned from the more professionalized human rights defenders, but also taught their knowledge from their bodily experience and from a long history of individual and collective struggles that can be truly viewed as 'epistemologies of the South'. Recognizing the knowledge and the contributions of these actors to the making of ecologies of women's human rights knowledge is also part of the global justice work that human rights defenders must seek to promote.

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References

American Convention on Human Rights '*Pact of San Jose, Costa Rica*', 22 November 1969 (entered into force 18 July 1978).

American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogota´ , Colombia, 1948.

Baxi, U (2006) 'Politics of Reading Human Rights: Inclusion and Exclusion within the Production of Human Rights', in S Meckled-García and B. Cali (eds),

The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law (London, Routledge), 182-200.

Cardoso, ELC (2012) *Litígio Estratégico e Sistema Interamericano de Direitos Humanos* (Belo Horizonte, Fórum).

CEJIL (Center for Justice and International Law), CLADEM (Latin American and Caribbean Committee for the Defense of Women's Rights), and AGENDE—Action in Gender Citizenship and Development. 2003. *Document for CEDAW on the Compliance by Brazil of the Diminished Obligations as State Party of the Convention Concerning Violence against Women. Violence against Women: The Case of Maria da Penha, Brazil*.

Cichowski, RA (2013) 'Legal Mobilization, Transnational Activism, and Gender Equality in the EU' 28(2) *Canadian Journal of Law and Society* 209–27.

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (entered into force 3 September 1981).

Dale, JG (2011) *Free Burma: Transnational Legal Action and Corporate Accountability* (Minneapolis, University of Minnesota Press).

Engstrom, P and P Low (2018) 'Mobilising the Inter-American Human Rights System: Regional Litigation and Domestic Human Rights Impact in Latin America', in P Engstrom (ed), *The Inter-American Human Rights System: Impact beyond Compliance* (London, Palgrave Macmillan).

Farrell, A and P McDermott (2005) 'Claiming Afghan Women: The Challenge of Human Rights Discourse for Transnational Feminism' in WS Hesford and W Kozol (eds), *Just Advocacy? Women's Human Rights, Transnational Feminisms, and the Politics of Representation* (New Jersey, Rutgers University Press), 33-55.

Fernandes, MPM (1994) *Sobrevivi... Posso Contar* (Fortaleza, Conselho Cearense dos Direitos da Mulher).

Gonçalves, TA (2013) *Direitos Humanos das Mulheres e a Comissão Inter-Americana de Direitos Humanos* (São Paulo, Saraiva).

Hernández Castillo, RA (2016.) 'From Victims to Human Rights Defenders: International

Litigation and the Struggle for Justice of Indigenous Women' in R. Aída Hernández Castillo (ed), *Multiple Injustices: Indigenous Women, Law, and Political Struggle in Latin America* (Tucson, University of Arizona Press), 163-189).

Holzmeyer, C (2009) 'Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal' 43(2) *Law and Society Review* 271-304.

IACHR (Inter-American Commission on Human Rights) (2001) *Report No. 54/01 (Admissibility), Case No. 12,051, Maria da Penha Maia Fernandes v. Brazil*, 16 April.

IACHR (Inter-American Commission on Human Rights) (2012) *Report No. 9/12 (Inadmissibility), Petition No. 11,996, Márcia Cristina Rigo Leopoldi v. Brazil*, 20 March.

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 'Convention of Belém do Pará', 9 June 1994 (entered into force 5 March 1995).

Keck, M and K Sikkink (1998) *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY, Cornell University Press).

Leopoldi, D, MA Teles, and TO Gonzaga (2007) *Do Silêncio ao Grito contra a Impunidade: O Caso Márcia Leopoldi* (São Paulo: União de Mulheres de São Paulo).

McCann, M (2006) 'Law and Social Movements'. 2 *Annual Review of Law and Social Science* 17-38.

McCann, M (2008) 'Litigation and Legal Mobilization' in KE Whittington, RD Kelemen, and GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford, Oxford University Press), 522-540.

Mendez, JB (2002) 'Creating Alternatives from a Gender Perspective: Transnational Organizing for Maquila Workers' Rights in Central America' in NA Naples and M Desai (eds),*Women's Activism and Globalization: Linking Local Struggles and Transnational Politics* (London, Routledge), 121-141.

Merry, SE (2006) *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago, University of Chicago Press).

Rodríguez-Garavito, C (2011) 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' 89 *Texas Law Review* 1669-1698.

Rodríguez-Garavito, C (2014) 'The Future of Human Rights: From Gatekeeping to Symbiosis' 11(20) *Sur – International Journal on Human Rights* 499-509.

Santos, BS (2005) 'Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality' in BS Santos and C Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge, Cambridge University Press) 29-63.

Santos, BS (2014) *Epistemologies of the South: Justice against Epistemicide* (Boulder, CO, Paradigm).

Santos, BS and F Carlet (2010) 'Movement of Landless Rural Workers in Brazil and their Struggles for Access to Law and Justice' in Y Ghai and J Cottrell (eds), *Marginalized Communities and Access to Justice* (London, Routledge), 60-82.

Santos, BS and C Rodríguez-Garavito (2005) 'Law, Politics, and the Subaltern in Counter-Hegemonic Globalization' in BS Santos and C Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge, Cambridge University Press), 1-26.

Santos, CM (2007) 'Transnational Legal Activism and the State: Reflections on Cases against Brazil in the Inter-American Commission on Human Rights' 4(7) *Sur – International Journal on Human Rights* 29-60.

Santos, CM (2009) 'A Justiça a Serviço da Memória: Mobilização Jurídica Transnacional, Direitos Humanos e Memória da Ditadura' in CM Santos, E Teles and JA Teles (eds), *Desarquivando a Ditadura: Memória e Justiça no Brasil 2* (São Paulo, Hucitec), 472-495.

Santos, CM (2010) 'Da Delegacia da Mulher à Lei Maria da Penha: Absorção/Tradução de Demandas Feministas pelo Estado' 89 *Revista Crítica de Ciências Sociais* 153-170.

Simmons, BA (2009) *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge, Cambridge University Press).

Thayer, M (2010) *Making Transnational Feminism: Rural Women, NGO Activists, and Northern Donors in Brazil* (London, Routledge).

União de Mulheres de São Paulo (2011) *União de Mulheres de São Paulo, 30 Anos, 1981–2011*.

21. De-differentiation tendencies in Russia: implications of Luhmann's approach to the analysis of the Russian criminal Justice system[169]

Konstantin Skoblik

Many at heart have justice, but shoot slowly,
That unadvised they come not to the bow,
But on their very lips thy people have it!
The Divine Comedy

1. Introduction

It is not a secret to many scholars that the Russian Federation (hereafter referred to as 'the RF') is notorious for having an overwhelming conviction rate and, consequently, a low acquittal one. The latter currently sits around 0.2% – 0.3% (Judicial Department at the Supreme Court of the Russian Federation [JDASCORF] 2020). At the same time, it is considered that the so-called accusatorial bias is the prime cause for such a state of affairs. As P. Solomon concluded, "In short, the combination of an extremely low rate of acquittal and minimal screening of cases during the investigatory stage indicates that Russian criminal justice has an accusatorial bias. For, simply put, once a case with serious charges has been started, it is extremely difficult for an accused to avoid conviction" (2015: 26). However, what other insights may appear if we change

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the theoretical focus? Nowadays, there are doubts regarding the explanatory potential of the concept "accusatorial bias". This notion has started to be used in a more political and journalistic way than in an academic one. The content of "accusatorial bias" has become uncertain, and applicable reference points for assessing the extent to which prosecutorial bias influences the Russian Criminal Justice System (hereafter referred to as 'the RCJS') have not yet been developed (Pozdniakov 2012). In this context, the descriptive power of N. Luhmann's theory can provide us with new insights into the operation of the RCJS. The German sociologist's approach offers a "[…] toolkit of instruments for observing a variety of social systems, such as functional systems, organizations and interactions […] His toolkit is universal in terms of its operation" (Barros, Amato and Fonseca 2020: 13-14).

Even though the current chapter consists of different parts, all of them center around one particular thesis, namely the RCJS and its focus on crime control by maintaining a high conviction rate are the result of de-differentiation in the meaning given to this concept by Luhmann. Ultimately, all elements of this chapter explore and develop this idea.

The interest in applying Luhmann's concept to the criminal process is also explained by the fact that the sociologist mainly produced his generalizations about the law by referring to German civil law (2013; Lange 1998). There is a lack of criminal process analysis through the lens of the autopoietic approach and an inclination of systemic studies towards civil (Teubner 1993), constitutional (Paterson 2021), and environmental law (Philippopoulos-Mihalopoulos 2009; Lange 2020), and towards the uses of the law by protest movements (Hanna 2021).

Although my feeling is that systems theory may hugely contribute to understanding the functioning of the RCJS, there can be much criticism to Luhmann's approach. It is known that during his lifetime Luhmann himself was regarded in very different ways such as radical, anti-radical, anti-humanist, anti-feminist, conservative and positivist. Since M. King and C. Thornhill have already responded to such critical claims masterfully (2003), there is no need to

repeat their objections. However, it is worth stressing the following points additionally. It seems that such critical statements are partially, if not entirely, based on a series of misunderstandings: 1) ignoring the idea of Luhmann's intellectual program on describing what is social as not centred around the legislative functions of human reason, which, due to the possibility of rational deduction, would dictate conditions to all areas of social existence. The latter was the main feature of the (human) Enlightenment, which, in essence, was still metaphysics, but with an anthropocentric foundation (2003); 2) misinterpretations of the most basic concepts of autopoietic theory (e.g. functional differentiation, autonomy, self-reference, and autopoiesis); 3) the non-demarcation of two opposite states of society as a condition for criticism, i.e. differentiation and de-differentiation. Taking into account these three remarks nurtures a more integral understanding of systems theory paying tribute to both its merits and limitations.

According to the author's intentions, the next section will describe some features of the RCJS (the code and its programs) through the lens of systems theory that meet the differentiation conditions when the subsystems of society (e.g. the economy, politics, or the law) are autonomous and operatively closed to each other (Luhmann 1992). In so doing, the right end of the 'de-differentiation-differentiation' continuum will be formed. The third part will demonstrate consequences that occurred within the RCJS due to de-differentiation, i.e. reasoning will go to the left end of the continuum. The conclusion will provide an overview of future research directions.

Now, after formulating the introductory statements, let us turn to outlining the facets of the Russian criminal process that correspond to the idea of differentiation.

2. The Russian Criminal Justice System as a Subsystem of Law

2.1. The System and its Code

The main thing that needs to be kept in mind while working with the autopoietic approach is the formation process of Luhmannian systems, i.e. how society begins to consist of the subsystems. This is crucial since the subsequent conceptual landscape of his theory one way or another reiterates and returns to the idea of differentiation as the process through which the operatively closed and autopoietic functional systems appear. The state of differentiation means that the system (e.g. the economy, politics, the law, science, education, religion, or arts) "operates by means of the continual reproduction of the difference between self-reference and external reference. That *is* its autopoiesis" (Luhmann 1992: 78). In a differentiated society, each subsystem is unique and has specific elements, processes, structures, and boundaries. By the reproduction of difference, the communicative units (subsystems) maintain their autonomy and boundaries. Operations of one subsystem cannot reach another, and each subsystem is compelled to construct its own internal image of the environment (Paterson and Teubner 2021).

The opposite pole of the continuum is the state of de-differentiation, when society represents a mono-system, or supermonad, whose subsystems are not yet distinctly differentiated, and their boundaries not clear and not stable. During the transition from de-differentiation to functional differentiation, the society loses the property of being organized hierarchically. This is a shift from stratification to a functionally differentiated society. The shift delegitimizes social stratification. Before functional differentiation the society had been "[…] the hierarchical, stratified organization of compartmentalized subjective status, whose overcoming was practically impossible" (Philippopoulos-Mihalopoulos 2009: 155). However, in the course of the transition to a modern society, "stratification becomes a mere by-product of the function systems, especially of the economy and education system" (Luhmann 2008: 40). There is also no

competition between function systems, as their relations "combine, in the terminology of »pattern variables« (Parsons), universalism and specification, namely encompassing competence – but only for their own function" (Luhmann 2008: 42).

As a result of these changes, the legal subsystem of society is differentiated from others by virtue of its unique binary code of 'legal'/'illegal' (Luhmann 2004). The concept of a code is essential for Luhmann's method since if the unit does not have its own binary coding, it cannot be regarded as a system. The law functioning on the basis of such a code implies that it can be viewed, in principle, as a system which makes selections according to its code to produce an order from noise (Paterson and Teubner 2021: 43). The code is "a distinction[170] between two opposed values, such as true/false for the scientific system and legal/illegal for the legal system. The code defines the societal subsystem's unity and is unique to that system (at least as a code)" (Baxter 2013: 170). As the code does not imply the existence of the intermediate values à la quasi-legal, or partially legal, it also reflects the logical law of the excluded middle (*tertium non datur*).

Since Luhmann's social systems are those of communication (Luhmann 2013), they perform the operations of 'inclusion'/'exclusion' with the aid of the

[170]Luhmann and scholars who employ his theory actively use G. Spencer-Brown's idea of drawing distinction (Luhmann 2013), creating binary formulas such as 'system'/'environment', 'legal'/'illegal', 'ecological flow'/'water scarcity', 'patron'/'client', 'capital'/'labor' (Amato 2020: 88) and the like. However, what are distinctions if not notions, which have words as "the signs of notions" (Bacon 1902). The idea of the distinction is, in principle, a manifestation of the general function of the notion. We need notions in order to distinguish some objects (perceivable or only conceivable) from others. For example, the notion of 'human being' by its content (attributes of a human being) makes it possible to distinguish a human being from a cat, chair, triangle, justice and all other notions whose content is different. However, in addition to distinguishing, notions likewise have a function of unification. The notion of 'human being' distinguishes everything that falls under its scope from notions with a different content, but also unites all objects that have the characteristics of human being into one class. Hence, 'distinction' is only one side of the distinction 'distinction'/'unification', because when we make a distinction, we automatically make a unification – systems differ from the environment, but all these objects (systems) are, due to common characteristics, simultaneously united into one class, which we call 'systems'. The quality of being differentiated differs from that of being de-differentiated. However, all objects that have the quality of being differentiated or being de-differentiated are at the same time united into the corresponding classes. It appears that the Luhmannian way of thinking just presupposes an additional emphasis on the side 'distinction'. However, it does not eliminate the side of 'unification' and only blurs it. Overall, the connection between distinctions and notions (though in different wording) has been already expressed by, for instance, M. Hanna, who has identified that the 'condensates' of binary distinctions are exactly 'concepts' (Hanna 2021: 173).

code. That is, the RCJS determines by means of its code what events can be internalized as communication belonging to it and what events cannot. For example, the communication during police activities (e.g. a test purchase or wiretapping), the criminal case initiation, the preliminary investigation and conduction of investigative actions (e.g. the interrogation or search), and the trial refers to the legal system, while the distribution of goods in society relates to economic communication. The code, along with programs of the system, allows it to understand precisely what kind of noise from the external world can be translated into order (Teubner 1993). Thanks to the code, a new communication is connected to an existing one, and the unnecessary one is cut off. Such a selection is crucial not to overload the system with issues that are not relevant to it and to reduce the complexity of the environment. Obviously, if the issues of the legal system center around the binary opposition 'legal'/'illegal', only other communication also centered around this distinction can be connected to the existing one.

It would be troublesome to resolve fact-finding questions about a person's involvement in the crime and the time and place of the criminal event with reliance on communication about the lack of resources and political declarations. Having connected to the previous communication, the new one (a search conducted on the basis of a previous interrogation) simultaneously creates conditions for connecting the future communication, in this case evidence obtained during the search requires an additional interrogation. In the event, it leads to the emergence of a cycle where communication produces the communication, and the RCJS, like any other subsystem of the society, autopoietically[171] (re)produces itself.

However, if the legal system reproduces itself by virtue of its unique code, which is standard for all fields of law (e.g. civil law, family law, criminal law,

[171] This chapter does not examine in detail phenomena of legal precedents, connecting precedents to precedents, and self-reference between legal norms, as these commonplaces have been already thoroughly analyzed by other theorists (Teubner 1993; Baxter 2013; Hendry and King 2017).

constitutional law, or environmental law), how does the code adjust itself according to peculiarities of the particular branch of law?

I will try to consider this matter on the basis of the example of the Russian criminal process as a subsystem of law. Moreover, the speculation of mine is that if the criminal process is regarded as a legal subsystem, there should be a specification of some traits of the legal system within the criminal process.

There have been many positions on the goals of the Russian criminal process and that of foreign countries. Scholars believe that it should seek the truth in the interest in "apprehending the *true* perpetrator" (Findley 2009: 9), reconstruct the allegedly criminal event (Brester 2012; Barabash 2017, 2020), ensure fair decision procedures, protect "all citizens from the possible abuse of the government's power" (Goodpaster 1987: 125, 134), control crime (Packer 1964, 1968), educate society members (Griffiths 1970), protect the crime victims' rights (Roach 1999). However, one way or another, the criminal process is forced to operate with the opposition 'guilty'/'unguilty' while achieving any of these aspirations. Using this distinction, the criminal process each time resolves a common issue for the entire legal system, namely that of being legal or illegal. Since the civil process also utilizes the concept of legal guilt, it is necessary to add that the functioning of the Russian criminal process refers to the construction of guilt used in criminal law.

Thus, the concept of 'guilt' in criminal law, like 'legality' in the entire legal system, is a medium for the RCJS, which is embodied in its code because "media exist as ways of understanding events throughout society, they are specifically developed within individual subsystems as *binary codes*" (King and Thornhill 2003: 23).

In the case of the RCJS, the value 'legal' corresponds to the value 'unguilty' in the criminal sense since if a person is not found guilty in the course of the criminal process, the behavior is legal. The other side of 'guilty' corresponds to the value of 'illegal'. As a result, the RCJS code is refined and takes an inversive form of 'guilty (illegal)'/'unguilty (legal)' or, from the point of view of the legal system, of 'legal (unguilty)'/'illegal (guilty)'. In the event, the basic distinction

between the guilt and innocence requires (and entails) many complementary distinctions such as the initiation/termination of the criminal case, the prosecution/defense, the imposition/revocation of the restraint measure, and the conviction/acquittal. With the aid of these and other distinctions, the RCJS as a functional subsystem of law organizes the communication encoded through the medium of the criminal guilt, ensures that this communication belongs only to it and not to other legal subsystems (civil, constitutional, environmental and the like).

2.2. The Programs of the Russian Criminal Justice System

The way wherein Luhmann has constructed his theory inevitably requires a move to be made from the code of the RCJS to its programs: the latter is precisely what complements the code and fills it with content. While the code is rigid and fixed, programs "must be formulated as highly complex, variable, and unstable with regard to details" (Luhmann 1995a: 318). Programs are the organizers of information which filter and select it. As some sort of steps or operations, they create conditions for the code application (Luhmann 2016). Ultimately, it is the programs that help to resolve fact-finding issues about the guilt/innocence and allocate values of the code.

Traditionally, Luhmann identifies conditional programs, which are, along with the code, the center of the legal system. They operate in a way that "If such-and-such facts obtain, then the legal consequence is legal or illegal" (Baxter 2013: 171). In principle, this provision of his theory is understandable enough and free from excessive intellectual acrobatics. The formula 'if–then' of the conditional program relies upon a hypothetical syllogism in *modus ponens* form (Asmus 1947; Turner 2020) internalized by the legal system through the construction of a legal norm[172].

[172] It may be added that the internalization of logical laws is a prerequisite for the emergence of the self-reference in the law and, consequently, of its autonomy. References between higher and lower norms in the legal pyramid are based, *inter alia*, on syllogisms of the logic.

There are plenty of concrete examples of the 'if–then' formula in the Criminal Procedure Code of the Russian Federation (hereafter referred to as 'CrPC RF'): "If there is a cause and grounds enshrined in article 140 of the Criminal Procedure Code of the Russian Federation, then the body of inquiry, the inquirer, the head of the investigative body, or the investigator initiates a criminal case" (Article 146 of the CrPC RF); "If there is sufficient evidence for accusing a person of committing a crime, then the investigator issues an order to regard the person as accused" (Article 171 of the CrPC RF).

In general, the idea of conditional programs allows Luhmann to illustrate and emphasize the cognitive openness of the legal system (and the RCJS) to the environment. By deploying these programs, the RCJS refers to the facts of the past and "translates law's binary coding into practical strategies for decision-making" (King and Thornhill 2003: 63).

Although theoretical statements about conditional programs help to conceptualize the criminal process through the lens of the autopoietic approach, the more interesting ones are ideas that make a more accurate and precise adjustment of systems theory to the RCJS possible. One of these valuable ideas refers to the core of the Russian criminal process: fact-finding. The key role of the fact-finding process has been recognized by many pre-revolutionary, Soviet and Russian scholars. It is widely believed that everything that occurs in the course of the criminal process centers around fact-finding and the reconstruction of the allegedly criminal event (e.g. the time, place, means of committing the crime, and the extent of the harm caused by the crime). Fact-finding nests in the preliminary investigation and the trial, and consists in collecting, verifying and evaluating evidence in order to reconstruct the event in question. Fact-finding serves as the *uber*program, which includes the 'middle-range' programs of collecting, verifying and evaluating evidence. During the implementation of these programs, the RCJS determines whether the particular information may be regarded as pieces of evidence and used in the reconstruction of facts. Such programs enable the RCJS to filter and remove the information devoid of necessary properties and reduce the complexity of the environment: the

irrelevant information is not utilized by the system in the reconstruction process. With the aid of fact-finding, the circumstances of the case are established, and the code is applied to a specific situation by making a legal decision.

In addition to those programs, the RCJS has devised the following criteria for filtering information and selecting noise from the environment: admissibility[173], relevance, reliability and sufficiency (Article 88 of the CrPC RF). The listed standards are, in fact, the development of the code since they help the system to understand what communication belongs to it and is necessary for making a final decision on a criminal case, allocating values 'guilty'/ 'unguilty'. The information selection process is vastly facilitated by the legal argumentation, which exactly "sets the boundaries for relevant communication" (King and Thornhill 2003: 49).

Records of investigative and judicial actions, as well as other documents, also supplement the programs noted above. They maintain the cognitive openness of the system and function as tools of the RCJS's memory. Compiling criminal cases, they reach their apotheosis forming the *dossier* as, according to M. Damaska, "the crucial instrument of collective memory" (Vogler 2006: 9). The *dossier* is what substantiates the operative closure and the autonomy of the RCJS, allowing it to construct its own reality since, as the Roman jurists put it, *quod non est in actis, non est in mundo*.

Apart from conditional programming and collecting, verifying, and evaluating evidence, there are other types of programs which are worth paying attention to. These are cognitive and predictive ones. Clusters of these programs are formed within the class of the conditional ones. The latter are divided into two groups by the system's reference to facts of the past (cognitive programs) or possible future events (predictive programs). The past facts, as well as the

[173] This requirement refers to the procedure of collecting evidence. That is, the information has to be obtained during special proceedings devised by the system itself (e.g. the interrogation, examination, cross-examination, and search) so as to be juridized and become evidence. It can be interpreted that, in spite of being cognitively open, the system remains operatively closed relying on and referring to the constructs created by itself.

possibility of certain future events, may equally become the circumstances (if) entailing legal consequences (then).

For example, decisions aimed at establishing certain past facts and implementing the cognitive program can be as follows: the refusal to initiate a criminal case, drawing up an indictment, the conviction/acquittal, and the criminal case termination. By making such legal decisions, the RCJS refers to the past because, for instance, drawing up the indictment or the conviction/acquittal require establishing the presence/absence of the circumstances of Art. 73 of the CrPC RF (e.g. the time, place, means of committing the crime, the extent of the harm caused by the crime). That is, in fact, the system needs to reconstruct within itself and through its semantics the event of the past that occurred in the environment. Although other decisions (e.g. initiating a criminal case, or bringing the accusation) do not refer to the moment of completion of the past event reconstruction, they are also related to the cognitive program since they mark the beginning and end of a particular stage of a past event reconstruction within the RCJS and embody the transition from one level of reconstruction to another, i.e. from one level (degree) of order from noise to another within the continuum "noise-order".

The idea of reconstruction in the criminal process is consistent with the fact that an autopoietic, autonomous and operatively closed system does not have direct contacts with the events of the environment. It can communicate about them and only recreate their image within itself through its own operations (Teubner 1993).

In turn, examples of a predictive program, when the legal consequences are contingent on the likelihood of a future event, are decisions on imposing restraint measures (Barabash 2015; Barabash 2017): e.g. bail, house arrest, or pre-trial detention. The CrPC RF directly links the grounds for their imposition with the prediction.

Article 97 of the CrPC RF includes a formula under which an investigator or a court has the right to impose a measure of restraint if there are sufficient grounds to conclude that "the accused, the suspect: 1) will hide from the inquiry,

preliminary investigation, or the court; 2) may continue the criminal activity; 3) may threaten a witness, other participants of criminal proceedings, destroy evidence, or otherwise obstruct criminal proceedings". With the aid of special semantics, all these cases contain a reference to the future and create a legal norm under which if there are grounds to expect the occurrence of events (1v2v3), then the restraint measure can be imposed. Thus, the need to reduce the risk from future behavior of the suspect or the accused is transformed into a legal rule based on the causal attribution between the facts of the present (e.g. the presence of foreign source income, or facts of the sale of property in the territory of the RF) and possible consequences in the future, for example, hiding from inquiry, preliminary investigation or court, because, as Luhmann has emphasized, "Like plants and animals, the legal system develops 'anticipatory reactions' to present occurrences which are quite regularly correlated with future situations (or so it is assumed)" (1995b: 294).

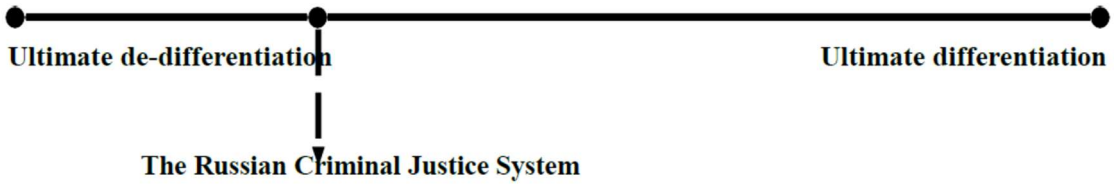
Besides the imposition of restraint measures, further examples of predictive programs in the RCJS can be given (the sentencing phase, and the application of medical coercive measures). However, since the scope of this chapter is limited to de-differentiation tendencies, it is unnecessary to thoroughly examine the phenomenon of predictive programs. After traits of the RCJS that are congruent with the idea of differentiation have been described, it is the appropriate time to concentrate on the analysis of de-differentiation in the RCJS.

3. The Crime Control Model in the Russian Criminal Justice System: Moving Towards De-differentiation

3.1. 'Blind' Legal Devolution

It has already been stated in the introduction that the so-called accusatorial bias is traditionally considered to be the prime cause for the low acquittal rate (0.2% – 0.3%) in Russia. However, what other insights may appear given a change in theoretical focus from the accusatorial bias concept towards systems theory?

One of the theoretical tools introduced by systems theory concerns the concepts of de-differentiation and functional differentiation, which may be put on the continuum for empirical analysis, where the left end is the condition of ultimate de-differentiation, and the right one represents the pole of ultimate differentiation.



Scheme 1. Differentiation and de-differentiation: degrees

Source: the author

Such a spectrum may ease criticism of the 'purity' of functional differentiation, which presupposes the transition of the world society to this last form of differentiation. In fact, "functionally differentiated world society resizes the other forms of social differentiation" (Amato 2020: 81). Due to this, as B. Lange has indicated, "it makes sense to talk about different degrees of functional differentiation depending on the specific time period […] different degrees of functional differentiation according to the particular part of the world we are talking about" (Lange 2020: 333). It could be added that it likewise makes sense to focus on different degrees of de-differentiation since, according to the continuum idea, the particular degree of functional differentiation simultaneously refers to that of de-differentiation. The more intense functional differentiation is, the less de-differentiation is and *vice versa.*

Applying this continuum to the RCJS, the latter may be characterized as being subjected to a particular degree of the de-differentiation. The de-differentiation idea becomes central for understanding patterns in the maintenance of the low acquittal rate, ones which have been in existence since 1950.

Since that time, the Criminal Justice System has been implementing a campaign against acquittals. It has led to a recurrent statistical fluctuation in the

sense that an acquittals spike has started to be followed by a substantial acquittals reduction. In a classic paper of 1987, P. Solomon affirms, "[...] in the late 1940s the rate of acquittals in Soviet courts started a decline so drastic that by the 1970s and 1980s acquittals had 'practically disappeared'" (1987: 1). Writing about the first years of jury trial in the RF, S. Thaman also pays attention to declining acquittals in trials by jury after their spike. He notes that in 1997 the acquittal rate in jury trials was 22.9%, however by 2003 "only 15% of cases ended in acquittal" (2007b: 407).

All such trends remain nowadays. For instance, a similar pattern of "rise-fall" acquittals is emerging over the recent Jury Reform. This reformation, which began in 2018, expanded jury trials to the level of District Courts[174]. Prior to this, they had been operating only at the level of Regional Courts[175]. Although the reform has only been happening for two years, it has already posed some critical challenges for the RCJS. The main disturbance to the system is that the acquittal rate from juries at the district level has risen sharply. According to the Institute for the Rule of Law at the European University at Saint-Petersburg (hereafter referred to as 'the IRL at EUSP'), the acquittal rate was 25.7% in the half-year of 2018, 24.6% in 2019 and 27.5% in 2020 (Khodzhaeva 2021). Although in 2020 the acquittal rate was higher than in previous terms, it is misleading because 62.1% of exonerations were reversed by appellate instances, as opposed to 54.5% reversed in 2019 and only 20.7% overturned in 2018 (Khodzhaeva 2021). On the one hand, in 2020 there was a slight rise in acquittals (from 24.6% to 27.5%), but on the other hand, there was an even more drastic increase in annulled acquittals. Hence, the system is again trying to keep the low acquittal rate.

Keeping in mind the low acquittal rate problem, it is now necessary to create a historical narrative about possible causes that have led to the de-differentiation and the RCJS's obsession with convictions. The usage of the word

[174] These courts are one of the basic elements of the courts system in the RF. They handle most civil, criminal and administrative cases. District Courts are primarily courts of the first instance.
[175] "Regional court jurisdiction includes original and appellate cases. As courts of first instance, regional courts handle the more complex civil cases and the more serious criminal cases that are not considered appropriate for the district courts. A judge and a jury or a panel of three judges would hear these cases" (Terril 2016: 400).

'possible' here is accounted for by the fact that it always depends on the vantage point of the observer who attributes causes to certain factors. P. Solomon's paper on informal norms and the practice of the Soviet Criminal Justice provides us with valuable information on strategies that the system (with the aid of the capacity for resonance) has used to control the acquittal rate. It also tells us about causes that could condition such a system's reaction to the acquittals.

Solomon considers that before the late 1940s, a small portion of cases had collapsed at trial and resulted in acquittals (1987). However, this situation later changed as acquittals started to decline. What happened in that period? Why did the Soviet officials change their attitude towards acquittals? Solomon explains such a cataclysm by a new stigma which the acquittals acquired over the 1940s. The Soviet superiors started to treat them as 'defective goods', mistakes and weakness, which embarrassed the representatives of Soviet power in front of the USSR's citizens and the international community. "The appearance of shortcomings of any kind became an acute source of embarrassment to the Soviet leadership" (1987: 33), which strived to maintain the positive image of the Soviet system due to competition with the USA. In turn, the trial courts "were a particularly visible part of that government which displayed to the public the products of Soviet law enforcement agencies" (1987: 33). Besides Solomon's view, Thaman (1995, 2007a, 2007b, 2008) likewise takes notice of negative attitudes towards acquittals since "the overarching policy of Communist Party officialdom was one of no acquittals" (2008: 99). The acquittals prevention tendencies of the late 1940s has altered very little to date, and the 'no-acquittals' policy of modern Russia "effectively converts the trial court into a mere sentencing court which imposes the judgment sanctioned in advance by the prosecutor in the accusatory pleading" (2008: 108).

The phenomenon of considering acquittals as 'defective goods' reflects the efforts of the USSR's political system to legitimize itself by providing a high level of performance in other systems, such as the economy, science, and the law. In so doing, reflexive units of the Soviet political system devised the subsystem of evaluation of the Criminal Justice System performance since if the distinction

'effective/ineffective' is employed, it is accordingly necessary to implement tools for such a performance assessment. The acquittal-conviction ratio served as one of the assessment criteria because the Soviet officials tried precisely to avoid "failures in court, that is cases that had been investigated and sent to trial but failed to produce a conviction" (Solomon 1987: 5).

Going back to the modern Russia, E. Paneyakh confirms the perpetuation of this evaluation subsystem. It is worth citing her accurate description in detail,

> In processing a criminal case, officers from different agencies strategically bargain with one another to balance their 'performance-evaluation-related' interests at the expense of other parties. They develop techniques of selecting the 'right' cases (and avoiding 'wrong' ones), manipulating charges depending on the victim's and defendant's statuses. They fake evidence and impose pressures on defendants, victims, and even courts in order to achieve outcomes that further the 'evaluation-related' needs of all enforcers involved (2014: 115-116).

Commenting on the relation between the performance assessment of the crime control campaign and the existence/non-existence of acquittals, I.L. Petrukhin has also stressed that, "There are strict directives of "judicial bureaucracy" discouraging exonerations. It is based on a false opinion that the acquittal represents the obstacle to the crime control campaign, the sign of judicial power weakness, criminals' means of the punishment avoidance […]" (2009: 62).

This state of affairs suggests that the political system sees the acquittal as undesired output not because of the mere fact of exoneration, but because it serves as a sign of the ineffective Criminal Justice System desperately trying to control crime. In the eyes of the political system, meaning both the USSR's political system as well as that of the RF, such 'unsuccessful' justice undermines its legitimacy.

This thrust on the war against crime and the impeccable performance of such a campaign has shaped the Soviet-Russian Criminal Justice System as the Crime Control System. Factually, the Russian criminal process is now operating in the mode of the Crime Control Model developed by H. Packer. Before going deeper into the features of this model, it is necessary to respond to possible criticism against the applicability of Packer's model to the Russian justice.

Firstly, despite the fact that this model was initially used to analyze the American criminal process, it became classical after more than fifty years. Scholars actively apply it to explain the American and Russian processes as well as the English, French, Japanese, Chinese, Iranian and Turkish ones (Terril 2016).

Secondly, the choice of Packer's conception is additionally accounted for by facts of the reception and transplantation of the American institutes into the criminal processes of other countries. Referring to the reconstruction time and the post-Soviet one, R. Vogler has explained that "since US financial support for the *Perestroika*[176] program was crucial, it was inevitable that north American forms of procedure should figure significantly in discussion […]" (2006: 177). Referring to Europe, B. Schünemann has likewise concluded about the triumphal march of the American criminal process model around it (2008). Thus, if due to the reformation, various criminal processes start acquiring traits of the American justice, it is possible to apply the analytical apparatus (the Crime Control Model) devised on the American basis.

Having set out the advantages of using Packer's theory, I will now summarize some of its provisions since the RCJS, as noted above, has acquired the features of the Crime Control Model.

Thinking about this model, Packer uses the metaphor of the assembly line. He supposes that the conveyor belt of the criminal process "moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by; the same small but

[176] The literal meaning of this term is 'reconstruction'. It refers to the set of steps (e.g. the development of freedom of speech, and the introduction of contested elections), which were taken by Mikhail Gorbachev during the 1980s in order to restructure the political and economic system of the USSR.

essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file" (1964: 11). This image is, in turn, based on several constituent elements, namely efficiency, speed, informality (a minimum number of ceremonious rituals), uniformity, and the presumption of guilt. Each of the listed components is necessary for turning the assembly line metaphor into reality.

The model, or more precisely the process, will operate effectively if the system demonstrates high performance in apprehending, trying and convicting offenders. Additionally, such a process must show a high rate of apprehension and conviction in a context where the workload is enormous and the resources are very limited. Therefore, the main emphasis of the model must be on the speed and finality of the decision. Speed "in turn, depends on informality and on uniformity; finality depends on minimizing the occasions for challenge. The process must not be cluttered with ceremonious rituals that do not advance the progress of a case" (Packer 1964: 10). In this logic, the establishment of special procedures for obtaining evidence, the necessity to explain the rights to the citizens involved in the criminal process, and even the very existence of these due process protections are considered as such slowing-down rituals, which undermine the efficiency of crime control. As Packer has clarified, "extrajudicial processes should be preferred to judicial processes, informal to formal operations" (1964: 10). However, it is not enough to have rituals reduced only in one case. There must be uniformity. The whole process should be a stereotyped routine so that the conveyor belt can handle a large number of cases.

In addition, the Crime Control Model is based on the presumption of guilt, which allows it to cope with the tremendous workload. This presumption means that, "once a determination has been made that there is enough evidence of guilt so that he should be held for further action rather than released from the process, then all subsequent activity directed toward him is based on the view that he is probably guilty (Packer 1964: 11).

Besides the presumption of guilt, the speed and throughput of the described system also rely on the guilty plea. The dystopian state to which such

a process aspires implies that the adjudicative procedures (cumbersome rituals) must be reduced as much as possible, and the main emphasis must be placed on administrative fact-finding stages (Packer 1968). The proliferation of the guilty plea hugely facilitates the high rate of speed and efficiency in crime control.

The aforementioned aspects are only an outline of Packer's model. In addition to the essential components (efficiency, speed, informality, uniformity, and the presumption of guilt), the American scholar also develops a number of practical issues. For example, it is of benefit to the Crime Control Model to hold a suspect in custody since pre-trial detention increases the chances of a guilty plea. In addition, the appeal must be made through a court of the first instance, and not every error can be the basis for the reversal of a conviction, but only one that influenced the result of a trial. (Packer 1964)

Although it is possible to continue listing the specific problems discussed by Packer, the main focus is now turned to the consistent movement, as already mentioned, of the Soviet-Russian Criminal Justice System towards the Crime Control Model. The facts cited by Solomon, Thaman, Petrukhin, the dissemination of the guilty plea[177], the findings of the IRL at EUSP (Paneyakh, Titaev, Shklyaruk 2018; Khodzhaeva 2021), as well as data of own empirical research on the acquittals prevention strategies in trials by jury, confirm the conclusion about the crime control movement.

3.2. The De-differentiation Influence on the RCJS: Merging Conditional and Intentional Programs

Why does the occurrence of the Crime Control Model in the RF seem to be the result of de-differentiation? Let me recall one of the theses of the previous

[177] Analyzing the functioning of courts of general jurisdiction in 2005, I.B. Mihailovskya points out, "It is noted that there is a tendency of the active usage of the guilty plea. In 2005, the guilty plea was applied almost 1.5 times more than in 2004. 2.4% of cases were resolved through the guilty plea in Regional Courts, 30% were resolved through the guilty plea in District Courts, and 37.5% were resolved through the guilty plea by Justices of the Peace" (2012: 46-47). The statistic of JDASCORF (2021) for 2020 shows that 296 483 (52.6%) persons out of the total number of the convicted during this period (562 906) also pled guilty.

section, namely that acquittal has become the undesirable outcome for the political system not by virtue of the mere fact of exoneration, but because acquittal has been considered as a sign of an ineffective Criminal Justice System and, therefore, of an ineffective political system in implementing the crime control program.

From the standpoint of an autopoietic observer, this paragraph already provides some answers. Under conditions of differentiation, all functional systems are autonomous to each other. For the legal system, this means that the law "is not defined by reference to external criteria but is self-referentially constituted" (Lange 1998: 455). The law produces the resource of the legality by itself, which is not contingent on an external source (e.g. divine law, eternal law, or natural law) because with the appearance of the constitution "the traditional legal hierarchy of divine law, eternal law or variable natural law, and positivistic law vanished. Its cosmological and religious fundamentals had dissipated anyway" (Luhmann 2004: 406-407).

The same rule is applied to the political system. The legitimacy resource does not depend on the external source. In the state of functional differentiation, the political system produces it within itself, and legitimacy is not based on the efficiency indexes of other functional systems or on physical coercion. According to Luhmann, "[…] The political system […] cannot obtain legitimacy from any *ab-extra* principles or normative source. The legitimation of power is always a communicative act of 'self-legitimation', which occurs within the political system, and it 'excludes legitimation through an external system'" (Thornhill 2012).

The last statement about the external system is of special importance for elaborating this text since when the movement towards de-differentiation begins, the political system starts exploiting other systems to produce its legitimacy based on the external reality[178]. In the event, a paradox occurs in the sense that

[178] The adoption of a constitution, no matter how positive it may seem, can just be another way of legitimizing the political system with the help of the legal one. Writing about the Soviet Constitution of 1936, M. Voslensky stresses that its introduction was mainly the act of foreign policy, "anticipating Yezhov's terror, it [the Soviet Leadership] wanted to balance the unfavorable

since the political system ceases to generate the resource of legitimacy within itself and seeks to legitimize itself through outside factors, delegitimization emerges. As legitimacy is made dependent upon external factors, the self-reference and the operative closure of other systems, besides the political one, are at stake. De-differentiation becomes not only a local phenomenon and has a destabilizing impact on the whole society.

Politics needs only to be concerned with its function, which consists in making collectively binding decisions (Luhmann 2004). Its legitimacy rests on the ability to identify the relevant part of the environment and to respond to it in an adequate manner. The functional differentiation, "however, is undermined wherever the state is conceived as a universal decision-making body, which can freely regulate non-political communication" (King and Thornhill 2003: 81). Politics overburdens itself with tasks that are beyond its function[179]. If the process of differentiation implies increasing autonomy and rationality, a situation whereby the political system legitimizes itself with the aid of the Criminal Justice System decreases them. Subsystems of society get highly interdependent. Since the Soviet era, such patterns of operating the political system and the Criminal Justice System have been happening with the help of the structural coupling 'criminal procedure law'[180].

The proclamation of the crime control goal, the development of the performance evaluation subsystem, and the control of acquittals marked as 'defective goods' rest on the incorporation of the intentional program

impression that *yezhovchina* was supposed to make in the West with a demonstrative transition to supposedly parliamentary forms of government" (1991: 360).

[179] Historical examples of de-differentiation, when the political system becomes responsible for solving an excessive number of problems and, therefore, interferes in other subsystems of society, are the welfare state and the socialist states of the Eastern bloc. The former takes too many demands and obligations (Jalava 2006), overloads politics with issues that it cannot control, and, consequently, undermines the legitimacy production. The latter, in turn, "fail to differentiate economic from political functions, and thus tend towards a total conditioning of politics and society" (King and Thornhill *2003: 83*).

[180] P. Solomon has correctly noted, "A fundamental change in the attitude of the authorities towards the law may require an escape from the model of relationships between the state and society, which has preserved over a long period of the Russian history. In the Russian tradition, the state is a continuation of the ruler and its interests, and goals (conservative or transformational) are higher than the interests and goals of society" (Solomon 2008: 219).

(*Zweckprogramme*) into the legal system based on conditional programs. Purposeful programs orient the system to achieving a result fixed within the program. These programs are "based on present intentions projected into the future. Examples of such programmes would be financial investment, town planning or the control of dangerous drugs […] they are judged on their performance; that is, on whether the purpose that was intended is in fact achieved" (2003: 61). Paraphrasing this citation, an example of such a program would be the Soviet-Russian crime control program judged on its performance, that is, on whether the purpose that was intended is in fact achieved.

3.3. The Paradox of Efficiency

Describing this program, it is not enough to simply mention its results-orientation; the Crime Control System additionally masks the paradox of efficiency. It has already become clear that the RCJS, apart from the existing distinctions, uses one more – 'effective'/'ineffective' difference. The efficiency, as noted above, is assessed by the high rate of apprehension and conviction. The paradox is that the system itself applies the distinction 'effective'/'ineffective' to itself, and, in evaluating itself, it self-referentially goes back to its basic distinction (the binary code) 'guilty'/'unguilty' since the acquittal-conviction ratio (or the guilty-unguilty ratio) is of prime importance for system assessment.

Applying more fully the apparatus of systems theory, the following statements may be deduced. The system's first-order observation makes a basic distinction 'guilty'/'unguilty'. Making this distinction, the system is not yet observing itself. On the other hand, by using a distinction 'effective'/'ineffective', the RCJS already deploys the second-order observation in the sense that it observes itself in the operation of the observation (Hanna 2021: 174). However, the criterion used by the system for its performance assessment and the second-order observation refers back to its binary code 'guilty'/'unguilty', i.e. to the first-order observation and the acquittal-conviction ratio. It seems that during the third-order observation, which concerns the question of how the system will

evaluate its performance and efficiency, the system refers back precisely to the basic distinction. The first-order observation consists in making this basic distinction, and the second-order one is the very process of efficiency assessment. In short, a self-referential cycle emerges. The third-order observation refers to the first-order observation to determine the criterion for the performance evaluation and to answer the question of how to conduct the second-order observation in order to evaluate the first-order observation. Based on the results of the first-order observation evaluation, the system corrects its functioning. If the information produced within the system about its performance shows a decrease in efficiency or a failure to implement the crime control program, the mechanism of stabilization is launched.

The reference from one type of observation to another and the correction of the system's operations are performed by the reflexive units of the system. They are the Regional Court of the RF federal subject[181], the Supreme Court of the RF, the Constitutional Court of the RF, the Ministry of Internal Affairs of the RF, the Investigative Committee of the RF, the General Prosecutor's Office of the RF, and the Prosecutor's Office of the RF federal subject. The evaluation and the achievement of high performance are impossible without their operations. S. Thaman has perfectly described the role of the RF' Supreme Court in this process as a reflexive instance of the RCJS, "the SCRF is acting to deprive the jury of its historically and statutorily rooted competence to determine guilt. The SCRF is acting as a political rather than a judicial institution. Its goal appears to be to fight crime by annulling 'scandalous' jury acquittals"[182] (2007b).

In general, the paradox of efficiency means increasing the number of reflexive instances and growing bureaucracy as an overburdened political

[181] 'Federal subject of the RF' refers to one of 85 federated states, which form Russia as a federation.

[182] Thaman's opinion and the emphasis on the political nature of the RF' Supreme Court are compatible with the interpretation of L. Amato, who calls supreme courts 'meta-organizations' and notes that they "…(especially when performing judicial review) are at the top of the core legal organization (the judiciary, in a State law) and decide cases with a collectively binding prerogative, akin to the core of politics" (2020: 96).

system attempts "to provide 'performances' (*Leistungen*), in areas which are not relevant to their own operations" (King and Thornhill *2003: 84*).

3.4. A New Undertone of the System's Operations

Unfolding the efficiency paradox, as well as the unproductive fusion of conditional and intentional programs[183], has led to a situation whereby the operations of the RCJS, which include accommodation of surprises (variety), banalisation of irritations (redundancy), the system's learning, building up the system's memory and intelligence, variation, selection and retention, and the system's capacity for resonance, have aimed at preventing acquittals, thus increasing the efficiency and speed of the RCJS's conveyor belt. The system has started to operate mainly on the side 'guilty' of the code.

Pursuing the goals of the intentional program, the Crime Control System uses the operations mentioned above for invention, selection and retention in order to maintain a high conviction rate. Some of these strategies have been examined by P. Solomon. His work cited earlier 'The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice' is precisely about the ways of the system's stabilization. These 'informal norms' appear to be the strategies which the system deploys to decrease the acquittal rate and maintain de-differentiation tendencies. Some of them are as follows: conducting an inquiry into the evidence that amounted to an investigation before starting a case officially (pre-investigation); returning the case to the supplementary investigation; reducing the charge to a less serious offense, convicting the accused, and sentencing him to a lenient, non-custodial sanction such as corrective work or a suspended sentence; sending the case by the cassation court back for a supplementary investigation and retrial instead of acquittal. (Solomon 1987).

[183] At the same time, the very interaction of two types of programs is productive for society, but only as long as the systems remain separate (Luhmann 2004).

In this logic, metamorphoses that have occurred within the procedure of terminating the criminal case may be another concrete example of de-differentiation. In the first half of the 20th century, this procedure was adjudicative, i.e. only the court could terminate the preliminary investigation. Article 203 of RSFSR's Criminal Procedure Code of 15th February 1923 stated that "The investigator draws up a grounded decision on the termination of the preliminary investigation with the exact reference to the act that was the subject of the investigation, and, notifying the procurator, forwards the case to the court that has jurisdiction over it. The court considers the case in the pre-trial conference and issues a ruling on the criminal case termination if it agrees with the decision of the investigator [...]".

Yet, RSFSR's Criminal Procedure Code of 27th October 1960 enshrined the transformation of the decision on the criminal case termination into the category of nonadjudicative administrative decisions made by the investigator in the course of the investigation. Investigators themselves, without court sanction, started terminating the criminal case and sending a copy of the decision to the procurator (Article 209). The lack of court participation in the termination procedure has continued to this day. Being almost adjudicative in terms of consequences and administrative in terms of making, this decision has turned into a 'proto-acquittal'. In the event, such a proto-acquittal decision has formed the foundation for the strategy of criminal case termination instead of the person's acquittal.

As for the control of acquittals in jury trials, Thaman, who studied the first wave of jury trial resurrection (in the 1990s), likewise identified a number of the following strategies: during the evidence examination stage, summation of the trial and formulation of the question list, the collusive introduction of trial errors by the judge and prosecutor to assure a grounds for acquittal reversal by the appellate court (2007b, 2008); cases of investigators, prosecutors, and defense lawyers convincing defendants to forego jury trials; prosecutors remanding the case to the investigator after the jury had been selected and had heard the bulk of the evidence; the intentional violation of the victim's rights by the investigative

authorities during the preliminary investigation in order to reassert those rights during trial when it becomes clear that there is not sufficient evidence for a conviction; annulling acquittals by the Supreme Court of the RF (2007b).

The empirical study of mine conducted in 2019-2020 and consisting of jury trial observations (135 hours, 45 court sessions) in District Courts also revealed a number of strategies deployed by the RCJS to ensure the guilty verdict: the blocking of unwanted communication and providing the preferable option (manipulation in communication)[184]; the unexpected returning to the evidence examination stage, after the defense presents its evidence (trial recursion)[185]; trial acceleration[186]; the deliberate introduction of trial errors to form grounds for annulling the acquittal by the court of higher instance; using the aggrieved party by procurators to persuade laypeople (victims asking inadmissible questions in jury trials; an emotional speech of a victim in closing arguments); the court assistance to the accusing party in adducing evidence (advice how to present

[184] This strategy utilizes the ability of the RCJS to transform communication connected with the side 'unguilty' of the code into communication relevant to the side 'guilty'. This is about how, because of de-differentiation, the system deals with the communication within itself. Since de-differentiation impedes the reproduction of difference, the justice system becomes obsessed with the side 'guilty' of the code and the communication relevant to this side. The manipulation in communication strategy implies a number of the following tactics: ruling out the question asked by one of the parties; interruption of a speaker; warnings and reprimand; advising the jury to disregard comments. The tactics can be used singly or in combination.

[185]This strategy can be explained in the following way. Prosecutors, after their evidence is examined, let the defense present its case. While the defense is presenting its evidence, procurators are waiting for the opportune moment. After the defendant is questioned and evidence of the defense is presented, procurators say they have additional information and present new pieces of evidence that disprove the defense evidence and the defendant's testimony. After the defense evidence is presented, the accusing party "would twist all things to their advantage…like a psychological feint meant to impress the audience, the jurors", as one of the judges has explained. My feeling is that the trial recursion strategy is the domain of the system's intelligence. The defense lawyers asserted that they had not witnessed the sudden presenting of additional evidence by the procurators before the Jury Reform started. The trial recursion strategy is precisely the case when the system invents, selects and retains new tools of its stabilization.

[186] Since the efficiency of the crime control program is contingent on the speed of the conviction, the system accelerates jury trials. The necessity of acceleration is accounted for by the fact that trials by jury currently slow down the assembly line for different reasons such as terms of the jury selection, new, complicated trial processes, and problems with the appearance of the jurors at the court sessions. There have been detected the following set of tactics related to this strategy: providing a tight schedule of trials; judge's remarks about the trial protraction by the defense; the prosecution refusing to examine their witnesses / victims who regularly miss the trials; replacing a juror who misses more than one trial or replacing an ill juror at the phase of the closing arguments; finishing a trial just before the jury foreperson was going on vacation.

evidence before the jurors in a clearer way, suggestions on the examination of victims, the court itself asking questions of a witness if the victim struggles to formulate a question); sentencing the defendant to the most severe punishment at the jury trial that ended in the guilty verdict to intimidate other accused and prevent them from applying for the trial by jury.

The usage of the strategies and tactics listed above[187] in order to implement a goal-oriented crime control program means that the RCJS is preoccupied with communication corresponding to the meaning 'guilty'. The communication initially coded through the side 'unguilty' is then transformed by the system into the opposite one. The legal argumentation likewise starts fulfilling its function of determining what is relevant to the system and what is not (Luhmann 1995b) based on a new criterion, namely what will facilitate the conviction and what will not. Evidence against the defendant is more likely to be regarded by the system as admissible, relevant, reliable, and sufficient.

Cognitive and predictive programs, as well as programs of collecting, verifying and evaluating evidence, are deployed by the system only to the extent that allows it to maintain the efficiency and speed of the crime control program. Based on the systems theory view, the concept 'accusatorial bias' acquires a new connotation as bias in favor of the side 'guilty' of the code. The distinction of 'guilty'/'unguilty' is not upheld. Using only the communication on guilt impedes the reproduction of the difference between the legal system and the environment, i.e. between the RCJS and politics. The difference reproduction is replaced by the reproduction of sameness as "systemic corruption and dedifferentiation block the functional need of 'ensuring sufficient disintegration'" (Amato 2020: 103). The RCJS is turning from the system for itself into the system for politics. Since the difference is not maintained, the functioning of autopoiesis is disturbed. Autopoiesis is precisely the reproduction of the

[187] Surely, the system has developed more ways of reacting to irritations than indicated in the text. The whole set of strategies and tactics can additionally be divided, according to different criteria, into clusters: strategies implemented at the stage of the criminal case initiation, at the stage of preliminary investigation, in the course of trial; strategies implemented in usual or special criminal proceedings (for instance in jury trials); strategies applied by the District Court/Regional Court/Supreme Court.

difference inside (by means of re-entry) and outside the system. The system cannot have any other *telos* besides its autopoiesis besides the difference reproduction (Philippopoulos-Mihalopoulos 2009). It serves as the basis of the functional differentiation, which "provides a lesser degree of integration than other social forms" (Amato 2020: 100)

It is thought that autopoiesis is "above all "a production of internal indeterminacy" (Pors 2015: 84). However, no longer reproducing indeterminacy, the RCJS acquires traits of the trivial machine which autopoietic systems are not. G. Teubner explains that such machines "link particular inputs with particular outputs in a fixed, ordered way. Trivial machines are synthetically determined, analytically determinable, independent of the past, and predictable" (1993: 2). The trivialization (Paterson and Teubner 2021) of the criminal justice machine means that it becomes possible to apply the input/output model to it and use causal explanation since by having different inputs, the output can be predicted as 'conviction'. This conclusion is curious as Luhmann himself spoke about the inapplicability of this model to the autopoietic legal system, which does not function in a calculable, predictable manner (2013). However, he meant it by implying the existence of a state of functional differentiation. Contrary to that, the de-differentiation which is happening to Russian justice allows the input/output formula to be used in systemic analyses.

Moreover, by producing a 99.8% conviction rate, the RCJS begins to stabilize normative expectations in a skewed way. Luhmann has believed that the function of the law "[…] is the maintenance (stabilization) of expectations despite disappointments (counterfactual examples)" (2004: 14). That is, the behavior expected by virtue of law and demonstrated in the present can be similarly expected in the future, even though deviations from the rules occur occasionally. Therefore, the law, just as importantly, stabilizes normative expectations across the time. In other words, "Within the framework provided by legal communications, it is safe to assume that this future will *normatively* be no different from the present, that the same distinctions marking what conduct

is legal and illegal will exist tomorrow as they exist today" (King and Thornhill 2003: 54).

Stabilization of expectations, the fact that the legal norms in force today will be valid tomorrow allow society to reduce the indeterminacy of the future. However, in the case of the Crime Control System, it is not the normative expectations that are additionally stabilized, meaning that there is no legal norm prescribing to convict more often than to exonerate or *vice versa*, but the expectation of a specific output in the form of the conviction. From this stance, the future of the criminal case and society with such a law subsystem becomes quite predicted and certain. However, the absence of uncertainty[188], as noted above, implies the absence of the difference and, therefore, de-differentiation[189].

4. Conclusion

In this chapter, I have tried to outline sides of the RCJS that are congruent with differentiation and de-differentiation. It is evident that the analysis of the Russian system through the lens of the Luhmannian approach should be continued. Many statements expressed here, including those about the unique code of the RCJS, cognitive and predictive programs, the paradox of efficiency, strategies of the system's stabilization and the like, need to be elaborated further by a comprehensive description of the RCJS on the basis of systems theory: by a description, which links the level of lofty abstractions with particular cases of the system's functioning. Meanwhile, such an intellectual program poses several questions. Some of these are as follows: what concrete empirical studies should be conducted to determine the actual position of the RCJS on the differentiation-

[188] Making itself internally determinable to ensure the implementation of the intentional program, the RCJS starts exploiting the distinction 'risk'/'danger' in its specific way. *The system views acquittal as a risk, not a danger, as it tries to avoid acquittals and deploys acquittals prevention strategies. The risk concept exactly means that, from the system's point of view, it is possible to prevent an undesirable future.*

[189] Even the fact that under the crime control model due process protections are seen as unnecessary rituals and formalities that should be reduced as much as possible to increase the speed and the performance of conveyor belt already shows signs of de-differentiation. Initially, human rights arose exactly as an element of the differentiation process and response to the threat of de-differentiation (Luhmann 2008; Philippopoulos-Mihalopoulos 2009).

de-differentiation continuum; whether it is possible to apply the research findings on the RCJS described here to criminal processes of other countries and to what extent.

References

Amato, LF (2020) 'Still a European Anomaly? Theses on Luhmann, Functional Differentiation, World Society and the Legal System' in MA Barros, LF Amato, GF Fonseca (eds), *World Society's Law: Rethinking Systems Theory and Socio-Legal Studies [recurso eletrônico]* (Porto Alegre, RS: Editora Fi), 71-118.

Asmus, VF (1947) *Logic: a Textbook* (Moscow, Editorial). (In Russ.)

Bacon, F (1902) *Novum Organum* (New York, P.F. Collier).

Barabash, AS (2020) *The Presumption of Innocence Is a Myth of Russian Criminal Process Theory* (Moscow, Yurlitinform). (In Russ.)

Barabash, AS (2017) *Basic, Extra and Subsidiary Fact-Finding Processes within the Stages of the Preliminary Investigation and Trial*. (Moscow, Iurlitinform). (In Russ.)

Barabash, AS (2015) 'Objectives and Grounds for Imposing Restraint Measures in Criminal Proceedings' 12 *Topical Issues in Russian Law* 184-190 (In Russ.)

Barros, MA, Amato, LF, Fonseca, GF (2020) 'Systems Theory and Socio-Legal Research: a Map of Perspectives' in MA Barros, LF Amato, GF Fonseca (eds), *World Society's Law: Rethinking Systems Theory and Socio-Legal Studies [recurso eletrônico]* (Porto Alegre, RS: Editora Fi), 13-32.

Baxter, H (2013) 'Niklas Luhmann's Theory of Autopoietic Legal Systems' 9 *Annual Review of Law and Social Science* 167-184.

Brester, AA (2012) 'The Purpose of Criminal Proceedings and its Importance in Determining the Method of Criminal Proceedings' 1 *Vestnik of Saint Petersburg University. Law* 74-81. (In Russ.)

Findley, KA (2009) 'Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process' 1069 *Univ. of Wisconsin Legal Studies Research Paper* 1-41

Goodpaster, G (1987) 'On the Theory of American Adversary Criminal Trial' 78 (1) *The Journal of Criminal Law & Criminology* 118-154.

Griffiths, J (1970) 'Ideology in Criminal Procedure or a Third "Model" of the Criminal Process' 79 (3) *The Yale Law Journal* 359-417.

Hanna, M (2021) 'Casting Off from the Rock of Uncertainty: Observations on the Empirical Application of Luhmann's Sociological Theory and a Case Study on the Concept of Normative Expectations' in CF Campilongo, LF Amato, MA Barros (eds), *Luhmann and Socio-Legal Research: An Empirical Agenda For Social Systems Theory* (Abingdon, New York, Routledge), 166-187.

Hendry, J and King, C (2017) 'Expediency, Legitimacy, and the Rule of Law: a Systems Perspective on Civil/Criminal Procedural Hybrids' 11 *Crim. Law and Philos* 733-757.

Jalava, J (2006) *Trust as a Decision: The Problems and Functions of Trust in Luhmannian Systems Theory* (Helsinki, Yliopistopaino).

Judicial Department at the Supreme Court of the RF, 2020. *A Report on the Work of General Jurisdiction Courts in Handling Criminal Cases as Courts of the First Instance* [online]. Available from: http://www.cdep.ru/index.php?id=79&item=5258 [Accessed 10 April 2020]. (In Russ.)

Judicial Department at the Supreme Court of the RF, 2021. *A Report on the Work of General Jurisdiction Courts in Handling Criminal Cases as Courts of the First Instance* [online]. Available from: http://www.cdep.ru/index.php?id=79&item=5671 [Accessed 19 May 2021]. (In Russ.)

Khodzhaeva, E (2021) 'Jury Trials in 2018-2020'. Statistics [online]. Available from:

https://enforce.spb.ru/images/Products/Other_Publications/spravka_sudy_2018_2020.pdf [Accessed 22 June 2021]. (In Russ.)

King, M and Thornhill, C *(2003) Niklas Luhmann's Theory of Politics and Law* (London, Basingstoke: Palgrave MacMillan).

Lange, B (2020) 'Systems theory, regulation and environmental law interviewed by Marco Antonio Loschiavo Leme de Barros, Lucas Fucci Amato and João Felipe Bezerra de Assis' in MA Barros, LF Amato, GF Fonseca (eds), *World Society's Law: Rethinking Systems Theory and Socio-Legal Studies [recurso eletrônico]* (Porto Alegre, RS: Editora Fi), 325-336.

Lange, B (1998) 'Understanding Regulatory Law: Empirical Versus Systems-Theoretical Approaches?'18(3) *Oxford Journal of Legal Studies* 449–471.

Luhmann, N *(2016) Truth, Knowledge, Science as a System* (Moscow, Logos). (In Russ.)

Luhmann, N (2013) Introduction to Systems Theory (Cambridge and Malden, Polity Press).

Luhmann, N (2008) 'Beyond Barbarism' 14 (1) *Soziale Systeme* 38-46

Luhmann, N (2004) *Law as a Social System (Oxford Socio-Legal Studies)* (Oxford, Oxford University Press).

Luhmann, N (1995a) *Social Systems* (Stanford, Calif. : Stanford University Press).

Luhmann, N (1995b) 'Legal Argumentation: An Analysis of its Form' 58(3) *The Modern Law Review* 285-298.

Luhmann, N (1992) 'The Concept of Society' 31 (1) *Thesis Eleven* 67-80.

Mihailovskya, IB (2012) *Processes of Governance in a Judicial System* (Moscow, Prospect). (In Russ.)

Packer, HL (1968) *The Limits of the Criminal Sanction* (Stanford, Stanford University Press).

Packer, HL (1964) 'Two Models of the Criminal Process' 113(1) *University of Pennsylvania Law Review* 1-68

Paneyakh, E, Titaev, K, Shklyaruk M (2018) *The Trajectory of the Criminal Case: an Institutional Analysis* (St. Petersburg, EUSP Press) (In Russ.)

Paneyakh, E (2014) 'Faking Performance Together: Systems of Performance Evaluation in Russian Enforcement Agencies and Production of Bias and Privilege' 30 *Post-Soviet Affairs* 115-136.

Paterson, J (2021) 'Politics, Law and Legitimacy: Re-constructing Brexit from a Systems Theory Perspective' in CF Campilongo, LF Amato, MA Barros (eds), *Luhmann and Socio-Legal Research: An Empirical Agenda For Social Systems Theory* (Abingdon, New York, Routledge), 223-246.

Paterson, J and Teubner, G (2021) 'Changing Maps: Empirical Legal Autopoiesis' in CF Campilongo, LF Amato, MA Barros (eds), *Luhmann and Socio-Legal Research: An Empirical Agenda For Social Systems Theory* (Abingdon, New York, Routledge), 33-67.

Petrukhin, IL (2009) *Acquittal and the Right to Rehabilitation* (Moscow, Prospect). (In Russ.)

Philippopoulos-Mihalopoulos, A (2009) *Niklas Luhmann: Law, Justice, Society* (Abingdon, Routledge).

Pors, JG (2015) 'Is the System Badly Named? Noise as the Paradoxical (Non-)foundation of Social Systems Theory' 22 (4) *Cybernetics and Human Knowing* 75-89.

Pozdniakov, M (2012) 'The Ambiguity of Accusatorial Bias' in V Volkov (ed), *How Judges Make Decisions: an Empirical Study of Law* (Moscow, Statut), 54-107. (In Russ.)

Roach, K (1999) 'Four Models of the Criminal Process' 89 (2) *J. Crim. L. & Criminology* 671-716

Schünemann, B (2008) 'Zur Kritik des amerikanischen Strafprozessmodells' In W Wohlers and E Wesslau (eds.), *Festschrift Für Gerhard Fezer Zum 70. Geburtstag Am 29. Oktober 2008commemorative Publication Dedicated to Gerhard Fezer in Honor of His 70th Birthday on 29 October 2008* (Berlin, New York, De Gruyter), 555-576.

Solomon, PH, Jr (2015) 'Understanding Russia's Low Rate of Acquittal: Pretrial Screening and the Problem of Accusatorial Bias' 40(1) *Review of Central and East European Law* 1-30.

Solomon, PH, Jr (2014) 'The Law in State Governance' in E Paneyakh (ed), *Law and Law Enforcement Through the Prism of Social Sciences: a Reading-Book of Modern Texts* (Moscow, Statut), 201-220. (In Russ.)

Solomon, PH, Jr (1987) 'The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice' 39(4) *Soviet Studies* 531–555.

Terrill, RJ (2016) *World Criminal Justice Systems* (New York, Routledge).

Teubner, G (1993) *Law as an Autopoietic System* (Cornwall, Padstow: T.J. Press Ltd.)

Thaman, SC (2008) 'The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy', in JD Jackson, M Langer and P Tillers (eds), *Crime, Procedure and Evidence in Comparative and International Context* (Oxford, Hart Publishing), 99-118

Thaman, SC (2007a) 'The Good, the Bad, or the Indifferent: 12 Angry Men in Russia' 82(2) *Chi.-Kent L. Rev.* 791-808.

Thaman, SC (2007b). 'The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond' 40(2) *Cornell International Law Journal* 357-428.

Thaman, SC (1995) 'The Resurrection of Trial by Jury in Russia' 31(6) *Stanford Journal of International Law* 61-274.

Thornhill, C (2012) 'Sociological Enlightenments and the Sociology of Political Philosophy' 1 (n° 259) *Revue internationale de philosophie* 55-83.

Turner, DD (2020) *Form and Content: An Introduction to Formal Logic (Open Educational Resources*).

Vogler, R (2006) *A World View of Criminal Justice* (Cornwall, Bodmin: MPG Books Ltd.)

Voslensky, M (1991) *Nomenklatura: The Soviet Ruling Class* (Moscow, The Soviet Russia). (In Russ.)

22. Destabilizing barriers to the effective access to justice: the National Council of Justice as a reconstructing organ of Brazilian Judiciary

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1. Introduction

Traditionally, especially in the European and Latin American academy, legal studies present a bifurcation of methods: either they are approached from an external point of view, concerned with moral (philosophical) evaluations or empirical (sociological, historical, psychological) descriptions about law in general, or about a particular legal order, branch of law or situation-problem; or they approach a given order from within, dogmatically assuming the current law as the foundation of an argumentation aimed at solving controversies. This is the case of practical discourse in the forensic environment, but also of the doctrinal elaboration aimed at identifying valid law, systematizing it and presenting its interpretation possibilities (Ferraz Jr 2008: 16-28).

One of the open strands in the line of Critical Legal Studies is aimed precisely at offering an alternative to this bifurcation: studies that, concerned with the solution of legal problems from an internal point of view, do not stick only to the commentary of the rules currently in force, but also turn to the analysis, criticism and proposal of legal reforms (making use, for instance, of references to comparative law); these studies tend to adopt an interdisciplinary approach, incorporating discussions and methods typical of other sciences (for example, empirical research and sociological theories). This approach would characterize a kind of 'anti-dogmatic doctrine' in law (Amato 2017: 157-173).

In the case of the present study, the object of analysis is an innovation already incorporated into Brazilian law – either by Constitutional Amendment

45/2004, which established the National Council of Justice (Conselho Nacional de Justiça, hereinafter 'CNJ'), or by the Council's norms, especially the resolutions that instituted the *national policy of prioritizing the first instance of justice*. At any rate, the openness to empirical and interdisciplinary analysis maintains the affinity of our approach to that perspective focused on the study of institutional innovations.

It is along these lines that Unger (1996: 129-134) presents the proposal of 'legal analysis as institutional imagination'. This method incorporates, firstly, a concern with mapping alternative sets of social practices and rules, part of which law shapes in the form of organizations and procedures. Secondly, institutional imagination from a legal point of view would involve criticizing the established organizational and procedural forms in light of the very ideals that the legal order proclaims. In this chapter, the (constitutionally enshrined) ideals of access to justice and celerity of jurisdiction are contrasted with evidence on the slowness of the judicial branch in Brazil; on the other hand, those principles serve as a normative foundation to evaluate the policies that the National Council of Justice has been adopting to solve this structural problem – notably, we evaluate the policy of prioritization of the first judicial instance.

The aim of this paper is to analyze, based on empirical data collected by the National Council of Justice, how the policy of prioritizing the first degree of jurisdiction was justified and implemented, and to point out elements of this experience that would characterize the CNJ in the exercise of a role as a 'reconstructive organ' of the Judiciary. To this end, we adopt the categories of 'destabilization rights' and of a 'reconstructive branch of government', conceptual proposals developed by Roberto Mangabeira Unger.

For Unger (1998: 228-229, 269-271; 1996: 30-33), citizens should have legal instruments to demand localized, punctual, but structural, corrective interventions in public or private organizations and procedures that renitently disrespect constitutional rights such as equality – for example, by implementing routine, unconstitutional discrimination in their organizational practices. Unger suggests that such a task would not fall to the public administration in general

(geared towards the elaboration of structuring, but general and not specific public policies), nor to the legislative branch (geared towards the general and abstract regulation of typical situations), nor even to the judicial branch. Judges and courts are structured for the application of the law in the solution of concrete cases (dispute settlement), or for the invalidation of legal norms (in judicial review), with little organizational capacity to accompany more complex and time-consuming enforcement, which may imply a continuous review of the very order issued by the judicial authority. Hence the idea that the first support for the citizen to exercise these 'destabilization rights' should be in a new branch of government, or, at least, in a new agency – which could be called a 'reconstructive' branch, power or agency.

This chapter will follow some argumentative steps. Firstly, it will introduce an approach with selective affinities in relation to Unger's socio-legal theory: Niklas Luhmann's social systems theory (on these affinities, see Amato 2017). From this perspective, we introduce a social-systemic characterization about the judiciary and the role of the National Council of Justice in Brazil. Next, we deepen the presentation of the hypothesis that the CNJ is a 'reconstructing organ' of the Brazilian judiciary, theoretically characterizing what we mean by 'destabilization' and 'reconstruction'.

The third step is to delve into data on the national policy of prioritization of the first instance jurisdiction, implemented through resolutions of the CNJ, focusing on the repercussions of this policy in facilitating access to state justice. The Brazilian judicial power is composed of five branches: state, federal, electoral, labor and military justice. The concentration of the analysis on state courts is justified by the countless socioeconomic and cultural differences among the (27) units of the Brazilian federation; the courts of these federative units did not have, before the CNJ, a central body of coordination[190], what made standardization difficult. When it comes to the state judiciary, there is an

[190] Unlike federal courts, which are guided by the Council of Federal Justice (CJF), and unlike labor justice and the Superior Council of Labor Justice (CSJT), the state courts are guided by state judicial organization statutes, as well as by the court's own rules, making it difficult for the CNJ to standardize procedures and workflows to implement the first instance prioritization policy.

overlapping of federal (or national), state and even regulatory (courts') norms. In addition, the focus on the state branch is justified because, in 2013, when the policy of prioritizing the first degree began, state justice concentrated more than two thirds of the total number of judges in Brazil (CNJ 2014a: 33).

Finally, we analyze this policy by highlighting elements of 'complex enforcement' that qualify it as an example of the 'destabilizing' and 'reconstructive' actions took by the CNJ in fixing the judicial branch. With this, we were able to prove the research hypothesis.

2. A morphology of law as a social system

As a subsystem of society, the legal system is specialized in the assignment of the 'legal/ illegal' code. The definition of what is allowed, prohibited, or obligatory, and of which norms are valid or constitutional, and which are invalid or unconstitutional, is done through decisional programs. In the conditions of high complexity and contingency, disagreement and differentiation of contemporary society, the legal system seeks to reduce and structure communicative possibilities by means of some tools (Luhmann 2014; 2004). On the one hand, it seeks to bind certain counterfactual expectations to sanctions, reinforcing norms through incentives (such as the promise of prizes or rewards) and threats (disincentives that act preventively and repressively). On the other hand, aiming at the decidability of social conflicts, the law 'juridifies' them; that is, it duplicates the social conflict, reducing its complexity by transforming it into a legal controversy, into a dispute about the law. The social system of law does this work by means of symbolic abstraction and generalization: by translating complementary social roles (such as teacher/ student, parent/ child, consumer/ supplier, worker/ employer) into the form of legal roles (such as claimant/ complainant, accuser/ accused, plaintiff/ defendant) and by structuring diffuse social values (with their moral, political, religious, economic implications) in the form of decision-making programs. Such programs are the formalized normative statements, either in the form of finalistic norms (purposes, policies, principles),

or in the form of conditional norms (rules with well-typed incidence hypotheses and well-defined normative consequences).

Procedures are what allow law to select and recycle normative expectations (*i.e* the social structures that will have legal support), as well as to define, in the abstract and in the concrete case, which incentive or disincentive measure will be adopted (in the form of positive or negative sanctions). Through procedural norms, the law strengthens its autonomy, achieving reflexivity: it regulates how to create, change, apply and execute norms. Here we have what general jurisprudence identifies as norms of organization and competence, or as secondary rules. The legal system operates by interweaving a series of procedures (electoral, legislative, administrative, jurisdictional, self-regulatory processes), which reduce complexity (the degree of dissent and cognitive and normative divergence) at the same time that they increase it – for example, the vote and approval of a bill momentarily ends the political controversy over the regulated issue, but initiates disputes over the formal validity and substantive meaning of the new norms created (Neves 2008).

Decision-making in law thus involves creating or applying programs through procedures. To this end, the legal system specializes internally in a series of organizations – decision-making systems. In typological terms, there are programs, procedures, and organizations that are more open to value dissent, to social demands, and to the very structural alteration of law. Here we have the periphery of the legal system, composed of organizations and programs with different weights in determining the solutions to conflicts: law schools and legal doctrine; the legal profession and legal acts; organizational advisors and private self-regulation; the legislative branch, the public administration, and legal and infra-legal normativity. At the center of the legal system, however, lies the only organizational unit obliged to make decisions, once provoked: the judiciary, with its judges and courts. The prohibition of the denial of justice (prohibition of *non liquet*) is what distinguishes the judicial organization and its programs (sentences) from other organizations and programs that construct the law. Only the judge, once provoked, is obliged to decide – and constrained to decide

according to the law (Campilongo 2011, Ramos 2017). This typical characterization of jurisdiction is complemented by institutional principles such as jurisdictional inertia, impartiality, and the political and legal unaccountability of judges for their decisions.

A series of changes brought about in the context of Brazil's re-democratization and consolidated by the 1988 Federal Constitution included, among other innovations: reinforcement of judicial independence (in the case of the guarantees of the judges: vitalicity, irremovability and irreducibility of salaries); expansion of the legitimates and actions of abstract judicial review (including political parties with representation in the National Congress and union entities of national scope as legitimates to propose actions to control unconstitutional norms or omissions); creation of special courts for civil cases of lesser complexity and criminal offenses of less offensive potential; new legislations and legitimated actors for the defense of trans-individual rights (as in the consumer and environmental law).

It is in this context that an explosion of litigiousness was detected in Brazilian society beginning in the 1990s, including new actors and conflict modalities, such as collective conflicts (Faria 1992). With respect to facilitating access to justice, since the 1988 Constitution there has been a great expansion of the periphery of the legal system, through what the Constitution characterized as the 'essential functions of justice,' such as the Public Defenders of the Union and the States (aimed at promoting free judicial and extrajudicial assistance) and the Public Prosecutor's Office, focused not only on criminal prosecution and monitoring as *custos legis* in cases involving issues of public interest, but also legitimized for the defense of collective, diffuse, and individual homogeneous interests.

As for the organizational core of the legal system – the judiciary itself – there has been a series of constitutional innovations drawn up since Constitutional Amendment No. 45 of 2004. Among these innovations, it is worth mentioning the creation of the National Council of Justice (CNJ). This is a mixed body that controls the judiciary and is composed of representatives of the

judiciary, the Public Prosecutor's Office, the Brazilian Bar Association and Brazilian citizens (in the latter case, one jurist indicated by the Federal Senate and another by the House of Representatives). Presided over by the Chief Justice of the Supreme Federal Court, the CNJ has, among its attributions, to 'prepare a semiannual statistical report on cases and sentences rendered, by unit of the Federation, in the different organs of the Judicial Power', as well as to 'prepare an annual report, proposing the measures it deems necessary, on the situation of the Judicial Power in the country and the activities of the Council [...]' (Federal Constitution, art. 103-B, §4, VI and VII).

From a systemic point of view, therefore, at the top in the hierarchy of the Brazilian judicial organization, we have the Supreme Court, which functions as a 'meta-organization' (Amato 2017: 228-230), connecting the core of the legal system (in its role as the last instance of appeal of the judiciary) to the core of the political system (in its role of abstract judicial review of statutes and normative acts coming from the political branches of the State); the National Council of Justice, on the other hand, functions as an apex body of the judiciary that allows it to build 'second-order observations' (Minhoto, Amato and Barros 2021: 346): to observe, evaluate, parameterize, quantify, through its reports, the decisions made by the jurisdictional bodies – judges and courts. In this second-order observation of the Brazilian judiciary, the CNJ makes extensive use of an economic analysis of the efficiency of judicial provision.

In the exercise of this role, the CNJ, based on statistical data that revealed the precariousness and overload of the Judiciary's 'entrance door', proposed a national policy of priority attention to the first degree of jurisdiction. Such a case of formulation of an organizational policy by a control agency of the judiciary can characterize an analysis of the National Council of Justice as a constitutional innovation aimed at 'destabilizing' structural failures of the judiciary. Its aim in this case is to reconstruct organizational routines and procedures in order to promote the fruition of constitutional rights related to judicial rendering, with emphasis on access to justice and the reasonable duration of the lawsuits.

3. A hypothesis: the CNJ as a reconstructive organ of the Brazilian judiciary

The activity that the CNJ has been carrying out through the policy of prioritizing first-degree jurisdiction illustrates the related concepts of 'destabilization rights' and 'reconstructive' branch or agency. Unger (2015, pp. 127-143; 1997, pp. 387-391) introduced the idea of 'destabilization rights' in a series of writings in the 1980s, when he was leading the American Critical Legal Studies movement. The example from which he drew in his argument was the discussion of the principle of 'equal protection' in American law and the measures that the judiciary of that country began to develop to combat, for example, racial segregation. Since the Brown cases of 1954 and 1955, when the Supreme Court not only declared the unconstitutionality of racial segregation in schools, but also launched itself into the task of coordinating the administrative reorganization of the entire school system, the United States judiciary began to adopt 'structural injunctions', measures of 'complex execution' aimed not only at declaring the constitutionality/constitutionality of a rule, nor only at demanding certain reparation, compensation or punishment. It was about directly intervening in practices, procedures, and organizations that repeatedly failed to comply with constitutionalized ideals (especially as fundamental rights), changing the structure and functioning of these routines.

This practice spread to various sectors and organizations – reorganization of electoral and school systems, hospitals, prisons, companies, etc. – but ended up in crisis as of the 1980s (Weaver 2004; Tushnet 2003). Two main factors are pointed out for this crisis: the operational overload of the judiciary with the task, which demands more bureaucratic and technical means than the typical routine tasks of the organization (for example, capacities for evaluation, planning, and execution of medium-term interventions in a given organization, policy, or procedure); and the lack of legitimacy that a not directly elected power would have to interfere, with expanded discretion, in public policies and private practices. Incidentally, an important point is that the very organization that is the target of the intervention has in-depth knowledge of its routines and structural

flaws; therefore, the judicial procedure may not be effective if it simply decrees corrective measures externally, imposing them from the top down.

It is in this context that Unger (1998: 228-229) suggests the *sui generis* character of this type of intervention (of complex execution), not described among the classical functions of any branch. These are structural interventions, similar to those programmed by the legislative in a general and abstract way and executed by the public administration in the implementation of public policies; however, at the same time they are localized, temporary, punctual interventions, to correct flaws in a policy, procedure or organization – either public or private. These interventions are punctual, like judicial decisions, but their structural character requires expanded limits on discretion and even a longer duration, until defective practices are reordered. The theoretical solution, then, is that 'destabilization rights' would be claims for this kind of localized but structural corrective intervention in an organization, procedure, or policy, in the name of conforming to the ideals and rights proclaimed by law, especially by the Constitution. These rights should be firstly claimed in face of a new state power or agency, which could be called a 'reconstructive' branch (Unger 1998: 228-229; 1996: 30-33).

Brazil does not have procedural instruments analogous to the 'structural injunctions' of 'complex execution' in US law. The closest guarantee to this would be the writ of injunction (art. 5, LXXI, Federal Constitution, regulated by Law 13.300/2016): a judicial order for the legislator to overcome its omission in regulating norms that are not fully effective and that, until they are regulated, make the exercise of fundamental rights unfeasible. However, like the paths of abstract control of unconstitutional omission, these are actions of the judiciary on the normative level, without administrative reordering of an organization or procedure. To promote such a reordering, notes Unger (2018a), the writ of injunction would have to be radically reshaped, to the point of giving rise to a new 'destabilizing'/'reconstructive' constitutional guarantee; such a judicial instrument would have to fall under the competence of the entire judiciary (and not just superior courts), supporting all rights (and not just constitutional

freedoms) and authorizing the judiciary not only to notify the omission to other powers, but to coordinate itself, taking the necessary financial and human resources, the punctual structural intervention in the renitently unconstitutional situation diagnosed.

On the other hand, Amato (2018: 158-173) evaluates how the Brazilian experience since the 1980s has moved in a direction aligned with the tasks of destabilizing structural injustices and rebuilding practices and institutions, even if a new State power was not created. The legislation on trans-individual rights – from law 7.347/1985 (Public Civil Action) to the Consumer Defense Code (law 8.078/1990), passing through the constitutionalization in 1988 of a broad list of individual, collective, and even diffuse rights and guarantees –, combined with the new functions of the Public Prosecutor's Office for protecting these rights and with the organization of the Public Defender's Office, would have created a network of 'reconstructive' organizations and procedures in the country with functions similar to those of the destabilization rights[191].

Thus, there were innovations on the periphery of the legal system that aimed to facilitate access to justice. The restructuring and organization of these public organs or agencies 'essential to justice' (in the terms of 1988 Constitution) has already been analyzed under the optics of the concept of 'destabilization rights'. This is the case, for example, of the actions of the Labor Prosecutor's Office, in the fight against situations analogous to slave labor, in remedial structural intervention in cases of employment of child labor or generalized moral harassment, or in any renitent disrespect of labor rights by employers (Carvalho Jr. 2020: 177-197; Carvalho Jr. and Martinez 2021). Outside public law, the very creation of the institute of judicial rehabilitation (Law 11.101/2005) incorporates the proposal of an independent manager, appointed by the judiciary, who can reorganize a certain business company in crisis, taking into

[191] It is also true that the negotiation and administrative actions of the Public Prosecutor's Office, sometimes preventive of judicialization (through terms of adjustment of conduct, *e.g.*), replacing a more imperative model of judicialization and compliance with sentences, presents special challenges in order not to fall into a spiral of delegitimization of State power and reaffirmation of the ineffectiveness of the law in the face of persistently illicit practices (Moita 2023).

account the interest of the collectivity in preserving the business, positioning bankruptcy as an extreme solution.

The innovations presented by the Brazilian legal system since the 1980s in terms of fundamental rights, in jurisdictional procedures and in the essential functions of justice have combined with a series of reforms in the judiciary, especially Constitutional Amendment no. 45/2004, which established the National Council of Justice. This is an innovation directed at the core of the legal system. The very constitutional discussion about the character and configuration of this control agency (whether it would be a totally external body, or of mixed composition, with members from the judiciary and members appointed by the legislative branch) shows the difficulties in meeting those peculiar demands of operational capacity and political legitimacy that would characterize a 'reconstructive' agency capable of 'destabilizing' defective practices in a certain social sector. In this case, it is a self-observing reconstructing agency of the judiciary itself, aimed at building and reconstructing its practices by creating rankings, metrics, and guidelines that mirror the failures of judicial provision, as well as by designing and executing judicial policies, as illustrated by the very policy of prioritizing the first instance.

In the hypothesis of this research, the CNJ would function as an organ that reconstructs the judiciary. We do not have exactly the configuration of 'destabilizing rights' in the case analyzed – the actions of the CNJ, particularly in the proposition and implementation of the national policy of prioritizing the first instance. This is because there are no citizen prerogatives to provoke the 'reconstructive' or 'destabilizing' actions of that body. It is not so much a subjective right that can be invoked before the CNJ or the judiciary, but an institutional intervention, orchestrated by the body, to solve a general and structural failure in the access to justice and in the effective and fast jurisdictional provision (procedural rights state in art. 5, items XXXV and LXXVIII, of the Federal Constitution). Even so, the theoretical categories of 'destabilization rights' and 'reconstructive' agency are useful for positioning and describing the functional innovation brought by the National Council of Justice, as an internal

instance (agency) that aims to destabilize failures and reconstruct routines of the very branch of State of which it is part (the judiciary). An alternative interpretation would be that the rights of access to justice and speedy delivery of justice are not, in this case, being judicially demanded, but are being administratively implemented by means of judicial policies promoted by the CNJ; from this alternative point of view, these rights would function as 'destabilization rights'.

On the other hand, instead of the constitution of a super-agency or Power in charge of the 'destabilization' of structural injustices in general, our case study analyzes the effectiveness of an arena or observatory internal to a Power. Such an institutional design seems to corroborate the thesis that it is necessary for organizations and reconstructive procedures themselves to be structured 'commensurate with the difficulties of implementing changes in the routine of the scattered foci of oppression in a complex society, shattered into so many self-referential zones and encased in so many organizations' (Amato 2018: 17)[192].

The National Council of Justice arises with the purpose of being a control body of the judiciary itself. Thus, it is institutionally internal to the judiciary, but with the power to manifest itself in the creation of public policies, in the terms of art. 103, I of the CNJ Internal Rules. Thus, the CNJ seems to have a sensitive role of interlocution and change, with the constitutional capacity to give opinions and act, even to deconstruct the *status quo*, even if in organs or organizations with

[192] So too, within the direct public administration, reconstructive bodies could be structured. Let's look at an example of destabilization of structural failures and institutional reconstruction in the sector of the right to education and public education policies. In proposing the goal of reconciling local management of schools with national quality standards, there is the need to nationalize standards for evaluating the performance of each student and school and also to implement mechanisms for redistributing financial and human resources among the regions of the country. Such tasks involve a redesign of cooperative federalism in this sector, even encompassing a reconstructive task (see Amato 2021). Unger (2018b: 83) then suggests: 'When a local school network repeatedly fails to meet the minimum quality threshold, trans-federal bodies representative of the three levels of the federation will bail out that network. In an extreme case, they will take over and temporarily assign management to independent managers with the task of fixing it and returning it fixed. This is not federal intervention. It is about collegiate action within the federation to ensure the fulfillment of a responsibility of the State and a right of the young citizen.'

broad corporate resistance to change and self-correction, as is the case of the judiciary.

One identifies (Rosilho 2011: 150-153) precisely an experimentalist profile, based on trial and error, in the CNJ's performance as a formulator of judicial public policies; such organizational style and the support in technical and technological expertise (*e.g.*, in terms of statistics and jurimetrics) aim to enable and legitimize the CNJ to deal with the traditionalism of a Power originally deconcentrated and closed. The very origin of the CNJ can be seen as a certain destabilization, notably in face of the innovative commands of Constitutional Amendment 45 and the various questionings and reactions it provoked – for example, several writs of mandamus that were filed against the CNJ's acts, besides the Direct Unconstitutionality Action 3.367-1/DF, proposed by the Association of Brazilian Magistrates and judged by the Federal Supreme Court in 2005, having as its core matter precisely the discussion about the administrative and controlling powers of the National Council of Justice.

4. The National Policy of Prioritization of the First Degree of Jurisdiction

In the annual report prepared by the CNJ in 2013, a statement was presented that would give rise to an important debate in the Brazilian Judiciary, with direct impact on the lives of the public (CNJ 2013a). With the suggestion of measures and guidelines to prioritize the first level of jurisdiction, the Council would again face the limits of the exercise of its normative and executive constitutional functions (art. 103-B, §4, I, II, III and V, Federal Constitution), due to an alleged clash with the administrative and budgetary autonomy of the courts (art. 99 of the Constitution).

To develop and implement the proposed policy, the CNJ relied on data and information provided by the courts, collected and processed by the Council's internal departments. The basis for prioritizing the first degree was, in fact, the analysis of the information in the annual reports of the Council from 2005 to 2013, which showed the chaotic situation of the base of Brazilian judiciary, in relation

to the distribution of both human and budgetary resources. The data that were compared and verified (including through inspections and other steps taken by the Council) made it clear that the implementation of measures to improve the first degree of jurisdiction was necessary.

The problem was diagnosed, albeit partially, and thus the first of the phases indicated in the CNJ *Strategic Management Department Guide* was observed: a) diagnosis of the problem; b) agenda formation; c) policy formulation; d) implementation planning; e) monitoring; and f) information transparency. Note that the normatization of this guide itself adopts an experimentalist understanding of the CNJ's administrative function.

> It should be noted that this material will be especially useful for policies of a marked programmatic nature, *i.e.* those that have, to a greater or lesser degree of detail, objectives and guidelines that call for continuous and coordinated actions to solve a problem. Therefore, they are policies that demand greater management effort, under the perception of a management cycle, and drive continuous processes of planning, execution, monitoring, evaluation, and eventual redesign of the policy and prioritized actions. (CNJ 2021a: 3)

In the process of formulating the policy, a working group was created at the CNJ, in which judges, civil servants, lawyers and members of the Public Prosecutor's Office participated. The group analyzed data from the *Justice in Numbers* reports produced by the Council up to that time, including that of 2013 (base year 2012), which showed that, during 2012, more than 70,000 cases were processed at the first level, which was equivalent to about 80% of all proceedings in the Brazilian judiciary. It was also noted that the workload in the first level was 5.6 thousand cases per judge and the rate of congestion was 75.6%. Thus, the imbalance in relation to the second level of jurisdiction (courts) was evident; in these courts the workload was approximately 3,000 cases per judge, in addition to a much lower rate of congestion: 46.3% (CNJ 2013b).

The following year's report (CNJ 2014a) also attested to the discrepancy: in the first level, demand per magistrate grew 0.5% in 2013 compared to 2012. In the second level, demand fell by 3.1%, increasing the difference between the two levels of jurisdiction. Once the bottlenecks in the first level of jurisdiction were perceived, at least from a quantitative perspective, rules were defined to attempt a more equitable distribution of personnel and budget in the organs of the judiciary.

The first measure suggested by the working group, and accepted by the direction of the CNJ at the time (2013), was to present to the courts, during the VII National Meeting of the Judiciary (ENPJ), a priority guideline – serving as a guide for the programs, projects and strategic actions of the courts – to improve judicial services at the first level of jurisdiction, in order to equalize budgetary, property, technological and human resources between the first and second levels (CNJ 2014b).

Once the proposal was approved at the VII ENPJ, an important milestone was defined in the process of prioritizing the first instance. In fact, the meeting in question was innovative, including for being the first held in a northern Brazilian state: the municipality of Belém, in the state of Pará. On the other hand, although there has been a public commitment on the part of the courts in relation to the priority attention to the first instance, there was, and still is, resistance at the time of application of managerial measures subsequently imposed via resolutions. In any case, the VII ENPJ was the phase that gave official light to the national policy aimed at improving services at the first level of jurisdiction, where most of the Judiciary's cases were (and are) processed. In the process of formulating the policy, it is worth noting the public hearing held in February 2014, in which individuals, public and private institutions participated, helped to make the judicial policy more democratic and participatory.

In short, it proposed an equitable distribution, guided by efficiency and proportionality, of budget, public servants, positions, and commissioned functions between the first and second levels. From the body of work prepared by the working group, initiatives focusing on the celerity and effectiveness of

judicial services emerged. Among the measures adopted we can highlight: (i) to align the strategic plan of the courts (CNJ Resolution 70) with the guidelines of the policy; (ii) to redistribute the work force between first and second degrees, having as parameters the proportionality in the demand for cases; (iii) to ensure adequate budget; (iv) to provide technological infrastructure for the satisfactory operation of judicial services; (v) to stimulate the engagement of the members of the organs of justice in governance, providing administrative decentralization and commitment to institutional results; (vi) to encourage dialogues and develop partnerships for the fulfillment of the objectives.

It was also proposed, as an aid to decision-making, that research be done on the causes and consequences of the malfunctioning of the lower instance. In addition, it was suggested that the judiciary staff be trained in the activities of the first degree of jurisdiction. A normatization was also proposed in order to gradually reduce the cases of delegation of jurisdiction from the federal courts to the state courts, as a measure that seemed appropriate for the treatment of tax executions and social security claims that caused an even greater overload in the state courts.

In the budgetary part, the prioritization policy advocated the need for identification and proportional distribution of the budget between the first and second levels, with public demonstration of the planned and executed amounts. It is worth noting that what was sensed at the time without statistical support – the inadequate and disproportionate distribution of the budget favoring the second level – today is subject to public observation, via the *Justice in Numbers* panel[193], with transparency so that the judicial policy could bring measurable results.

As a result of the preparatory work that led to the proposal of the National Policy for Priority Attention to the First Degree of Jurisdiction, in 2014 the CNJ

[193] Right on the home page of the *Justice in Numbers* panel, the total expenditures of the Judiciary are distributed in human resources, other expenses, and information technology. Filters can be applied by time or court, among others. Available at https://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw_l%5Cpainelcnj.qvw&host=QVS%40neodimio03&anonymous=true&sheet=shIGLMapa

instituted two resolutions to regulate it: Resolution 194, which established the policy, followed by Resolution 195, which dealt with budget distribution in the courts. Remember that the CNJ has the constitutional task of controlling the administrative and financial performance of the other judicial bodies (art. 103-B, §4, Federal Constitution). That is why it is competent to issue rules for a fairer and more efficient distribution of resources, without this representing undue interference in the autonomy of the courts.

The monitoring of compliance with these resolutions included a summons to the courts at the end of 2014 to inform them of compliance with Resolution 195. At the time, despite the fact that the Resolution has been in effect for more than six months, only the courts of Amapá, Ceará, Distrito Federal, Mato Grosso do Sul, Minas Gerais, Pará, Rondônia and Roraima had published detailed tables of expenditures, as required by articles 4 and 9 of the Resolution, according to which the courts were obliged to separate the budget for the first and second levels, disclosing on their websites the allocation of funds so that society could have access to the format of expenditures. In other words, 19 of the 27 state courts ignored the command.

With regard to monitoring the execution of Resolution 194, 23 of the 27 state courts were summoned to appoint a representative to the Prioritization Network (art. 3) and 22 submitted an action plan for achieving the judicial policy in question (art. 8), well beyond the deadline, which was 120 days from the publication of the norm. Regarding the Prioritization Network, it is important to emphasize the role of coordination and assistance – and not of mere (top down) imposition – intended by the CNJ, considering that the Prioritization Network was composed of representatives of all Brazilian courts and interaction with the Collaborative Governance Network (established by CNJ Ordinance n. 138/2013).

In 2016, when the prioritization policy was two years old, however, Resolutions 194 and 195 were still not formally complied with by the courts, despite several requests made in the process of monitoring compliance with the decisions. In fact, by July 2016, state courts of Minas Gerais, Rio de Janeiro, São Paulo and Rio Grande do Sul – the largest Brazilian state courts – had not even

forwarded their respective action plans to achieve the goals of the Prioritization Policy. Therefore, in an attempt to make the policy of prioritizing the first degree effective, another norm was edited by the CNJ in 2016: CNJ Resolution No. 219, to deal with the distribution of servers, commissioned posts and trust functions in the courts. Didactic and with the technical participation of the Council's internal departments (Judicial Research Department and Budget Monitoring Department), the norm brought concepts, methodologies, models, and metrics to evaluate, for example, the proportionality of the number of civil servants in the areas of support for judicial activity at first and second levels, based on the average number of new cases distributed to each level in the three years preceding the edition of the Resolution.

It is also important to note the provisions of art. 22 of Resolution 219, in the sense that there must be a single career path, without differentiation between permanent positions, commissioned positions, and positions of trust at first and second levels of jurisdiction. To make this provision effective, it was stipulated that, in the courts in which the local law distinguished between the careers of first and second level civil servants, the court's board of directors should prepare and submit to the respective state parliament a bill for correction within 180 days. However, even today (2022), there are disparities between careers in certain courts, such as that of the state of São Paulo.

The CNJ, through its support departments, has dedicated itself extensively to monitoring the implementation of the judicial policy of prioritizing the first degree. In this regard, we highlight the opinion survey conducted by the Judicial Research Department (CNJ 2016) among judges; about 30.84% of all first degree judges (excluding electoral judges) answered the questionnaire, which consisted of 18 objective questions about the policy of prioritizing the first degree. The survey's conclusions include: i) 73.9% of the judges were unaware of the work performed by the regional management committees (art. 3, §2, of CNJ Resolution 194); ii) 84% of the surveyed judges indicated that any changes resulting from the policy initiated in 2014 had not had a satisfactory impact on their working

conditions; iii) regarding the fairness of budget distribution among the courts, 73% of the surveyed judges felt that such distribution was not appropriate.

Reading the research report of the Judicial Research Department (CNJ 2016), one can conclude that first-degree judges were not engaged in the policy that would prioritize them, with derisory levels of participation in judicial management. Such a finding denotes the complexity and the need for correction in the policy's direction, requiring institutional action with greater sensitivity and capacity for coercion, to transform the balance of powers within the structure of the judiciary's bodies. The aforementioned steps – questionnaire and survey with judges –, however, were concomitant with the issue of CNJ Resolution 219, which dealt with guidelines for the correct distribution of the work force in the judiciary bodies. The idea of Resolution 219 was to complement the judicial policy, based on the premise that if there was a balance among the levels of jurisdiction in the allocation of human and budgetary resources, it would be possible to obtain better results in the delivery of judicial services, in compliance with the constitutional command of a reasonable length of lawsuits.

The partial results of the implementation of the measures related to prioritization by all courts of justice in Brazil (CNJ 2015, 2018, 2021b) show a significant improvement in the first degree. However, as can be seen in the historical series of the Comparative *Justice Productivity Index* in state judiciary (first and second level), this result is not seen in the same proportion. Likewise, as for the Index of Satisfaction to Demand and the Congestion Rate, when observed throughout the implementation of the judicial policy studied, they do not portray improvements that occurred in the first degree. Although no substantial changes have occurred, state courts' expenses for the first level of jurisdiction have increased until 2021.

Between 2014 and 2021, state laws created several judgeships and their respective office structures, even though the drafters of the bills, second-degree judges (or appellate judges), were necessarily knowledgeable about the policy of prioritizing the first degree. In this context, when called upon to comment on the compatibility of its own norms with the concrete situation in the courts, the CNJ

seems to work with knowledge and techniques alien to mere judicial enforcement. It seeks, in political-administrative terms, to implement and maintain judicial policy, despite the deficiency in general monitoring and qualitative evaluation. For example, in the case of the Bahia Court of Justice, low productivity was detected, in addition to legislative measures that increased the allocation of financial and human resources for the positions of second-degree judge and their advisors. The CNJ requested the administrative intervention of the National Inspector General's Office.

In the case of the creation of positions of judges in Bahia Court of Justice, it was found that the Council acted in order to preserve its normative and executive function. However, its deliberation, although collegiate, was de-constituted by the Federal Supreme Court that, without going into the merits of the policy, indicated the federative issue and the impossibility of the Council assessing the constitutionality of state law. This occurred in a monocratic decision taken in 2018 by a Supreme Court justice in the case of MS 36.133, filed by the state of Bahia. This is just an illustration of the difficulties of enforcement of a judicial policy by the CNJ. The Council itself may provide a greater or lesser degree of enforcement to the inspection of compliance with its orders by the other judiciary bodies: for example, in relation to the Court of Justice of the state of São Paulo, noncompliance with the guidelines imposed by the CNJ was verified, which gave rise to relevant judicial and administrative decisions, but the National Council of Justice, once provoked, has not yet issued imperative decisions on the issue (until June 2022).

5. Elements of complex enforcement in the restructuring of State Justice

In order to verify whether the CNJ functioned as a 'reconstructive' agency in the implementation of the judicial policy of prioritizing the first instance in state courts, it is important to verify to what extent its activity incorporated elements of a 'complex enforcement', analogous to the modus operandi of the

'structural injunctions' that have historically characterized the US Judiciary (Sargentich 1978; 1981; Sabel and Simon 2004; Liebman and Sabel 2003).

It was observed that the idealization of the Prioritization Policy of the First Degree of Jurisdiction resulted mainly from the transparency given to the numbers (both procedural and budgetary ones) of the Brazilian judiciary, from the creation and consolidation of the National Council of Justice. By observing the work of the judiciary with its technical and technological tools, this body mapped structural barriers to the effective enjoyment of the fundamental rights of access to Justice and to a jurisdictional response in adequate time (art. 5, XXXV and LXXVIII, Federal Constitution).

With this undesirable picture and the undue differentiation between the first and second jurisdictional levels, the CNJ initiated the measures for formatting the judicial policy in question. The statistics gathered by the CNJ showed a systematic wrong and elucidated some of its factors, by exposing the uneven distribution of resources among the different judicial levels. One characteristic of complex enforcement – the renitence and persistence of the violation – seems to be present.

On the other hand, the process of institutional design of the judicial policy involved multiplicity of representation, with public hearings and consultations to collect solutions and criticisms brought by participating entities and individuals. Such representative multiplicity is another characteristic of 'complex enforcement', besides the objectives of solving collective problems and claims – in this case, an organ of the judicial branch acts to solve structural flaws endogenous to this power, but with diffuse and relevant social repercussions. It can also be interpreted that the CNJ sought to give social effectiveness to the rights of access to justice and to a reasonable length of lawsuits, which functioned as 'destabilization rights' – here, with a self-propelled administrative dynamic, different from the way in which the provision of justice itself functions (which depends on the provocation of parties who have standing to sue).

In fact, access to the judiciary and its response in a reasonable time is difficult to deduce and require via formal law, since it is not possible, at the limit,

to determine the immediate delivery of decisions to 8,612 judges (number of judges existing in the state courts at the time the policy was proposed - CNJ 2014a: 80) and, moreover, to provide them with conditions to decide. Obviously, a complex remedy with prospective correction was required, whose mechanism would enable (or at least 'aim at') a lasting compliance, requiring the adherence of the violating organization; in this case, the judiciary. Thus, although in an embryonic state as to the implementation format of the prioritization of the first degree, during the VII National Meeting of the Judiciary (in 2013) a guideline for its institutionalization was approved (CNJ 2014b). According to this guideline, courts committed to improving first-level judicial services and equalizing budgetary, technological, and personnel resources between first and second levels. In this first moment, therefore, before the formal conception, the prioritization of the first level had, in theory, support from the courts' top managers, considering that the heads of the courts participate in the National Meetings of the Judiciary, with voting rights.

For the deliberation and voting of the guidelines that would formally institute the policy, the CNJ did not have great debates in face of the abject portrait of the distribution of resources in the judiciary. This required an attitude, a plan, even if it could be made more flexible in the near future, in order to implement, even if with delays and partially, measures to correct the structural problem of slowness and judicial inefficiency. Then came CNJ Resolutions 194 and 195 (2014), preceded by the CNJ rules that, to a greater or lesser extent, offered technical and political contributions to make viable the promising judicial policy. Among them, Resolutions 184/2013 (criteria for the creation of positions, functions and judicial units) and 185/2013 (instituting the electronic judicial process) stand out.

Resolution 219, more guiding and explanatory, came in 2016, with the purpose of effectively equalizing the distribution of workforce, working as a form of correction of the previous resolutions. Such review, self-correction and complementation of measures characterizes the complex enforcement in the reconstructive activity, in order to maintain or obtain the engagement of the

violating body. Given the complexity of the rebuilding effort in the first level of jurisdiction, policy enforcement needed to be gradual and adjusted, which is why it was foreseen, for example, that second-level public servants assigned to the first level could be temporarily attached to the first-level judicial units in the city where the court has its headquarters, until specific conditions for assigning them to the inland districts were in place.

An analysis of the data from the *Justice in Numbers* reports and panels (CNJ 2014a, 2017, 2020) showed a positive impact on the distribution of budgets and personnel, as well as an increase in first-degree productivity when state courts are considered as a whole. Even with the edition of state laws subsequent to the policy that created structures or maintained undue differentiations for the second level of jurisdiction (as seen in the case of the Courts of Justice of Bahia and São Paulo), the CNJ's action in the reconstruction of judicial administration at the first level seems to have occurred, or at least to have legitimately begun.

As for the monitoring of the policy – bearing in mind that one of the characteristics of the reconstructive activity is, precisely, the strong monitoring – , the performance of the technical staff of the National Council of Justice, with the preparation of reports on the activity of the courts in the compliance with the judicial policy, was essential for this supervision.

On the other hand, when the CNJ is called upon to decide on the compatibility of its own norms in relation to concrete court situations, it works in different ways, making use of a certain syncretism in the production, omission or procrastination of a specific decision on the non-compliance of a certain state court with the national judicial policy. In the case of Bahia Court of Justice, the Counci's decision verified, based on budgetary and statistical data, the disrespect for the policy of prioritizing the first degree and tried to deconstitute a state law proposed by that Court that benefited the second degree of jurisdiction and that was processed in less than 10 days. The Council's decision was later annulled in a monocratic decision by a Supreme Court justice when he decided that the CNJ could not rule out the enforcement of the Bahia state law and that the judicial

policy of prioritizing the first degree would not be compromised by its noncompliance in the case of Bahia.

In the particular case of the largest Brazilian court of justice, the Court of Justice of the state of São Paulo, there has been a repeated refusal to unify the careers of the first and second levels, despite the provisions of art. 22 of Resolution CNJ 219/2016. This fact led to the filing of judicial measures, whose decisions favorable to public servants occupying first-degree positions were administratively de-constituted by the presidency of São Paulo Court of Justice. The São Paulo Court had, in 2017, 20.5 million cases, representing 32% of the total number of cases in the state branch and 25% of the cases in the Brazilian judiciary (CNJ 2018). As in the case of CNJ Resolution 185 (on electronic judicial proceedings), São Paulo Court of Justice was late in responding to the CNJ regarding the prioritization policy, failing to comply with policy provisions, in addition to making several extension requests for compliance with measures from previous Resolutions (194 and 195). The Council, in view of the peculiarities that could arise from the São Paulo's non-adherence to the judicial policy of prioritizing the first instance, granted the Court's requests, accepting the argument of budgetary unfeasibility. However, and with the intent that the fulfillment of Resolution 219 would occur, even if deferred in time, the Council determined the presentation of studies to implement the equalization. By June 2022, the situation was not yet resolved.

This demonstrates the possibility of the CNJ combining what some authors (Rodríguez Garavito and Rodríguez Franco 2015) point out as important elements for the effectiveness of destabilizing failed structures and rebuilding constitutional institutions: strong implementation monitoring combined with moderate remedies. In this case, we have orders with open commands, aimed at lasting compliance, even if such compliance is postponed and modulated in relation to the deadline initially marked in the judicial policy.

6. Conclusion

With the observations and analysis of this research, it seems correct to state that the policy of prioritizing the first level of jurisdiction follows the path institutionally trodden by other important measures for the prevention and rationalization of litigation and for the rational use of the judiciary (for example, Resolutions 12, 49, 65, 71, 72, 75, 106, and 125), demonstrating that the CNJ possesses characteristics of a 'reconstructive' agency.

The CNJ's task in the investigated policy was given by its constitutionally recognized normative capacity, together with the specialization and inter-disciplinarity that characterize the technical aspect of the Council's decisions, including the proposition of unprecedented measures capable of substantially changing the management of a bureaucratic machine as expensive and important as the judiciary.

We also envision the possible functioning of rights to access the judiciary and receive a timely and adequate response as 'destabilization rights'. These rights are characterized by the function of protecting a certain collectivity from a systemic or structural exclusion or deprivation of fundamental rights, within a 'persistent state of affairs' – as is the case of inefficiency in judicial administration. Much remains to be done by the National Council of Justice on public policies for the improvement of the judiciary, but it is certain that its normative and supervisory action in the (attempt of) reconstruction of access to justice demonstrates flaws and potentialities worthy of note.

References

Amato, LF (2017) *Construtivismo jurídico: teoria no direito* (Curitiba, Juruá).

Amato, LF (2018) *Inovações constitucionais: direitos e poderes* (Belo Horizonte, Casa do Direito).

Amato, LF (2021). 'Direitos sociais e políticas públicas experimentalistas: federalismo cooperativo, auto-organização e parcerias público-privado-

comunitárias' in GF Fonseca and JV Alves (eds), *Direitos sociais e interdisciplinaridade: reflexões sobre saúde, moradia, educação e trabalho no Brasil* (Porto Alegre, Fi), 31-69.

Campilongo, CF (2011) *Política, sistema jurídico e decisão judicial* 2nd ed. (São Paulo, Saraiva).

Carvalho Jr., PL (2020) *Direito e imaginação institucional em Roberto Mangabeira Unger* (Salvador, EDUFBA).

Carvalho Jr., PL and Martinez, L (2021) 'O processo estrutural no combate ao assédio moral na esfera trabalhista' 110(1033) *Revista dos Tribunais*.

CNJ (2013a) *Relatório Anual* (Brasília, Conselho Nacional de Justiça) Available at: https://www.cnj.jus.br/wp-content/uploads/2011/02/relatorio_anual_cnj.pdf Accessed on: 21 Sept. 2022.

CNJ (2013b) *Justiça em números 2013 (ano-base 2012)* (Brasília, Departamento de Pesquisas Judiciárias, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-content/uploads/2011/02/relatorio_jn2013.pdf Accessed on: 21 Sept. 2022.

CNJ (2014a) *Justiça em números 2014 (ano-base 2013)* (Brasília, Departamento de Pesquisas Judiciárias, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-content/uploads/2014/01/relatorio_jn2014.pdf Accessed on: 21 Sept. 2022.

CNJ (2014b) *VII Encontro Nacional do Judiciário* (Brasília, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-content/uploads/2013/11/116c374cc5cef0727cfb4097944d14c8.pdf Accessed on: 22 Sept. 2022.

CNJ (2015) *Justiça em números 2015 (ano-base 2014)* (Brasília, Departamento de Pesquisas Judiciárias, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-

content/uploads/conteudo/arquivo/2015/09/204bfbab488298e4042e3efb27cb7fbd.pdf Accessed on: 22 Sept. 2022.

CNJ (2016) *Pesquisa de opinião magistrados do 1o grau* (Brasília, Comitê Gestor da Política Nacional de Atenção Prioritária ao Primeiro Grau de Jurisdição, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2016/06/0a57dba47c68ec0626a14426ba3f927e.pdf Accessed on: 22 Sept. 2022.

CNJ (2017) *Justiça em números 2017 (ano-base 2016)* (Brasília, Departamento de Pesquisas Judiciárias, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-content/uploads/2019/08/b60a659e5d5cb79337945c1dd137496c.pdf Accessed on: 22 Sept. 2022.

CNJ (2018) *Justiça em números 2018 (ano-base 2017)* (Brasília, Departamento de Pesquisas Judiciárias, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-content/uploads/2011/02/8d9faee7812d35a58cee3d92d2df2f25.pdf Accessed on: 22 Sept. 2022.

CNJ (2020) *Justiça em números 2020 (ano-base 2019)* (Brasília, Departamento de Pesquisas Judiciárias, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-content/uploads/2021/08/rel-justica-em-numeros2020.pdf Accessed on: 22 Sept. 2022.

CNJ (2021a) *Guia de gestão de política judiciária nacional: estratégias de atuação de gestor(a) de Política Judiciária Nacional* (Brasília, Departamento de Gestão Estratégica, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-content/uploads/2021/11/guia-de-poltica-versao-final.pdf Accessed on: 22 Sept. 2022.

CNJ (2021b) *Justiça em números 2021 (ano-base 2020)* (Brasília, Departamento de Pesquisas Judiciárias, Conselho Nacional de Justiça). Available at: https://www.cnj.jus.br/wp-content/uploads/2021/11/relatorio-justica-em-numeros2021-221121.pdf Accessed on: 22 Sept. 2022.

Faria, JE (1992) *Justiça e conflito: os juízes em face dos novos movimentos sociais.* 2nd ed. (São Paulo, Revista dos Tribunais).

Ferraz Jr., TS (2008) *Introdução ao estudo do direito: técnica, decisão, dominação.* 6th ed. (São Paulo, Atlas).

Liebman, JS and Sabel, CF (2003) 'A public laboratory Dewey barely imagined: the emerging model of school governance and legal reform' 28(2) *New York University Review of Law & Social Change* 183-304.

Luhmann, N (2004) *Law as a social system* (Oxford, Oxford University Press).

Luhmann, N (2014) *A sociological theory of law* 2nd ed. (New York, Routledge).

Minhoto, LD, Amato, LF, Barros, MALL (2021) 'Observing observers in social systems theory: an interview with Hans-Georg Moeller' 33(3) *Tempo Social* 333-353.

Moita, E (2023) *The nature and impacts of noncompliance* (Oxford, Hart).

Neves, M (2008) *Entre Têmis e Leviatã: uma relação difícil: o Estado democrático de direito a partir e além de Luhmann e Habermas* (São Paulo, Martins Fontes).

Ramos, LFR (2017) *Por trás dos casos difíceis: dogmática jurídica e a proibição da denegação de justiça* (Curitiba, Juruá).

Rodríguez Garavito, C and Rodríguez Franco, D (2015) *Radical deprivation on trial: the impact of socioeconomic rights in the global south* (Cambridge, Cambridge University Press).

Rosilho, AJ (2011) 'O poder normativo do CNJ: um caminho para se pensar o experimentalismo institucional' 1 *Revista Brasileira de Estudos Constitucionais* 141-160.

Sabel, CF and Simon, WH (2004) 'Destabilization rights: how public law litigation succeeds' 117(4) *Harvard Law Review* 1015-1101.

Sargentich, LD (1978) *Complex enforcement* (Cambridge, MA, Harvard Law School).

Sargentich, LD (1981) 'Dispute-settlement and enforcement' in LD Sargentich, *Advanced civil procedure: class actions and injunctions* (Cambridge, MA, Harvard Law School).

Tushnet, M (2003) '"Sir, yes, sir!": the courts, congress and structural injunctions' 20(1) *Constitutional Commentary* 189-203.

Unger, RM (1996) *What should legal analysis become?* (London, Verso).

Unger, RM (1997) *Politics: the central texts: theory against fate* (London, Verso).

Unger, RM (1998) *Democracy realized: the progressive alternative* (London, Verso).

Unger, RM (2015) *The Critical Legal Studies Movement: another time, a greater task* (London, Verso).

Unger, RM (2018a) *Palestra no HLS Legal Symposium.* Harvard Law Brazilian Association Legal Symposium, 26 abr. 2018a. Available at: https://www.youtube.com/watch?v=HyH-6jTxsto Accessed on: 22 Sept. 2022.

Unger, RM (2018b) *Depois do colonialismo mental: repensar e reorganizar o Brasil* (São Paulo, Autonomia Literária).

Weaver, RL (2004) 'The rise and decline of structural remedies' 41(4) *The San Diego Law Review* 1617-1632.