

**INNOVATION
AND TRANSITION
IN LAW** Experiences
and Theoretical
Settings

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Innovation and Transition in Law:
Experiences and Theoretical Settings

The Figuerola Institute
Programme: Legal History

The Programme "Legal History" of the Figuerola Institute of Social Science History –a part of the Carlos III University of Madrid– is devoted to improve the overall knowledge on the history of law from different points of view –academically, culturally, socially, and institutionally– covering both ancient and modern eras. A number of experts from several countries have participated in the Programme, bringing in their specialized knowledge and dedication to the subject of their expertise.

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Innovation and transition in law:
some introductory remarks on the heuristic value of a conceptual pair

Massimo Meccarelli, Cristiano Paixão, Claudia Roesler

1. Innovation-transition as a conceptual pair: correlation and juxtaposition; 2. The definition problem; 3. The issue of legal actors; 4. Areas of incidence of innovation-transition; 5. Conclusions

The contributions collected in this volume¹ are intended to offer a space for discussion on the major issues of the modernisation of law and legal change. Their object is principally represented by two key concepts – those of “innovation” and “transition” – which appear to be as relevant to these phenomena as they are little defined in the taxonomy of contemporary legal science.

Nevertheless, a critical reflection on the heuristic value of these categories in legal history seems to be useful². The problem of the modernisation of law in recent times, especially under the pressure of technological development and globalization, is to be considered as increasingly addressed using the interpretative key of “innovation”. Whereas it is rather in terms of “transition” that it seems possible to consider the effect of legal change.

The group of Italian and Brazilian scholars who participate in this volume, in continuing the common research itinerary undertaken in recent years,³ aimed to investigate these problems using an interdisciplinary prism. It includes points of view from inside the legal sciences – such as legal history, philosophy of law, constitutional law, private and business law – and from outside them, such as philosophy and the history of political institutions.

¹ This book is the result of two workshops held respectively at the Department of Law of the University of Macerata on 17 and 18 June 2019 and at the Faculty of law at the University of Brasilia on 4 and 5 November 2019.

We would like to thank Prof. Manuel Martinez Neira for including this publication in the series Legal History of the Figuerola Institute - Universidad Carlos III de Madrid. Many thanks also to Gabriel Faustino Santos for the editing of the manuscript.

² In this perspective see Costa (2019).

³ See the volumes: Meccarelli (ed.) (2016); Martins/Roesler/Paixão (eds.) (2020); Paixão/Meccarelli (eds.) (2021).

1. Innovation-transition as a conceptual pair: correlation and juxtaposition

Against this background, and in the light of the legal facts examined, the book investigates the theoretical possibility of conceiving innovation-transition as a conceptual pair and questions its possible applications. It seems that innovation, in fact, can occur precisely in processes of transition; while transition can be the consequence of innovation.

The framework of legal experience provides various confirmations in this respect. For example, to stay with the cases studied in the volume, let us look at the problem of the construction of a democracy in Italy or Brazil: here the projects, certainly oriented towards innovation, gained ground by crossing the space of a transition. This emerges from the analysis of the discursive strategies of the Judiciary in Italy after the collapse of Fascism (Meniconi), and from the study of the dynamics of constituent power in Brazil after the crisis of the Estado Novo in 1945 (Peixoto), as well as in the aftermath of the Dictatorship in 1988 (Paixão).

Other analyses clearly show how legal innovation finds its place in a transitional space. Alessio Bartolacelli reaches a similar conclusion by reconstructing the choices made by the Italian lawmakers in the last twenty years in private companies issues. It also emerges from the study of doctrinal and case law responses to unprecedented problems, such as the legal qualification of the body (Fusar Poli) and the legal regulation of the machines of the new technologies (Martello) in the early twentieth century, as well as regarding the new implications of the good faith clause in the current time (Gambino).

Moreover, philosophy indicates how transition is fully suited to act as a practical structure of innovation processes (Stara) and also from a strictly legal theoretical point of view, it can be seen that legal innovations are mainly expressed in new ways of using existing concepts (Gambino, Roesler). As pointed out by Massimo Meccarelli, innovation and transition share a common trait, as their performativity seems to consist in attributing a situational value to the law; moreover, they appear as complementary concepts that insist on different aspects of the phenomenology of legal change (respectively a *way of seeing* the law in the case of innovation and a *way of being* of the law in the case of transition).

The volume also takes into consideration a different value of the dyad innovation-transition: that in which the link between the two concepts is expressed as *juxtaposition*. In fact, if on the one hand, transition presupposes

the need for innovation, it also leads to opposing tensions. This is because by representing a place of time management (Paixão) and therefore by allowing different regimes of historicity⁴ to coexist, the construction of the “space of loss” as a foundation generated by the past (Paixão, Pinheiro) depends on it. In contrast to innovation, then, transition is a process that does not always provide directions on “where we are going to” (Bartolacelli). It can trigger resistance to a project for innovation, as, for example, emerges from certain attitudes of the Judiciary and its case law, in different historical phases (Fusar Poli; Meniconi). Transition may also be the consequence of a crisis in an innovation programme. In this book, two experiences are analysed: Giovanni Di Cosimo evaluates the parable of parliamentarianism in Italy and Claudia Carvalho studies the crisis scenarios in which the presidential regime took place in the Brazilian Republic between 1945 and 1964.

These axes constitute the underlying plot of the volume while structurally it is organized in three parts. In the first part, the book faces both the theoretical and methodological challenges posed by the two key concepts. In the second part, the book focuses on the relationships between the language and content of law. In its concluding part, the volume concentrates on some meaningful experiences, with different results concerning research in cases of innovation and transition. This lay-out, developed through the interdisciplinary prism of the research group, has increased the possibilities of investigation of the theme. Of the multiple results that have emerged, we highlight below those on which the different analyses seem to converge.

2. The definition problem

The first area is related to the *definition problem*. In many ways it is insuperable. We are not reflecting, in fact, on a strictly formal concept that can therefore be captured within an exclusively legal dimension. On the contrary, innovation and transition, even when observed for their importance in legal matters, are concepts that necessarily refer to different contexts, at the same time social, political, economic, cultural and anthropological; the problem of their definition, therefore, implies a necessarily transdisciplinary approach.

A further aspect that makes the definition problem more complicated is the importance of the point of view (Meccarelli, Guerra, Roesler); the act of

4 Hartog (2012).

reflecting on them implies its own «referential dimension»,⁵ since transition and innovation, seen from the legal point of view, do not have a *transcendental* character (Meccarelli). On the contrary, they are phenomenalist and, if on the one hand, this explains the difficulty of defining them as legal categories, on the other, it highlights their value as a tool for uncovering the historicity of legal forms (which traces their correspondence to social facts).⁶ This peculiarity, as will also be highlighted below, opens up an analytical perspective on levels of legal phenomenology, to which legal theory, inspired by a dogmatic understanding of law, has become insensitive.

The problem of innovation and transition, however, is not only the fact that it is irreducible to a purely legal format, but also offers a heuristic advantage for its impact. First of all, we should consider the problem of the function of the concepts that we use in order to talk about law. In the case of “transition” and “innovation” it is twofold: *theoretical* and *methodological*. Transition and innovation, in fact, are proposed as possible forms of legal change (identifying, therefore, a theoretical problem) and at the same time as analytical tools for studying legal change (identifying, therefore, a methodological problem). For example, it is possible, with transition and/or innovation, to perceive a way of being of legal phenomena such as democracy (Pinheiro), or constituent power (Peixoto), or even a temporal legal regime (Meccarelli, Paixão). At the same time transition and innovation serve as analytical tools when they allow us to differentiate between legal problems, to read them in their autonomy, with respect to social-political dynamics (Guerra, Paixão).

By emphasizing the functional dimensions of the concepts, the reader will find in the chapters of this volume an weighting of how their permanence and their replacement by other (new) concepts can be thought of. It is in conceptual innovation that, according to Roesler, the permanent and tense dialectics between the preservation of semantic meanings and innovation is harvested, which accompanies the also permanent process of interaction between the objectified law in different modes and the social reality that it seeks to regulate. Gambino makes us see, in turn, how conceptual innovations can be latent or explicit/radical and, according to this new conceptual pair, shows how they can bring about new and different hermeneutic demands. Martello’s analysis illustrates these dynamics and their internal dialectics well, when she examines the path of telephone regulation in Italy and analyses

5 Ginzburg (2019) 256.

6 Grossi (2006) 97-124; Grossi (2020) 78-99.

the intersection between technological innovation and transition. Exploring several historical examples, Fusar Poli also links the terms innovation and transition in a particularly fruitful way - which is also full of potentialities for future studies - by conceiving innovation as a form of transition that contains its apparent contrary, persistence and tradition.

From these analytical dyads mobilized above, an important theme of juridical reflection still emerges: the limits and possibilities of legal dogmatics. Understood as a way of thinking about legal problems in their applicational dimension, dogmatics emerges in Roesler's reflection as a way of fixing some starting points for legal reasoning that must, however, be permanently questioned by an investigative or zetetic approach. Dogmatic is always dangerously close to succumbing to a demand for conservation and, consequently, the freezing of concepts, the dogmatic needs to be "oxygenated" and learn to look at other fields of knowledge so that its function can be fulfilled in an increasingly complex world, as Meccarelli makes us see. With Gambino, on the other hand, we grasp the hermeneutic challenges posed by a series of resources that enable an open and fluid interpretation and, with this, hinder or modify the ways in which the dogmatic construction of legal solutions is perceived, especially in the case of what the author qualifies as latent innovation.

In connection with the above observations on dogmatics, we can say that the defining challenge of transition and innovation opens a perspective of meaning on dynamics that, precisely the formal constructions of general theory, have 'hidden' or 'removed' from the field of possible objects of the exercise of legal science. This applies in particular to the possibility of rediscovering a dimension of legal change that the book identifies in the processes of *objectivation of law*.

The process of transformation of social facts into normative facts that involves the performative role of jurisprudence (Meccarelli); the exercise of rethinking of concepts in a zetetic sense (Roesler); the re-signification of the etymological value of concepts (Gambino); the transformative dimension of legal problems, as a constitutive moment of such problems (Fusar Poli, Martello): these are all dynamics, expression of the phenomenon of objectivation of the law, which the issue of innovation and transition bring to the foreground.

What we are observing refocuses attention on the question of the importance of the different theoretical dimensions relevant for understanding legal problems.

Several of the chapters, in order to gain a legal point of view on the problem of transition and innovation, discuss the possibility of importing conceptual categories developed outside the legal sciences, in the field of theoretical and political philosophy or in the field of social and political sciences. For example, in order to understand the problems of legal change, the practical structure of discursive plans (Stara), the performative effect of the politics of silence (Paixão) or of melancholy (Pinheiro), as well as fields of knowledge such as transitology (Guerra), lexicography (Fusar Poli) and rhetoric (Roesler, Reis) all assume importance.

One of the many modes of interdisciplinary relationship which are relevant to legal knowledge and which can be clearly perceived from the innovation-transition dyad is that of the relationship between law and language. It is in the perception of this intrinsic relationship and in its importance for the fulfilment of the functions performed by law that reflections on the functions of language appear. Following a clue from Koselleck,⁷ Roesler stresses that expressing innovation always depends on the constitution of an acquired lexicon, that may not be completely new from the semantic point of view, but rather a gradual sliding of the meaning already present in the uses of language. Exploring the semantic dimensions that appear in the emergence of the word “innovation” itself and its uses, Fusar Poli contributes to a sharper and more subtle perception of the relationship between transition and innovation. The focus on the constitutive function of language and its many ways of shaping reality, its nuances and its interdictions also appear in the way Meniconi investigates judicial discourses, be they sentences or those aimed at a broader public, seeking to understand how the Italian judiciary expressed its values and attitudes in the Italian democratic transition. Another interesting aspect of these uses in judicial sentences is, finally, explored by Gambino when observing the hermeneutical nuances of the use of good faith as an interpretative clause capable of constituting a latent innovation.

It is worth pointing out an interesting aspect that emerges from the texts that make up this volume: one of the points of intersection between the categories of innovation and transition involves an important dimension in the history of law: space. As already stated in this introduction, it is evident that innovation and transition are placed as categories that allow for many temporal structures; this does not, however, rule out that space is an important component for some historical reconstructions proposed here, such as the

⁷ Koselleck (2010).

discussion of the Atlantic context at the time of the Haitian, American and French revolutions (Paixão) and the transformation that technological innovations promote in the relationship between society and space (Reis, Martello).

3. The issue of legal actors

A promising way to think about the innovation-transition pair that appears in the texts of this volume is from the perspective of the different players: jurists in general, magistrates, legislators, political actors in a strict sense such as political parties, collective social actors who mobilize around certain agendas and, last but not least, the historical contribution of certain individuals.

It is quite reasonable to suppose that certain players among those listed above can operate in such a way as to produce innovations or allow more or less clear and delimited transitions, especially since their mode of intervention in reality implies it. This is the case, for example, of the legislator and of political and social actors, as the texts of Paixão, Carvalho, Martello, Di Cosimo, Bartolacelli, and Gambino make us see. More subtle and latent, though no less efficient, is the way in which jurists and magistrates act in this scenario and the texts of Meniconi, Reis, Fusar Poli, Roesler and Gambino are excellent ways to approach the phenomenon.

Less easy to situate, perhaps because they require a specific look at the small details of a historical time, are the contributions made by individuals and their idiosyncrasies when we think of innovative dynamics and the construction of transitions. The reader will find stimulating clues in the texts of Meniconi, Reis and Peixoto.

In addition to these trajectories, one can also point out the actions of social movements that assume a prominent role in the dimension of constitutional history, as highlighted, for example, in the text of Paixão, which identifies a series of entities and groups that, in the struggle for democracy, constituted the unified black movement in Brazil.

4. Areas of incidence of innovation-transition

There is a third aspect which deserves highlighting in these introductory pages. It has already been noted that our volume aims to provide a contribu-

tion for a reflection on the significance of innovation and transition intended as analytical categories for understanding legal change.

This requires us to consider their impact on different areas of the legal dimension. Although it was not one of the goals of this project to carry out a comprehensive survey on this issue, the multidisciplinary approach of the book has opened up some perspectives on the subject. By referring back to each of the essays for further study, it may be useful, here, to consider some aspects. The first area of incidence of our analytical categories is undoubtedly represented by legal theory. Considering innovation and transition in order to reflect on legal change, leads, in fact, to a reflection on how legal thought proceeds, with which methods and with which instruments (Meccarelli, Roesler, Gambino, Fusar Poli). It also offers the opportunity to think of legal theory – rather than as the place of construction of a system – as the forum where various theoretical disciplines meet; as already mentioned above, in order to explain the legal importance of innovation and transition we must draw on keys of interpretation and categories elaborated by other knowledge (Pinheiro, Paixão, Reis, Stara) or even weave a dialogue with them in order to grasp the element of differentiation of the legal issue (Guerra).

Besides, legal history is another area to be considered. In this case it is a question of recovering, through the dimension of experience, indications for a phenomenology of the transition and innovation problem. This seems all the more relevant if we consider that, as observed above, only in their emergence in the real dynamics that trigger social aggregations, can innovation and transition express their relevance for the law. This volume, in particular, proposes itineraries on innovation and transition in modern and contemporary times in Italy and Brazil, with reference to legal thought (Meccarelli, Fusar Poli, Carvalho, Martello), case-law and the activities of judicial institutions (Fusar Poli, Meniconi), development of legislation (Martello, Bartolacelli) and the constitution making process (Paixão, Peixoto, Carvalho).

The latter, on the other hand, represents a thematic area that is also addressed with reference to the current phase. In fact, the dynamics of innovation and transition are considered not only in relation to the *constituent processes* (Paixão, Peixoto), but also with reference to the *constitutive processes*.⁸ In this way, the institutional dynamics that, outside the constituent moment, take on importance in structuring the constitutional dimension are

8 On the distinction between constituent and constitutive dynamics in the constitutional dimension please see Paixão/Meccarelli (2020).

also considered. In particular, it is the de-constituent dynamics (Di Cosimo, Carvalho)⁹ that become the object of analysis. More in general the problem of democracy, assumed as the terrain in which constitutional law, institutional and political dynamics intertwine, is the object of study in several chapters of the book (Pinheiro, Paixão, Guerra, Di Cosimo).

Another important point of the innovation-transition pair involves the relationship between law and emotions. Some texts discuss issues such as melancholy analysed as a power device, the identity between representatives and those represented, democracy and its relationship with memory policies and, finally, the role of silences in the construction of constitutional history (Pinheiro, Paixão). In fact, it may be interesting to question the role and function of emotions in historical processes related to law. New studies in this field are undoubtedly welcome.¹⁰

It is interesting to remark in this respect, how the space of relevance of the dynamics of innovation-transition is represented, not only by issues related to public law, but also to private law. The essays by Francesco Gambino and Alessio Bartolacelli effectively highlight the problematic nature of the phenomena of innovation-transition, when they occur in a normative space, which focuses on the values of stability and certainty in inter-individual relations. In addition to corporate law (Bartolacelli) and contract law (Gambino), the problem emerges in the investigations carried out on the early twentieth century by Elisabetta Fusar Poli and Francesca Martello with regard to the regulation of personality rights, copyright, patents and technological inventions.

5. Conclusions

The conceptual pair innovation-transition has multiple potentialities for further research, as we seek to highlight in these introductory lines. The range of research topics contained in the work, as well as the numerous other disciplines involved (beyond/outside legal history), suggest that discussions on innovation and transition are far from exhausted. New possibilities have actually been opened up by the contributions included in this volume.

Based on these perspectives, we should consider: what are the possible

⁹ For a reflection on the current Brazilian scenario, please see Paixão/Zaiden Benvido (2020).

¹⁰ On the different configurations of emotions see Didi-Huberman (2013).

connections between innovation and transition? As shown in the texts of Meccarelli and Stara, it could be argued that innovation in law, in order to be autonomous, seems to presuppose the existence of a transition (or several of them). Transition, in turn, has greater autonomy as an explanatory key, as can be seen even by the existence of the fields of knowledge linked to it - “transitology” (dealt with in the Guerra paper), “transitional justice” (in the contributions of Meniconi and Paixão) and the extensive research, books and articles related to political transitions, especially in the second half of the twentieth century (a feature found in the articles by Peixoto, Carvalho and Di Cosimo).

Innovation and transition thus have a common aspect: both are actually temporal players, that is, they operate in the organization of the interaction between past, present and future. The studies performed based on this conceptual pair enable the articulation of the temporal dimensions in several ways, with emphasis on historical processes of continuity, rupture, transformation, restoration, permanence of past structures, invention of traditions and other attitudes focused on the tension between past, present and future.

Throughout the analyses proposed in this volume, we note the creative use of these concepts by actors, institutions, and organizations, emphasizing the aspects of quality, incisiveness, and distinctiveness of the conceptual pair innovation-transition.

All of the contributions in this volume are complex, rigorous, and open to various fields of knowledge. In the closing words of this introduction, we cannot fail to mention that we expect new research to be carried out - in legal history and in legal theory as in other fields of legal studies - relying on the conceptual pair innovation-transition, so that the capacity to think about the future may be renewed, like the character in the Divine Comedy who warns us that, despite all the obstacles, the stages of a life that “far longer will extend” must be completed.¹¹

¹¹ Alighieri (1921), Paradiso, XVII, 98-199.

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Setting Concepts

Time of innovation and time of transition shaping the legal dimension: a methodological approach from legal history

Massimo Meccarelli

1. Innovation and transition in law: a tentative conceptual setting; 1.1. Innovation and legal change; 1.2. Ascriptive time and transition in law; 1.3. An example in history: the transition to democracy and the aftermath of fascism in Italy; 1.4. Legal transition as a legal regime; 2. Innovation and transition shaping legal dimension: the objectivation of law; 2.1. The dyad “innovation-transition” and the objectivation of law; 2.2. The transition from the *ordo* to the *systema* and the disconnection of jurisprudence from the dynamics of objectivation of law; 2.3. Innovation-transition as an analytical tool for understanding the constraints of theoretical sustainability of legal concept; 3. Innovation and transition in law: rethinking borders of legal disciplines

1. Innovation and transition in law: a tentative conceptual setting

Legal change constantly draws the attention of jurists. Its relevance lies in the fact that it offers the possibility of multiplying the levels of analysis of legal issues, by bringing its relationship with its social, political, economic and cultural dimensions to the forefront. For a jurist, however, this is always a challenge, since considering legal change - precisely because of its openness to the pre-legal basis of legal forms - requires a continuous updating of the instruments used to carry out an observation of law and its dynamics. The purpose of these pages is to consider, from a historical perspective, the possible heuristic advantage that two analytical categories such as innovation and transition can offer in this regard.

First of all, I would like to attempt some conceptual delimitations in order to grasp the *juxtaposition*, such as the *relationship* between “innovation” and “transition”; then I would like to reflect on their *situational value* with respect to the legal discourse; moreover, I would like to consider the *dynamics of the objectivation of law* which can be observed in this light (i.e. dynamics that help to identify law as a special form of normativity with its own “objective” value). This will also allow me to reflect, in conclusion, on the impact that this can have in relation to the wider problem of the interdisciplinary

challenge, that contemporary legal problems pose to legal science as well as to the humanities and social sciences.

1.1. *Innovation and legal change*

If “innovation” designates *a radical way* of transformations occurring in the social, political, economic, technological, cultural fields, is it possible to identify the dynamics of innovation in legal change? What makes a legal change “innovative”? Could we speak of a time of innovation in legal experience? We can assess these questions tentatively, but the exercise may serve to better define the contours of our theme. In this regard we can consider two different perspectives.

In a first perspective, *from the point of view of the object of the analysis*, legal innovation represents a change perceived (in the context in which it occurs) as progress. Thus understood, “innovation” indicates an explicitly stated (self-asserted) dynamic, which qualifies itself as oriented towards producing a novelty, an unprecedented configuration, in law.

Let us focus our attention on some examples that we can find in the history of legal thought: when the purpose of a theory is to promote a radical proposal, the contrast between new and old is a typical argument. An example is the well-known pamphlet by Cesare Beccaria, *Dei delitti e delle pene*.¹ Despite the descriptive character of the title, this essay aims to promote a radical change in the penal system in line with “a society organized in a different way, to be built on new political principles”.² The book is related to a project for innovation; to this end the rhetorical constructions of its pages often insist on the contrast between new and old, where the new is just and correct and the old is unjust and wrong.³

Self-assertive innovation can also be found in works that are not characterized by an express purpose to mark a discontinuity, but which, at the same time, aim to explore new legal fields. Think of jurists like Hugo Grotius and his famous treatise *De iure belli ac pacis*. It is a work that intends to contribute to the establishment of a new legal framework for the new geopolitical dimension, that has emerged since the discovery of the Americas. The author

1 See Porret (ed.) (1997); Porret/Salvi (eds.) (2015); Chiodi/Garlati (eds.) (2014).

2 Sbriccoli (1997) 177.

3 Among the many examples see the opening page of the book “A chi legge”, Beccaria (1764).

expressly underlines this aspect in the introductory pages (the *Prolegomena*), where he states that he intends to impart his discourse *sicut mathematici...*; it is a matter of considering a different interpretative paradigm of social facts, which relies on a logical-abstract rationality (introduced by the new methodological approach of Descartes)⁴ rather than on a practical-evaluative one, as was common in the legal hermeneutics referable to the Aristotelian-scholastic tradition. A similar consideration can be made about many other authors that in this historic turn aim to develop this insight. Think for example, of works such as the *Nova methodus discendae docendaeque iurisprudentiae* by Gottfried W. Leibniz, which, highlighting this intent already in the title, aims to promote a radical change in legal hermeneutics.⁵

From a historiographical point of view, the fact that an “innovative” intention is explicitly expressed in the legal discourse, is a useful element of evaluation in the effort to historicize the experience. It may be relevant to consider, for example, that Leibniz and Grotius wanted to “label” their theory as innovative in order to understand the more general debate on legal change in early modern time. We know, in fact, that in this period there are other theoretical approaches, no less pertinent and effective in shaping a new legal landscape, which follow a different argumentative strategy, based on the demonstration of apparent continuity with tradition. I am thinking of figures such as Francisco de Vitoria, Domingo de Soto, Luis Molina⁶ and, more in general, of the Iberian scholasticism of the early modern age.⁷

The fact of an explicitly innovative intent is significant; at the same time it is not self-sufficient with respect to the historical analysis to be carried out. As historians, in order to weigh a project of legal innovation *explicitly stated* in the sources, we question and verify the importance of this project, in terms of its impact (on scholarly debate or on regulatory regimes, etc.). A major aspect of the historical evaluation of ideas on legal innovation is, therefore, the examination of its links with (its effectiveness in relation to) the needs

4 Grotius (1625), *Prolegomena*, post medium, ante finem: “Primum mihi cura haec fuit, ut eorum quae ad ius naturae pertinen probationes referrem ad notiones quasdam tam certas ut eas nemo negare possit, nisi sibi vim inferat [...] “Vere enim profiteor, sicut mathematici figuras a corporibus semotas considerant, ita me in iure tractando ab omni singulari facto abduxisse animum”.

5 Leibniz (1667); De Iuliis (2010); Hespanha (2012) 311-332.

6 Think of works such as those by Francisco De Vitoria (1538); Bartolomè de Las Casas (1997); Luis De Molina (1613); Domingo De Soto (1559).

7 Costa (2001); Costa (2014).

for change expressed by the social fabric or claimed by society. These brief considerations lead to the conclusion that the self-affirmation of the innovative intent of a theory, while it is a *determining* factor in understanding the occurrence of a legal change, is *not sufficient*, as such, to explain legal change in the historical experience.

This calls us to consider a second possible perspective on legal innovation: *recognised innovation*. Here we refer to phenomena of legal change that we – as observers, *from outside* – identify as innovative. Innovation we can consider from this point of view, as describing a certain way of being, a certain form, of change in law.

For this type of approach, the historical perspective is a privileged field. In fact, the historical point of view is always constituted as a sequence of experiences of change, that we qualify as such, based on evidence to which we attribute a certain degree of “*objectivity*”. Law in history always appears to be in motion, but in a sequence of discontinuities like this some of them present themselves as “innovative”, in the sense that they are outstanding for being bearers of a paradigm shift.

Francisco de Vitoria’s theory on *ius peregrinandi* and *ius communicatio-nis*⁸ is innovative because it introduces a different way of conceiving legal protection and permits the employment of European law in a new context, like the possible space of the new world. In other words, the invention of individual rights in the case of Vitoria, seeks to derive a position for European legal tradition in the unprecedented scenario of the new world, where it would otherwise have had no chance of being implemented (since the new world lacks the cultural, historical and spiritual assumptions, which formed the pre-legal foundation of that tradition). This result, to our eyes, is not affected by the fact that this theory is conceived as part of a discursive strategy aimed at establishing continuity with tradition. In other words: there is no self-asserted innovation in the case of Vitoria, but, from the outside, we can easily recognise the innovative nature of his theory.

Now let us take a second and different example. The theory of the social contract in Thomas Hobbes is also innovative; as historians we can see that it provides an unprecedented solution to the problem of the foundation of political power and social cohesion; it also offers a different solution to the issue of legal protection through protection of rights, even compared with the innovative theories of Vitoria. It is different because it is founded on the unprece-

8 Costa (2014); Neuenschwander (2013); Meccarelli (2014).

mented juxtaposition between *ius* (whose meaning is reduced to that of “*right*”) and *lex* (whose meaning is generalised in that of “*law*”), with the consequence that individual rights are the result of the will of the legislator, who, through its legal norm, provides rights; on the contrary, in the theoretical construction of Vitoria, individual rights are still the result of a legal dimensioning of justice.⁹

In the case of Hobbes, the recognized innovation also corresponds to a self-affirmed innovative intention: we are, in fact, dealing with a concept for modernization that is juxtaposed to tradition. Let us remember the well-known page in which Hobbes talks about “some foolish opinions of Lawyers concerning the making of Lawes” where he directly criticizes the attitude of “that juris prudentia” to the production of law; in fact, for him it is essential to dissociate the *ratio legis* from the *juris prudentia*, in order to place at the centre the will of the legislator.¹⁰ The innovative nature that we recognize in Hobbes’ theory, in addition to its outstanding position with respect to the context in which it is inserted, is also due to the fact that it is capable of explaining legal order without the need for tradition. Here innovation is undeniably associated with discontinuity.

Rousseau’s theory of the social contract is also innovative and even though it fits into Hobbes’s path, develops it in a novel perspective, which focuses on the citizen and the sovereign people, identifying new key problems, such as that of constituent power or of representation.¹¹ Rousseau is not the first to focus on the idea of the social contract in order to explain the genesis of a legal order, yet we agree in recognizing in his thinking a radical originality that introduces a discontinuity. His reflections, in fact, open up a novel scenario also from the point of view of the theories produced up to that moment, through the paradigm of the social contract; I am referring not only to the developments of thought that derive from Rousseau, but also to some institutional implementations inspired by it (think of the *Déclaration de droit de l’homme e du citoyen* of 1789).

I have mentioned three examples taken from different chronological phases; historiography often highlights their mutual relations as part of a unitary path of legal thought which, through the centuries of the modern age, produces the traits of legal modernity. However, the issue of recognizing the innovative nature of these developments of thought, allows us to identify

9 Please see Meccarelli (2014); Meccarelli (2017).

10 Hobbes (1651), part II, chapter 26, 189-193.

11 Costa (2001); Fioravanti (1998).

variations, in order to better articulate the way in which we can historicize this trajectory.

To come back to our main problem: with recognized innovation we intend to grasp an *intrinsic* character, an added value, which presents different features in each single original theory; at the same time this added value is always *relative*, since it depends, necessarily, on an *a priori* placed by us as the observer. Seen from this more “objective” side, innovation, even if it confirms its analytical value, reveals a limit.

Let us, therefore, reflect in synthesis on the two kinds of innovation we have considered, the “self-asserted” and the “recognized”, in relation to legal change. In both cases, methodologically speaking, innovation in law does not offer itself as a category of *transcendental character*, in the sense that, it can never constitute a concept independent of the dimension of experience, it cannot represent an *a priori* with which to order or consider empirical data. On the contrary, its analytical value lies in its *situational attitude*, i.e. in the way it explains the link between the circumstantial framework and the phenomenon of legal change. “Innovation”, in so far as it lets us grasp a *certain way of thinking about law* in the circumstantial framework, also allows us to understand levels of complexity and structures of that framework.

These were mainly methodological observations. And what can we say from a theoretical point of view? Can we speak of a time of legal innovation? If innovation in law, as we seem to have pointed out, does not have a transcendental nature but consists, above all, in *a way of considering the law in society*, which is necessarily affected by the relativity of the point of view, it can hardly be conceived as a *regime of law*. However, given its situational character, it seems plausible to speak of innovation as a time of law, if we understand it as an indicator of a perceived *regime of historicity*, in the sense specified by François Hartog: a certain “way of linking together past, present and future”, an “experience of time” to which the “categories of past, present and future give order and meaning”.¹² In this perspective we can consider the idea of a *time of innovation that gives shape to legal dimension*.

1.2. *Ascriptive time and transition in law*

Let us now consider the other pillar of our reflection: transition in law. Transition, like innovation, does not belong to the general categories of the

¹² Hartog (2015) XV-XVII and 11-16; Paixão (2013); Ricouer (2000) 480-498; Benjamin (1940) 75-86; Scuccimarra (2016).

theory of law either; from a methodological point of view, it too presents itself as a category with different analytical values.

Usually we tend to consider “transition” in a *descriptive key*, that is, as a historical phase between a point of departure and a point of arrival. In this perspective transition seems to indicate a chronology of law rather than a legal regime. If one speaks either in specific terms of a transitional regime, or if one speaks in more abstract terms to refer to some kind of change in legislation, in case law and jurisprudence, in theoretical categories, the transition constitutes the *time frame* in which a phenomenon of change in law is observed. The importance of the transition thus understood, for the jurist and for the historian, lies in the fact that it represents a temporal segment in which a legal change occurs¹³; it is a historical time, qualified by the complex interweaving of old and new, which it is possible to observe in the interplay of forces between continuity, discontinuity, and also the emergence of the *innovation in the transition*. Nevertheless, thus understood, the transition does not describe a regime of law.

Besides acting as a descriptive category of historical phenomena, “transition” can also be considered in a different light as an *ascriptive time*, i.e. a time with its own attributive force. With this term, in fact, I would like to suggest the idea of a temporal condition capable of attributing to law specific regimes and contents. If descriptive time contains the occurrence of the law, ascriptive time, on the contrary, represents a *regime of the law*. There are many possible examples and they seem to be of two different types. We can, in fact, distinguish the attributive times that *rule the permanence* of the law¹⁴ and those that bind it to a *condition of impermanence*.

If we think about customary law, repeal, constituent power, etc., they are all concepts that gain their own autonomy in legal terminology, making time an element of their content (in the sense that it is time that marks the production of legal effects). In the customary norm it is the recurrence in time that turns a social fact into a normative fact¹⁵. Repeal consists in a specific temporal turning point that defines the life of a norm from which precise effects derive; the constituent power is also a specific temporal turning point that takes on the founding value of a legal order.¹⁶

13 Costa (2019) 29-33.

14 See Bretone (2004) 33-58.

15 See Paolo Grossi's introduction to the re-edition of Bobbio (1942).

16 Ackerman (1991).

However, as we mentioned above, there are also examples of attributive time that affect the law in different ways, determining and justifying the law to the extent that it links it to a *condition of impermanence*. Transition is an example of this type of temporality. Transitional space, as such, is productive of circumstantial legal configurations, that act for the present; at the same time, with respect to the future, these legal configurations are reflected as constraints and preconditions¹⁷. In other words, the effects of the decisions, taken by political, social and also institutional actors during the transition processes, inevitably project themselves onto the post-transitional phase. This *ultra-activity* of transitional time results precisely from the special condition of impermanence that characterizes it; for this reason, we argue that transition, understood in the attributive sense, represents a regime of law.

1.3. An example in history: the transition to democracy and the aftermath of fascism in Italy

We can search for examples in history. For the contemporary age, I am thinking above all of the major theme of the transition to democracy. It is a time in which the project of the future applies to a reality in turmoil, “un monde perpétuellement glissant”, as the historian Lucien Febvre observes in opening the first issue of the new series of the review *Annales* in 1946.¹⁸ However, it is also a reality that is forced to deal with a dramatic demand for justice in order to build a new order.¹⁹ This is the time in which the “angel of history”, to recall the plastic image of Walter Benjamin, is pushed with open wings towards the future, while still looking at the past, contemplating the frightening scenario of the rubble, which can no longer be restored.²⁰

We consider, in particular, the significant experience of the transition in Italy between 1943 and 1948, preparatory to the political and legal turning point for the Republic and democracy.²¹ In this temporal frame (of transition understood in a descriptive sense) that goes approximately from the fall of Fascism to the enactment of the new Republican Constitution, we are im-

17 See also Costa (2019), in partic. 40-41, on the possibility of considering the transition as a “structuring totality” that gives shape to systems and structures.

18 Febvre (1946) 3.

19 Sands (2016); Stonebridge (2011); Sebald (2004).

20 Benjamin (1940) 80.

21 Pombeni (ed.) (2016); Bernardini et al. (eds.) (2017); Focardi/Nubola (eds.) (2015).

pressed by the richness of the questions that trigger the reflection of the jurists. A look at the indexes of the legal journals of those years already shows the variety of structural problems which are discussed to address the situation. They often concern problems of the moment, but they call into question the general principles, or rather, they impose a choice as to which are the general principles of reference for the solutions to be taken. In this impermanent space, in which the transition foregrounds its attributive nature, tentative assessments of new legal theories are experienced, and legal debates are held on relevant issues like, for example, the replacement of legal norms over time, such as those on *ius superveniens*, the retroactivity of the statutory law, the nature and limits of the normative power of the Executive, the relationship between law and constitution, the relationship between justice and law, etc.

Without making a list of the problems on the agenda, what is important to highlight here, is that the debate, on legal issues related to the circumstantiality, is immediately linked to that, *de jure condendo*, regarding the “regular” time that will follow the transitional time; this laboratory of transition offers itself as a place of identification and empowerment of new principles and fundamental categories, to be employed also for the new legal system.

Let us try to consider a more specific example, still with reference to this period of post-war and post-dictatorship which was a transition to democracy. Among the urgent issues to be addressed, that of the accountability of fascism and that of collaboration with German troops, during the last years of the war, assume a key importance. In this regard, between 1943 and 1946, we see a sudden change of approach.

The first is inspired by the aim to achieve *restorative justice*. The Minister of Justice Palmiro Togliatti, in submitting bills to the Parliament, explained that an act of clemency towards any criminal act should be granted for “any immediate and direct motive in the anti-fascist action”. The amnesty would be “an act of restorative justice to which society is indebted” in favour of those who broke the law “to contrast the fascist tyranny”.²² Indeed, an amnesty of this kind was issued first with a Royal Decree no. 96 7th April 1944, and then with Decree no. 719, 17th November, 1945. At the same time, other measures enacted between 1944 and 1945 established severe sanctions and special courts against the fascist leaders for the acts committed during the dictatorship; also collaboration with the German enemy, as well as any support for the re-establishment of a Fascist regime, were considered criminal offences.

22 Togliatti (1945) 472-473.

This set of norms was implemented²³ in exemption of some fundamental principles of liberal criminal law (as was also happening at international level in order to make crimes perpetrated by the Nazi regime accountable), such as the prohibition of the retroactive effect of legal norms, the exhaustiveness and precision in the normative description of a criminal offence, and the principle that requires the courts to be pre-constituted to the facts they have to judge (the so-called principle of the *juge naturel*).

What is interesting is that, in a couple of years, the approach changed radically. Rather than “restoring justice” to the anti-fascists, the aim became to promote a broad pacification between winners and losers; as a consequence, the problem arose of mitigating the effects of the exceptional measures taken in order to make fascism and collaborationism accountable. In 1946, an amnesty was issued,²⁴ on the initiative of Minister Togliatti himself, the Minister that had supported and implemented the strategy of restorative justice. This time the amnesty was mainly for crimes perpetrated by fascists. Fascism would remain illegal with reference to future events²⁵, but for the past, with the new amnesty, the goal now became to promote a “new climate of unity and concord”.²⁶

It is the change in the political and institutional framework that inspires

23 This is a series of measures taken through different Acts. The most relevant is the Decree no. 159 27th July 1944, “Sanzioni contro il fascismo”, that provided epuration from the administrative bodies of those who had held specific leading positions in the Fascist party; it established criminal sanctions for acts carried out by members of the Fascist party during the years of the regime; for the immediate future it provided for sanctions against those who collaborated with the German troops and supported the reconstitution of the Fascist regime; it created a special court, the High Court of Justice. For a more detailed analysis of this case, see most recently Caroli (2020); Franzinelli (2018).

24 Amnesty of 22th June 1946 no. 4. See Franzinelli (2006); Nubola (2016); Colao (2011); Caroli (2020).

25 See Act 3rd December 1947 no. 1546 “Norme per la repressione dell’attività fascista e dell’attività diretta alla restaurazione dell’istituto monarchico”; XII Transitional and final provision in the Italian Republican Constitution of 1948; Act 20th June 1952 no. 645 “Norme di attuazione della XII disposizione transitoria e finale (comma primo) della Costituzione”.

26 Togliatti (1946) 711: “Tale è l’atto di clemenza che, approvato in un grave momento della nostra vita nazionale, certamente contribuirà a creare nel Paese quel nuovo clima di unità e di concordia che è il più favorevole alla ricostruzione politica ed economica, e nel quale dovrà continuare, entro i limiti stabiliti, la necessaria opera di giustizia per il definitivo nostro risanamento politico e morale”.

this new approach. In fact with the Referendum of 2nd July 1946 the decision to proclaim the Republic was taken and a Constituent Assembly of clearly anti-fascist character was elected and called on to write the text of the new Constitution. Starting from the premise that “with the passage from the monarchy to the Republic a new period in the life of the unitary Italian State had opened up” Togliatti explained that, now, it was necessary to give a sign of “pacification and reconciliation of all good Italians”, which was also meant to include former supporters of the dictatorship.²⁷

1.4 Legal transition as a legal regime

Let us go back to our path for some evaluation. In the case I have just mentioned, the regimes that the law takes on are explained and justified in relation to the political situation. What is interesting for our analysis, however, is that this experience of transition is intended also to produce effects on the next scenario (thus highlighting, if you like, a double attributive effect: one on the present time, one on the future).

In fact, if we consider how the two approaches (reparation Vs pacification) were combined, or which prevailed, we can ponder to what extent the transitional time represented a constraint on future democratic life. Evidence of this can be seen in the activity of the institutions and in particular in the attitude of the judiciary in the first decades of democracy.²⁸ Then there is the other aspect I mentioned, that of the importance of the transition as a moment of emergence of issues and problems relevant to the legal debate. We must not forget, in fact, that the regulatory regimes that have been activated as a consequence of the problem of bringing the past to justice, have not been in line with the principle expressed by Italian liberal legal culture on criminal law. At the same time, it is precisely the legal culture of the liberal age that the project for democratization was looking at in order to identify the fundamental principles and to build the new constitutional order. That experience of transition was axiologically linked to the democratic project, but to close the accounts with the past it was employing instruments not completely in line with that project. This gap between the project and the instruments contrib-

²⁷ Togliatti (1946) 708. See also Berlinguer (1946) 484; Pilotti (1947) 21; Funaro (1947) 62.

²⁸ On this point see the chapter by Antonella Meniconi in this same volume, precisely in reference to the Italian case.

uted to a debate on the situation that, actually, was able to identify issues and problems, important for considering features of the new criminal system for democratic Italy. The issue of retroactivity, of the constitutionality (or constitutional basis) of criminal law, the issue of standards of precision in drafting norms concerning criminal offences; the issue of the presumption in criminal trial, the issue of causality in criminal law, the regimes of mitigating circumstances, and many other key issues of the criminal system in the democratic age, were identified and discussed, starting from the problems arising from the transitional criminal law we are talking about.²⁹

Let us leave the examples aside and now return to our methodological itinerary. Transition, like innovation, comes to our attention as a category that helps us to understand the *situational nature* of the legal dimension. Both indicate a time of law (i.e. they refer to a certain regime of historicity that characterizes the phenomenon of legal change). However, the two concepts are significantly different.

We have, in fact, already considered that the category “innovation”, applied to the legal dimension, does not have a transcendental character; on the contrary, it allows us, above all, to grasp a *certain way of thinking of* the law in the circumstantial framework. If, on the other hand, we consider the concept of “transition”, understood as attributive time, it seems to reveal a *certain way of being of* the law; it is not only a time of the law, but also a *legal regime*.

2. Innovation and transition shaping legal dimension: the objectivation of law

2.1. The dyad “innovation-transition” and the objectivation of law

After the two concepts have been defined, we can now evaluate their possible relations. The aspects that distinguish them, as seen from our analysis, lead us to think of the two concepts as complementary. On a closer look, in fact, “innovation” and “transition” share a common element, that of *situating* our problem - i.e. understanding legal change and understanding the change of categories and concepts that describe it - *in a context*. They take this analytical value because, as we have just observed, they manage to take into

²⁹ For more details on this point please see M. Meccarelli, *Time and Legal Change. Some Methodological Remarks on Italy’s Transition to Democracy*; and A. Meniconi, *The Failed Reconciliation: The role of the Judiciary in Post-Fascist Italy and the Togliatti Amnesty*, both in Paixão/Meccarelli (eds.) (2021).

account respectively a way of seeing the law (innovation) and a way of being of the law (transition). Hence their complementarity. We might be able to go deeper into the analysis if we consider the horizon of possibility of “*innovation-transition*” as a *dyad*.

The last example I gave, which showed, in the attributive time of the transition, a moment of *mise en forme* and development of new legal configurations, suggests that the study of the transition allows us to acquire an analytical point of view on innovation processes. One could, in this respect, consider *transition as innovation*, and look at the time of transition as a preferential framework for studying the phenomenon of legal change.

It is “preferential” because it allows us to rediscover an aspect of this phenomenon that legal modernity has overshadowed. I refer to the dynamics of the *objectivation of law* (i.e. the dynamics of the transformation of social facts into normative facts, of the development of a jurisprudence capable of recognizing its legal importance,³⁰ of the construction of a legal knowledge based on a cognitive diagnosis of the social facts). Historiography³¹ has identified “legal modernity” as the cultural and scientific turning point in the idea of law, which in Europe marks the detachment from forms and structures established during the medieval legal experience (based on the jurisprudential dynamics of production and construction of the legal order), to give space to a concept of law, based on the idea of the primacy of political power and, therefore, on the relevance of statute law as the main source of law. This transformation of the legal systems of continental Europe took shape, starting from the new approaches to natural law in the modern age and finding complete configuration in the Nineteenth century with the establishment of codified legal systems.

2.2. *The transition from the ordo to the systema and the disconnection of jurisprudence from the dynamics of objectivation of law*

It might be useful to dwell briefly on the paradigm shift from the *ordo* to the *systema*, which marks the entry into legal modernity between the 16th

³⁰ In this same volume, Francesco Gambino also dwells on this problem, considered, however, from the point of view of the current legal system.

³¹ Grossi (2003); Grossi (2005); Hespanha (2012). For a philosophical perspective on the problem recently Cacciari/Irti (2019).

and 19th centuries.³² With this I would like to draw more attention to the implications that this process had on legal hermeneutics, leading to its disconnection from the dynamics of the objectivation of law.

It is a process of re-signification of the concept of jurisprudence, which has been designed to relativize and with this to update the existing law, to an instrument conceived to promote the hypostatization (and then dogmatization) of legal concepts. As I have already had the opportunity to highlight in previous studies,³³ this change in the method of interpretation of law, contributes to redefining the nature of jurisprudence, and to reorienting the function of jurists; as a consequence, the process of production of law would cease to be a phenomenon to be made objective through a hermeneutic activity.

In fact, “jurisprudential law”, developed according to the paradigm of the *ordo*, which for brevity we could also refer to the *ius commune* tradition, consisted precisely in a hermeneutical activity, based on an Aristotelian-tomist conception of *ratio* and, therefore, capable of shaping the legal dimension, by objectifying it. Following this approach, the order had to be recognized through an observation of social facts and, consequently, hermeneutic activity was that exercise that allowed jurists to produce a probable awareness of law; namely the jurists’ interpretation represented a moment of approach to the truth, an *intelligere* that had to be verified and updated over time. The exercise of producing jurisprudence consisted, therefore, in an assessment of possible variations in the content of the law over time; it was a *nomo-poietic* process. Hence this understanding of legal hermeneutics served to ensure a permanent capacity to update the legal system, independently of the options of political power and its legislative activity.

The new paradigm of Cartesian rationality, which some orientations of legal thought have adopted,³⁴ was to change the method of interpretation; the jurists, proceeding from axiomatic assumptions, would carry out a hermeneutical activity which would no longer be practical-evaluative; on the contrary, it would be a logical-deductive activity, capable of producing firm results. Here lies the change: the legal hermeneutics of Modernity no longer look at the reality of social facts to reconstruct and justify the legal order; on the contrary, it is now based on an ahistorical and predefined *a priori* (for example, to stay with the doctrines of natural law: individuals as the main ob-

32 Cappellini (2010) 243-246.

33 Meccarelli (2016) 140-142.

34 See Hespanha (2012) 307-314; Tarello (1976) 133-190; Villey (2013) 493ff.

ject of the problem of the protection of rights, features of the state of nature, classification of natural rights, etc.).

As I have mentioned, this trend has taken on more and more prominence during the Modern Age. The real culmination was to be seen in the continental success of the jurisprudence of concepts in the 19th century. Here the activity of the jurist aimed definitively at “rationally” identifying the rules, institutions and ordering categories, so as to be able to describe the legal dimension as a legal system. This jurisprudence aspired to establishing and generalizing legal institutions by describing them as dogmas, so as to make them capable of subsuming social facts in themselves. As can be seen, with the jurisprudence of the *System*, an inversion with respect to the jurisprudence of the *ordo* was achieved, since only by starting from social facts could the jurisprudence of the *ordo* arrive at conceptualizations.

It should also be mentioned that this itinerary is also followed by the Judiciary. This is particularly evident in the invention of the procedural device of “*cassation*” in France, promoted as a model of judgement at the Supreme Courts, which has become widely established on the Continent.³⁵ Here too, the parable of the metamorphosis of jurisprudence closes, whose distinctive feature becomes that of its *nomo-phylactic* activity.

From the historical point of view, it is a process in which, while this jurisprudential law has been reduced to the format of the Cartesian *cogito*, the law imposed by the political power (statutory law) occupies the space left free, ruling the updateing of the law.

2.3. Innovation-transition as an analytical tool for understanding the constraints of theoretical sustainability of legal concept

I have lingered on this historical transition, because it highlights a change that directly affects our issue. The modern concept of law, in fact, has led to considering the emergence of legal normativity as a problem of identification of the sources of law and systematization of their mutual relationship.

That is, the categories that describe the emergence of legal normativity have been defined starting from the *result* in order to regulate an activity of *production* of law. Its value as a *process* and, therefore, the possibility of framing it as a phenomenon of *objectivation* of the law, have been left in the background.

35 Calamandrei (1921); Calogero (1937); Meccarelli (2011); Halpérin (1987).

Our hypothesis is that, through to the innovation-transition dyad (i.e. thanks to their situational value) we can recover this level of understanding of legal phenomenology. This possibility is evident from legal history; think of the example we have just given with regard to transitional criminal law and its ultra-activity.³⁶ A potential field of application for this kind of approach aimed at considering the innovation-transition as a dyad, is that of constitutional history. I am thinking in particular of the study of constitution-making processes which could benefit from an analysis that, in addition to the usual *constituent* factors, would also consider the *constitutive* ones, that emerge in ascriptive times (such as the transition, the exception, the crisis). In fact, through the first, the constituent factors, we focus on social, political and legal facts that aim to contribute to the production of a constitution (think of constituent conventions, or political rallies). These are bottom-up dynamics, bearers of a programmatic projection. With the second (the constitutive factors) we can include in the analysis of a constitution making process, also other dynamics that, as normative facts, have effectively contributed to producing the constitutional order, without being part of its design. These dynamics are both top-down or bottom-up, they can be multiple, simultaneous, asynchronous and competitive, and above all express circumstantial potential. Think, for example, of the granting of a Constitutional Charter, the enactment of a law of constitutional importance, a decision of a Constitutional Court that changes a constitutional rule, a transitional regulation, a revolutionary event or a coup d'état, that de facto establish a new constitutional order.³⁷ These are relevant factors that especially transitional time can contain, due to its special attributive force.

A possibility of re-gaining an understanding of the dynamics of objectivation of the law seems useful also in relation to the current time; the problems we are called to reflect on today, increasingly require us to consider a multi-normative space, which does not seem to be ascribable to the monistic format of state legal systems (set up from the Nineteenth to the Twentieth century) and the categories connected to it.

³⁶ Moreover, this would also help, perhaps, to provide new elements of understanding of some connected events such as the permanence in force, over the decades of the Republican experience, of the criminal code and criminal procedure code, issued during Fascism. See Sbriccoli (2009) 695-700.

³⁷ For a more detailed reflection on the historiographical implications of the distinction between constituent and constitutive dynamics see Paixão/Meccarelli (2020).

What we have observed above, concerning the opportunities that the situational value of innovation and transition opens up, urges us to consider one last issue. The use of these as analytical categories, in fact, in so far as it gives us a perspective on the processes of the objectivation of the law, allows us to gain a different point of view on legal concepts and their use. This is because it leads us to remove from the abstract (dogmatic) frame in which they are conventionally located.

The innovation-transition dyad - that serves as an analytical key for understanding the configurations of law in their situational value - allows us to observe legal categories and concepts in their original functions and therefore, to grasp the constraints of their theoretical sustainability,³⁸ that is, the assumptions that justify their original *raison d'être* and, consequently, the viability of legal concept. Highlighting the constitutive limits of the categories and legal configurations can help us to verify the adequacy of the use of our conventional conceptual tools in relation to current problems.

Innovation-transition helps us, in other words, to recover a perspective of meaning for those foundations of legal structures that their enhancement in the dogmatic field prevents us from considering.

3. Innovation and transition in law: rethinking borders of legal disciplines

The possible de-dogmatization effect, of a study of legal change addressed through the dyad innovation-transition, allows us to conclude our itinerary with a reflection on the issue of the interdisciplinary dialogue and the opportunity to reconsider the boundaries between different legal disciplines.

Let us start from the observation that, if we look at the last two centuries, legal sciences have taken shape based on the *aggregative force of the dogmatic method*.³⁹ It was a matter of developing a knowledge composed of concepts and categories, hypostatizing the doctrinal configurations and thus the normative forms of legal problems. The axiological foundation, like the

³⁸ See in this volume the chapter by Claudia Roesler which refers to this issue, considering the problem of repetitive structure in legal language. Roesler highlights how dogmatic thought, despite its operative and stabilizing function, necessarily interacts with zetetic thought, which due to its cognitive function, provides the premises that are dogmatizable. That confirms the attitude of legal hermeneutics to make legal concepts questionable, when considering the normative relevance of social facts.

³⁹ Cappellini (2010) 155-162 and 239-248; Hespanha (2012) 410-451; Hespanha (2013); Haferkamp (2004).

assumed social model, inserted in this path, which referred to the liberal values of the monistic state and individual freedom, soon became an implicit one, which, from the perspective of legal hermeneutics, did not need to be questioned.

It is on the basis of this formalistic attitude, that a differentiation between the fields of law was produced; the premise for their study consisted in a *specialization of methods, categories and themes, marking boundaries and disciplinary partitions*. Achieving self-referentiality and thematic and methodological self-sufficiency, have also been ways of affirming the very essence and autonomy of each legal discipline. This means that the legal sciences have defined their specific identity by emancipating themselves from the problem of making a *cognitive diagnosis of social issues*. Over the last two centuries, making a diagnosis of the social has increasingly become a duty of other sciences, the social and human sciences and, above all, a duty of political actors.

All this has operated over the last two centuries, and in fact it is still operating, like a tacit pre-understanding horizon. This is an important problem today, when competence in grasping the social issues and an interdisciplinary openness is required in legal discourse. Considering this background, it seems to me that the study of innovation and transition, thanks to its situational implications, offers the opportunity to rethink disciplinary boundaries in the sense of breaking the self-referential closures. It is a question of starting a methodological practice that would encourage the experience of a dialogue between disciplines, by converging on three points:

- to include in the discourse on law the premises of a legal problem and, therefore, to *verify the tools and categories* with which we address it. In this, the opening to the social sciences and humanities, could be an added value; they can offer us inputs, suggest concepts and directions in order to carry out a cognitive diagnosis of the social issues from the legal point of view (think of the notions of otherness and of human and social interactions, the notions of social cohesion, or of normativity, just to mention a few examples that may concern our theme).

- to consider (also in the sense of questioning) the role that the single legal discipline can play in this context; which is a way to reconsider *what kind of pre-understanding* of the law in relation to society our disciplinary knowledge bears and what kind of pre-understanding could or should be bearer.

- to accept the challenge of a circulation of ideas, reflecting on the limits of the self-sufficiency of a specific disciplinary point of view and - in a sort of

reversed *actio finium regundorum*, made from (or according to) otherness - on the spaces of autonomy to be recognized by other legal disciplines.

Without seeking here to attempt a theoretical setting of such a challenging topic, we can, maybe, more simply observe that, today, while the need for an interdisciplinary dialogue seems to be accepted by most scholars, the question of its methodological implications remains to be investigated. An enhancement of the pragmatic attitude of legal hermeneutics, and a greater exploration of its dialogical potential, seem to represent grounds on which it could be possible to gain a margin of advancement. Furthermore dealing with time of innovation and time of transition could also represent an opportunity.

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What is a legal transition?

Thoughts on legal change amidst a political transition (Brazil, 1980-2020)

Maria Pia Guerra

1. Introduction; 2. How the literature on transitions still shapes legal studies; 3. The autonomy of the political, legal, and institutional spheres in current studies; 4. Legal transitions—rethinking the autonomy of the political, legal, and institutional spheres; 5. The Brazilian studies on legal transitions; 5.1. Social studies; 5.2. Institutional studies; 5.3. Legal history of doctrine and legal theory; 6. Final remarks

1. Introduction

In the last decade, social scientists from all over the world have sought to understand a new role carried out by the judiciary. A significant body of research has addressed global phenomena such as the judicialization of politics, the politicization of the law, the empowerment of constitutional courts, and the effects of these rearrangements of power on contemporary democracies.

As far as Latin America is concerned, local studies have been in line with global research trends. However, they have also, albeit less explicitly, established roots in another theoretical tradition—the tradition of transitology—embracing both its weaknesses and its qualities. They have done so by assuming that Latin American countries must be distinctly “recent democracies,” perhaps poorly consolidated ones, against which there may be a threat of returning to the formerly authoritarian state.

This paradigmatic link to transitology has led to two consequences. On the one hand, some of these studies of the Latin American context maintain substantive commitments to political elites and liberal institutions, with little transparency about those commitments. On the other hand, because the studies have been based in neo-institutionalist theories of political science, they have recognized the relative autonomy of institutions—a concept that has its advantages for understanding the complexity of the contemporary world— but they do not extend its potential benefits to the analysis of organizations in the legal system. The law, here, has continued to be subordinated to the instrumental or political use that is made of it.

This article aims to contribute to the debate by analyzing the concept of “legal transition,” broadly understood as the major changes to the legal system in a context of intense political and social transformation. This concept, employed by authors working on courts in Latin America, encompasses both transitology’s weaknesses and merits. A methodological clarity about its uses may help the researcher to better direct her lens of analysis, both by revealing the substantive commitments that may be included in the theoretical framework and by detailing the conditions under which it is possible to refer to institutional autonomy or to legal autonomy.

As we will argue, not all political or social pressure results in legal change. The system of law translates, or processes, in its own terms and times what we call external pressure. This means, first, that an instrumental idea of law is inadequate, or at least insufficient. It also means that the concept of the relative autonomy of political organisations, albeit interesting, should not be employed without mediation to research on legal organisations, as some scholarship has done.

The article has three parts. The first describes the underanalyzed influence of transitology in recent studies of law and courts in Latin America. The second follows the twists and turns related to the limits and possibilities of this theoretical framework to develop a concept of autonomy that is functional for legal studies. The third builds on the thinking from the previous topics to carry out a survey of the state of the scholarship on legal transitions in Brazil.

2. How the literature on transitions still shapes legal studies

During the last decades of the twentieth century, social scientists produced extensive scholarship on transition processes. The field of study became known as transitology and had among its central figures Guillermo O’Donnell, Phillip Schmitter and Juan Linz. Their aim was to analyze the more than thirty countries that have changed their political regimes since 1974, moving from authoritarianism to democracy. Thus, the researchers intended to develop conceptual tools for comparative studies of the third wave of democratization.¹

The field of transitology has downsized in recent years, at least as a form of studying the conditions for overcoming authoritarianism. However, we see its main theoretical concepts still being employed by transitional justice and

1 See O’Donnell (ed.) (1986); Huntington (1993); Linz/Stepan (1996).

by studies of courts in recent democracies, with major implications for the current understanding of law and democracy.

To begin with transitional justice, recent studies are closer to this intellectual tradition than it might seem at first glance, as Gabriel Rezende points out.² In its mainstream usage, transitional justice presumes an analogous link between democracy, liberal institutions, and an instrumental use of law, even though it has come to imply less a democratic consolidation than some version of a national reconciliation.³ These studies even point to “a set of tools designed to address the legacies of a troubled past” that are capable of being replicated in many places.⁴ Of the four pillars established by Ruti Teitel—memory and truth, justice, reparation, and institutional reforms—instrumental use of the law is evident in the latter, that is, in institutional design practices.⁵ However, the paradigm of transitional justice often presents itself as a “how-to” manual, setting out the tools, and even their order of implementation, to be as effective as possible. In that sense, it is not very far from the approach of international bodies, such as the World Bank, which developed models for rule of law in the 1990s that were inspired by neo-institutionalist theories and suited to development—and therefore resulted in programs for financing institutional reforms in Latin American countries.⁶ While we will not go any further here in terms of criticizing the commitment to liberal institutions, we just want to highlight, for the time being, the specific liberal understanding of law as a political tool.

A similar finding applies to current studies of courts and democracies.

2 Pinto (2013).

3 This argument mostly concerns mainstream transitional justice. For another point of view, see Naomi Roht-Arriaza, Rosemary Nagy, Lundy and McGovern. According to Lundy and McGovern: “‘Transition,’ as normally conceived within transitional justice theory, tends to involve a particular and limited conception of democratisation based on liberal and essentially Western formulations of democracy. Moreover, the assumption that ‘transition’ implies a move away from dictatorship and toward democracy ignores the problem that human rights abuses may continue to take place in circumstances where, in theory at least, the norms of liberal democratic accountability prevail. Challenging this permits a radical critique of implicit liberal versions of transition that may otherwise struggle to deal with the subversion of the rule of law, under the guise of law itself, in ostensibly liberal democratic states.” Lundy/McGovern (2008).

4 Gready (2011).

5 Teitel (2000).

6 Dakolias (1996); Carothers (1998); Guerra (2019).

Take, for instance, the work of the political scientist Diana Kapiszewski. According to her classification, Latin American countries from the late 1970s experienced a triple transition: political, economic and legal.⁷ In the political sense, which she calls “regime transition,” dictatorial governments have become liberal democracies. In the economic sense, most of the countries implemented reform policies that changed the state’s role in the national economy, moving away from interventionist models and toward liberal economic models.

In the legal sense, these countries have also undergone changes. Kapiszewski argues that there has been a complex, multifaceted, and nonlinear *legal transition*, which, above all, has intensified the role played by constitutions in legal systems. Even though not all countries have drafted new constitutions during or after democratization, all of them—or at least a significant number—have discussed the constitutionalization of law and have reformulated the way their societies grant rights and solve controversial issues.

The constitutionalization of law and a new understanding of constitutional supremacy, Kapiszewski continues, drove the judiciary, and especially the higher courts, to a new and more relevant position on the political scene. Hence the new wave of studies that ask, for example, who the judges are and how they decide—a question that until a few years ago, according to Andrei Koerner, would be considered irrelevant in the field of social sciences.⁸ Thus, while, on the one hand, social scientists do recognize that the judicialization of politics is a global phenomenon, on the other hand, they associate it with a project of major social and institutional reforms connected to that of the transitions to democracy in Latin America.

Kapiszewski’s study shows the connections political scientists have been drawing among political regime changes, institutional changes to the organization of the judiciary, and legal changes. Following the set of theoretical tools developed in transitology and neo-institutionalism, political scientists trace state reforms and changes in the legal systems from an understanding of the democratization process as a social phenomenon.⁹ One finds similar connections in Ginzburg, Helmke, and Ríos-Figueroa, among others.¹⁰ In Brazil, one also finds those connections in research concerning the process of the

7 Kapiszewski (2012).

8 Koerner (2017).

9 Hall/Taylor (2003).

10 Helmke/Ríos-Figueroa (2011); Ginzburg (2012).

empowerment of the *Supremo Tribunal Federal* (Supreme Federal Court). See, for example, the work of Diego Arguelhes and Leandro Molhano, as well as that of Fabiana Luci de Oliveira and Fabiano Engelmann, who associate the institutional transformations of the judiciary with the changes in the way that judges come to a decision.¹¹

The point here is not to deny the theoretical merits of transitology and neo-institutionalism. Those theoretical frameworks are useful for researchers who investigate how institutions affect the behavior of individuals. In some respects, the historical explanations based on the model of dependent causality—that is, on a model of rational action that explains current transformations through past circumstances—give solid insights into the effect of organizational rules on day-to-day institutional practices.

Models of neo-institutionalism, however, may have analytical limitations when transferred to the legal world. If such models are employed with insufficient methodological thought, they may mix the political criteria of institutional organization with the legal criteria of judicial interpretation. In that regard, it is necessary to explain, for example, why a change in the rules for how courts are organized—e.g., rules on the appointment of judges—should entail a change in their case law. The problem is certainly exacerbated by a less-than-rigorous use of neo-institutional theory, which does not specify the autonomy of the organizations that the theoretical model itself established. Thus, some of the Brazilian studies that followed the democratization process and the enactment of the Constitution of 1988, for example, unequivocally related changes in the institutional dynamics of the Brazilian courts to the global societal transformations, sometimes generically referred to as the enlargement of citizenship. Although a less common view today, some of those studies justified the empowerment of the courts by attaching them to the mobilization of civil society for its rights.

On the contrary, however, in order to understand the effects of democratization on the legal system, one must take into account the difference between the time of politics, the time of institutions, and the time of law, that is, the specific operational logic of each one of these fields of knowledge.¹² Connecting these logics requires an additional methodological effort from the researcher.

11 Oliveira (2011); Arguelhes/Ribeiro (2016); Engelmann/Bandeira (2017).

12 Ost (2005).

3. The autonomy of the political, legal, and institutional spheres in current studies

The main argument proceeds as follows: studies of transitology and neo-institutionalism have emphasized the relative autonomy of the political sphere and its organizations in relation to economic or structural constraints. Nevertheless, transitology has substantive values that were controversial at the very least. In addition, neither field of study has adequately extended this relative autonomy to the legal sphere. Yet although the legal transition certainly takes place in view of external pressures, it does so only to the extent that the legal system perceives them as pressures and only in accordance with its understanding of them, in its own time and based on its own categories. Legal change is that which occurs within the law. Therefore, the study of any legal transition must consider and differentiate the times of politics, organizations, and law.

The first step is to recognize that institutionalist studies, including transitology, have identified an autonomy for politics and institutions. These studies began to emerge in reaction to structural and functionalist studies that had been predominant up to that point. The institutionalist studies argued that social changes could not be observed through long-lasting economic and social patterns. The transition, in particular, would be an unpredictable event, unrelated by its own definition to the long-term patterns of structural analysis, which called for new categories of analysis.¹³ These studies thus opted for a theory centered on the contingency of interactions and on the constitutive uncertainty that marks the choices of agents. This theory of action highlighted agents, practices, and expectations, as well as ideas and purposes, always having as the action as the basic unit.

That choice, however, meant a voluntarist approach to processes of change. On the one hand, this view has led to an emphasis on the choices of political elites. As Leonardo Avritzer has correctly pointed out, although classical studies of transitology have recognized that social participation was a component of the processes of democratization, thus breaking with the previous tradition of elitism in studies of democracy, they have never considered it as a sufficient factor.¹⁴ Within this framework, political elites, or all groups and individuals with the power of agency, negotiate the political pact

¹³ See O'Donnell (1986); Linz/Stepan (1996).

¹⁴ Avritzer/Costa (2004).

in a more or less private space, a pact of sovereignty that will pave the way to democracy.¹⁵

On the other hand, the focus on institutions over-emphasized changes in the formal-institutional framework. To this point, this focus even had a substantive aspect: institutions constituted the objectively identifiable attributes of the success or failure of the transition to democracy and represented the settlement of political disputes in compliance with the rules of the game. In Adam Przeworski's synthesis, "democracy is consolidated when under given political and economic conditions a particular system of institutions becomes the only game in town."¹⁶ Thus, institutionalist theory produced an inversion of temporalities in comparison to previous studies: if, for structuralist theories, modernization and economic development would lead to democracy, for transitology, it was, on the contrary, the consolidation of liberal institutions that would lead to development.¹⁷ That understanding is why Nicolas Guilhot goes a step further to say that the dictatorships themselves were the transitions to liberal democracy and a liberal economy.

Research centered on agents and institutions assigned a certain autonomy to the political field and to institutions. The following obstacles, however, did not arise from the recognition of this relative autonomy, but, first, from an excess, from the substantive charge that linked transitology, political elites, and institutional democratic consolidation; and, second, paradoxically, from an absence, from a non-extension of the analytical categories developed for the political field to the legal field. It is possible, we argue, to maintain the analytical advantages of institutionalist theory, especially in its understanding of the complex world we live in, without falling into some of its missteps.

Studies of historical neo-institutionalism, which have also been critical for structural and functionalist theories, have given transitology the tools for understanding dynamics of change within institutions. In recent years, historical neo-institutionalist studies have also advanced to overcome some of its biases. In general, they have embraced a broad and loose concept: institutions comprise procedures, protocols, norms, and official and unofficial conventions inherent in the organizational structure of the political community or the political economy. This concept includes the rules of constitutional

15 Pinto (2013).

16 Przeworski (1991).

17 See Vitullo (2001); Guilhot (2002).

order, as well as the usual procedures and conventions.¹⁸ In some respects, institutions also have a dual nature: they are both the set of rules that sustain and constrain organizations, and the organization itself as a social actor, in cases where those rules acquire a coherent body of practice.¹⁹

In their “strategic” strand, institutionalist studies claim that institutions establish frameworks for expectations about the results of one’s own actions, as well as information about the foreseeable behaviour of other individuals; institutions do this through formal or informal rules of reward, incentive, and punishment for conduct. Thus, each agent can seek to maximize her preferences for strategic behaviour. In their culturalist strand, institutionalist studies have narrowed the amplitude of strategic action, stating that behaviour is also affected by general worldviews. Even in this strand, however, institutions channel individual behaviours through moral and cognitive models, repertoires of symbols, etc.²⁰

As institutionalist studies have further asserted, the formal and informal rules that an institution produces may create their own temporality. Despite disagreement over the best model for explaining change, scholars do agree on distinguishing path dependent developments, points of abrupt change, and processes of gradual change.²¹ For those who follow the idea of path dependence, institutional rules, once modified, guide agents to the next steps, encouraging social forces to organize themselves based on the returns expected by these rules, thus increasing the risk of uncoordinated action. Professional career rules, for example, guide agents to seek certain types of training and to expect positive results from this engagement. For those scholars who emphasize abrupt change, external factors can halt the previous predictions and force institutions and agents to adopt new directions.

In any case, institutions make internal decisions, which in turn affect the external world, especially to the extent that they distribute decision-making power in an asymmetrical way among social groups. They give unequal access to the decision-making processes that will allow for change and the formation of new dependent paths. This ability to influence decisions certainly does not mean that institutions are the only factor or that they exist in social isolation. But it does mean that, amid other factors, they create their own decision-making mechanisms.

18 Hall/Taylor (2003).

19 See March/Olsen (1989).

20 See Evans/Rueschemeyer/Skocpol (eds.) (1985); Immergut (1992); Hall/Taylor (2003).

21 See Mahoney/Thelen (2010); Murillo/Levitsky (2013).

From this brief overview of historical neo-institutionalism, it is possible to think about the significance of this relative autonomy of institutions for the legal system, or, in other words, to think about the changes that may have happened to the law and legal organizations, such as the courts, in parallel with social and political changes during the processes of democratization. Criticism in relation to the excess, to the substantive commitment that links democratic transitions, political elites and liberal institutions, does not require the abandonment of analytical categories suitable for describing the complex reality of the contemporary world, such as those which suggest the existence of relative autonomies for organizations. The alternative seems to rely on an increased attention to methodological strategies and, in particular, to historical studies—a commitment to be faithful to historical sources.²² That is, precisely, to inquire, from social dynamics, about the frontiers one is looking at—legal, political and institutional—rather than assuming a specific ordering of the decision-making asymmetries.

4. Legal transitions—rethinking the autonomy of the political, legal, and institutional spheres

Perhaps institutions might be better understood not as a set of standards, practices and expectations, but as a decision-making system. Indeed, conceptualizing institutions as a set of formal or informal rules, with a determined substantive content, makes it difficult to perceive that those rules are changeable and, therefore, do not constitute a permanent identifiable identity. Moreover, the rules concept hinders perception of the institution's boundaries and of how environmental factors determine its daily operation.

Using the concept of a decision-making system, on the other hand, allows the researcher to highlight the operationally closed communication processes. Organizations, here, lose the ambivalence of being at the same time a set of rules and an agent to form a system that generates itself, its interior, and its environment. They produce decisions that result from decisions and are

²² Historical studies, in this sense, have something of an impossible task. They start with concepts from the present in order to discover their past, distinct, and unattainable meaning, as, for example, using a present-day concept of constitution to elaborate a constitutional history. The idea of an autonomy of law, therefore, is also an operational concept, which might guide historical questions, provided, however, that the researcher does not read, in the sources, what they do not say. Hespanha (2011); Costa (2013).

occasions for future decisions. They understand external pressure in its own terms, since it is up to the system itself to define how it will make use of it.²³

Certainly, there is no middle ground between the two concepts and the two theories. Aside from the distinct basic unit—in one case, the action; in another, the communication—opting for one or the other also leads to different paths. Choosing historical neo-institutionalism seems to lead to an emphasis on change resulting from shocks external to the institutions. In contrast, choosing the theory of systems seems to stress the distinct use, among organizations, of the stock of semantics produced by society. In other words, organizations within the legal system operate differently than organizations within the political system. It is with this point in mind, therefore, that the choice of theory matters for the purposes of this article.

Following this rationale, systems of decision-making make use of a semantic framework developed by functional systems such as politics, law, and economics. The decision is an update among many possibilities and should present itself as something that has meaning. Like any communication, therefore, a decision would be unfeasible without the condensed, prearranged semantic forms of meaning, such as those that different functional systems have previously made accessible. Semantics serves as memory, by its ability to preselect the problems to be solved. Therefore, organizations decide based on the semantics produced by different functional systems.²⁴

As far as the organizations that integrate the legal system, such as the courts, are concerned, this focus on decision-making means recognising that the organizations operate as a subsystem within this functional system. The courts decide about themselves, supported by legal semantic forms. Although historical research should investigate these uses and, in fact, may demonstrate that the courts also use semantic forms others than the ones from this functional system, the idea of operational closure reminds us that not all political pressure or democratic pressure, no matter how much regime change it implies, reverts or should revert to legal change or change in case law.²⁵

Courts, as organizations of the legal system, produce two types of decision. Firstly, they decide about the nature of the organization, such as the inclusion or exclusion of their members, “special ties” for judges, when and how the courts should decide, the relationship between courts, and the responsibil-

23 Luhmann (2018).

24 See Hasse (2005); La Cour/Højlund (2013); Luhmann (2018).

25 Luhmann (2004).

ities of their members when they judge. With regard to this point, research should identify the operations and timing of the organization.

Secondly, courts also produce decisions about what belongs to law, what is legal, or what is illegal. Moreover, because of their central position in the legal system, they produce distinctions not only about the actual problem, but also about the criteria for identifying a legal problem and a legal decision. They thus oversee the consistency of legal decisions.²⁶ These are second-order observations that produce a closure of the legal system itself. These decisions, it is worth noting once again, do not always correspond to or stand concomitant with distinctions about what is legitimate, economic, or democratic and therefore do not always accompany processes of political transition. The courts translate, in their own language and in their own time of decision, what could generally be seen as external pressure. That is, in reality, something that the research needs to investigate and answer: if that translation occurs and, especially, in what terms and at what times.

Finally, making a distinction between central court communications and peripheral communications from the rest of the legal system also leads to another methodological concern. If it is not enough to identify political pressures in order to attest to a legal change, it is also not enough to look only at the courts. It is essential to perceive changes in general legal communications, both those traditionally understood as legal, such as case law and theory of law, made by and for jurists, and those perhaps found in other social groups, that the research might possibly reveal.

5. The Brazilian studies on legal transitions

Brazilian scholars have written extensively about the transition to democracy, across diverse fields and perspectives in the social sciences and perspectives, which only confirms the varied and multifaceted nature of this process. This section aims to introduce an up-to-date overview of the scholarship with regard to concerns related to the idea of a *legal transition*, as stated above. We classify the studies that relate to legal changes according to three topics: social studies, institutional studies, and traditional legal history studies.

Social studies analyze the production of law and of the constitution by diverse social groups. Usually such studies begin with theories of social movements, following the academic tradition of law and society. These studies

²⁶ Luhmann (2004).

focus on legal production that happens outside the courts and other organizations in the legal system—or, in other words, at the peripheries of the legal system. Institutional studies, on the other hand, analyze transformations in legal organizations and other state bodies. They encompass studies on the interactions between political and legal institutions, such as those concerning the phenomenon of the judicialization of politics and, in Brazil, of the empowerment of Supremo Tribunal Federal. Finally, studies of legal history in the more traditional sense dedicate themselves to understanding the historical formation of discourses and concepts produced by jurists and for jurists. There are fewer studies here in comparison with the other fields, but they show, in particular, some legal changes and features that other fields have taken for granted. Certainly, the classification into these three topics leaves aside a wide range of studies. However, it serves the purposes of this article, in the sense of underlining legal changes that have not been well understood in literature influenced by theoretical frameworks based in political science.

5.1. *Social studies*

Brazilian democratization had as a central milestone the promulgation of a new constitution. Thus, in the most literal sense, Brazil's democratic transition was a constitutional transition. Moreover, the National Constituent Assembly (ANC) of 1987-1988 galvanized Brazilian society in an unprecedented way. A multiplicity of social groups organized themselves to participate, forging new legal and constitutional discourses. These groups—grassroots social movements, professional associations, trade unions—constituted themselves in this process by constituting new constitutional languages.

Since then, an extensive scholarship has sought to identify the actors and pressure groups engaged directly and indirectly in the National Constituent Assembly. One area of investigation has focused on the constituent process. Published in the heat of the moment, Carlos Micheli's book recounted the saga of popular amendments, describing the social use of this formal mechanism for social participation.²⁷ In a similar vein, though writing more recently, Maria Helena Versiani investigated social engagement through the use of formal mechanisms, such as popular amendments and sending letters, as well as its consequences for the forging of new political discourses on the idea of a republic.²⁸

²⁷ Michelis (1989).

²⁸ Versiani (2010); Versiani (2013).

Over the years, collections of studies, often produced around commemorative dates of the promulgation of the new constitution, have detailed the role of specific groups in the ANC and in the constitutional debates that followed its convening. Combined with gender and race studies, this research has demonstrated the role of women, black movements, and indigenous people.²⁹ With regard to the use of formal mechanisms, it is also possible to point out a continuity with Leonardo Avritzer's investigations of sectorial councils, public hearings, and other constitutional mechanisms for social participation.³⁰

Some of these studies employed a social movement analysis methodology. In fact, the use of this methodology stems from a widely recognized coincidence between democratization and the formation of new movements in the early 1980s. Initially, the authors, also members of these movements, emphasized the arrival of new social actors into the public arena.³¹ They published legal studies on the social production of law, as well as ethnographic studies (also from the 1980s) on new social conceptions of bearing rights.³² Subsequently, they joined a line of investigation into law and society that stressed the non-state production of law, in which the law was understood to be only indirectly based in courts. In this sense, these studies distance themselves from the neo-institutionalist framework this article has previously shown.

Finally, with regard to studies of the Brazilian courts, the connection between social mobilization, institutional empowerment, and changes in case law seems to be more fragile, with the exception, among others, of Fabiana Luci's investigation of representations of the court in newspapers during the 1980s and 1990s.³³

5.2. *Institutional studies*

Taking the promulgation of the Constitution of 1988 as a point of reference once again, if some of the research on the constituent process highlighted the involvement of social movements, as described above, another group of investigations focused on the role of organizations and institutions. The differences between these two groups of scholarship are blurred and possibly

29 See Santos (2009); Magalhães (2015); Santana/Cardoso (2020).

30 Avritzer (2012).

31 See Sader (1988).

32 See Souza Júnior (2002).

33 Oliveira (2011).

relate more to theoretical and methodological disagreements than to the de facto organization of these groups, whether or not they adopted formal rules or had a coherent set of practice. Take, for instance, religious groups, which would easily fit into both frameworks.

Adriano Pillati developed well-known research on politicians and political parties in the National Constituent Assembly, relating them to the economic agendas of the country. He thus approached some of the ideas in transitology about political elites, albeit with different conclusions.³⁴ Within the field of constitutional history, the research group *Percursos, Narrativas e Fragmentos* (Trajectories, Narratives and Fragments) at the University of Brasilia developed studies on the National Constituent Assembly that also gave prominence to political agents, among other social actors, in their examination of the debates on terrorism, religious identity, labor and union autonomy, and freedom of communications.³⁵

Making explicit use of institutionalist methodologies, other studies have focused on the role of the *Ministério Público* (Public Prosecutor),³⁶ the Supremo Tribunal Federal³⁷, the judiciary³⁸, the police forces and the army,³⁹ and the Brazilian Bar Association.⁴⁰ Such institutional histories best represent the research on the Brazilian Supremo Tribunal Federal, which is to say again that transitology and current studies of Latin American courts share the same sources. Scholars have analyzed the connection between the justices' performances and the rules established by the Constitution of 1988, such as procedures for nomination, legal standing to sue, and the redefinition of legal competences.⁴¹ More recently, others have been seeking to map the affiliation and origin of the court's nominees.⁴²

The problem is that using this lens for the political universe tells only part of the story, the part that most clearly blurs the boundaries between politics and law. It leaves out the challenges regarding the understanding of legal traditions. One could even argue that, in Brazil, these traditions developed

34 Pilatti (2016).

35 Bigliuzzi (2007); Pinheiro (2008); Lourenço Filho (2008); Couto (2020).

36 See Maciel/Koerner (2014); Rogério Arantes (1999).

37 See Koerner/Freitas (2013); Arguelhes/Ribeiro (2016).

38 See Arantes (1997); Carvalho (2017).

39 Zaverucha (1998); Guerra/Machado Filho (2018).

40 Couto/Guerra (2018).

41 See Koerner/Freitas (2013); Arguelhes/Ribeiro (2016).

42 Fontainha/Santos/Oliveira (2017).

through a long process of negotiation between constitutionalism and authoritarianism, which would point, in a different sense, to a deep-rooted confusion of politics and law. However, even in this sense, legal traditions have operated within the legal system, rearranging legal reasoning itself. The blurred lines are something legal history must address, not assume.

5.3. *Legal history of doctrine and legal theory*

Along the lines discussed above, the idea of a legal transition cannot do without historical studies of changes in legal concepts. This area of more traditional studies of legal history identifies changes in doctrine, case law, and legal theories.

Again, a good example of this approach is the research on the Brazilian and other Latin American courts. Employing institutionalist methodologies, these studies detect changes in organizational rules and practices, such as composition and appointment, hierarchy among judicial bodies, procedural design, as well as changes in the balance between groups with decision-making power and the effect on the political role of the courts and on democracy as a whole. But given that courts produce two distinct types of decisions, on organization and on law, these studies only indirectly access changes in decisions about what is legal and illegal, on one level, as well as, at a second level, decisions about what constitutes a legal issue or, in other words, about the consistency of legal decisions. Although such connections may exist, it is up to the research to demonstrate them.

Recent Brazilian scholarship points to other interesting paths. In the past few decades, theories of legal reasoning have undergone significant changes. A wave of scholarship on the globalization of law spread throughout the world via neo-constitutional theories from authors such as Robert Alexy. Notwithstanding that development, Brazilian society may have had a particular national receptiveness to this framework following the promulgation of the Constitution of 1988. José Mendonça and Christian Lynch, for example, have compared Justice Luís Roberto Barroso's neo-constitutionalism to theoretical models adopted in other countries.⁴³ In the Brazilian version, the theory would have the function of rejecting the pre-constitutional past, dictatorial or not, and legitimizing an illuminist role of the judiciary and the Federal Court. In a similar vein, José Rodrigo Rodrigues has analyzed the practice of

43 Lynch/Mendonça (2017).

the Brazilian courts and the theories they have used to support judges' decision-making power.⁴⁴

Christian Lynch and José Mendonças' explanation fits in interestingly with the hypothesis Andrei Koerner has developed in his studies. According to Koerner, in the early 1990s, the Supreme Federal Court justices updated the theory of limited effectiveness of constitutional norms, a theory originally devised in the 1960s, to restrict the reach of constitutional norms with which they disagreed.⁴⁵ These ideas also fit in with the hypothesis of Diego Arguelhes and Leandro Molhano, for whom the justices have alternated restrictive and expansive legal reasoning techniques to guarantee their personal preferences.⁴⁶

However, the process of changing legal theories with regard to both production and diffusion—which have the potential to explain changes in law and jurisprudence—is still awaiting an in-depth treatment, with appropriate methodologies and historical sources. Research of this kind would need to encompass an analysis of academia, universities, the publishing market, and, as far as Brazil is concerned, possibly an analysis of the market and of the organizations that have been involved in preparing public tenders and bar exams, which have served as large-scale diffusers of conceptual and theoretical legal schemes.⁴⁷

6. Final remarks

Returning to the question posed at the opening of this article, which asked about what a legal transition is, a legal transition is a multifaceted phenomenon, used to refer to the possible transformations in law resulting from major political and social changes. Any answer to the opening question must consider the ways in which law and legal organizations translate or process, in their own terms and according to their own times, the pressures and interferences of their external world. That does not mean that interferences or changes do not occur, but that any interferences or changes must be demonstrated in the course of the research.

44 Rodrigues (2013).

45 Koerner/Freitas (2013).

46 Arguelhes/Ribeiro (2016).

47 On the matter, see the publications of the Observatory on Legal Education of the Fundação Getúlio Vargas, Brazil.

This question is certainly not new, although the term legal transition began to be used after the emergence of transitology. In 1894, in a book that would become a classic of Brazilian constitutional history, Felisbello Freire disclosed his discomfort with the newly created Supremo Tribunal Federal. Despite the proclamation of a republic in Brazil, the court retained traces and members of the monarchical regime. From the Supreme Court of the Empire, the new court had just changed its name: “They have all passed with their weapons and backgrounds from one court to another. The spirit of the two institutions, the profound differences of their attributions; the differences in education and special knowledge they claim; all this was of the utmost importance to transport a staff of old magistrates.” How would they perform their duties when they were unaware of this legal system they came to know only after they were “so old that they could no longer comprehend and feel the beauties of it”?

The excerpt is revealing of the differences among social time, political time, and legal time. Not every political change leads to a legal change, at least not concomitantly. Not every political transition, therefore, is a *legal transition*. It is up to the historical research to demonstrate the forms and elements that make up this special form of legal change.

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New philosophical paradigms and demand for law: space for innovation.
Reflections on the time of transition as a practical structure

Flavia Stara

1. Innovation to accommodate social changes; 1.1. The epistemological nature of innovation; 1.2. Social innovation and social transformation; 2. Processes of transition; 2.1. Transition as a practical-conceptual space-time phase

1. Innovation to accommodate social changes

In order to accommodate social change, it is essential to innovate, introduce new conceptual systems, new regulations, new procedures for production and new spaces for action and interaction. This requires to develop new theories and translating them into practical structures, into adaptive strategies in the awareness of the challenges and performance that the environment-world requires. No innovation can have a lasting effect and impact in case it does not respond to needs already present within the context in which it occurs.

Creativity and innovation, as significant moments within the development process, belong to different logical levels. Creativity is an individual resource: it asks for flexibility, skills, talent, in many ways it is uncontrollable, it can be promoted but not planned. Innovation is a cultural and socio-economic phenomenon. It involves the community, presents a risk factor and is the result of strategic actions. It calls for investments, infrastructure, dedicated policies. To innovate means to modify the structures of meaning of a given community that are rooted in the biologically oriented ways of interaction, in the ways in which the community foresees a horizon of socio-cultural expectations.

The drive for creativity is dominant in our society as it underpins the desire for innovation. But the call to innovate, and the creative imperative in particular, has proliferated beyond significant shifts in the economic cycle to incorporate the comparatively unremarkable micro-level creative acts that may – ultimately – have very little effect on society. The meaning of creation is, on the one hand, loosely defined (almost anything can be described as creative) and on the other it is ever more tied to the paradigm of production. We measure the success of creativity and the imperative for innovation in capitalist terms: things and ideas are all units that can be sold or utilized to create economic

value. In short, there is nothing creative in the discourse of creativity. The ‘change-making’ in management discourse is what Gilles Deleuze describes as a product of a thought limited to what is its grounding (the economics) and which operates with perceived legitimacy: it is the established way of thinking. In contrast, to be truly creative and open to possibilities, we require an ‘untimely’ modality of thinking.¹ Deleuze terms it as ‘nomadic’ thought.

1.1. *The epistemological nature of innovation*

The issue opens up vast spaces for reflection that are linked to the epistemological nature of innovation which is generation of knowledge and, therefore, has an implicit or explicit epistemology. While investigating the concept of innovation cannot but refer to the philosopher of science Thomas Kuhn, whose conceptions surpass both any monistic model of scientific knowledge and the notion of progress as a simple incremental accumulation of experience. Kuhn addresses the issue of innovation of paradigms and theoretical models, trying to understand the relationships existing between normally evolutionary periods of science and the ones defined as revolutionary. In his work: *The Structure of Scientific Revolution*² he argues that for every science it is possible to speak of a “pre-paradigmatic” period in which random facts and ideas accumulate. According to Kuhn, in the pre-paradigmatic period, different schools of thought can arise and clash, at times they may be in competition with each other but not destined to take over one another. It may happen that a theoretical system begins to be accepted and shared by everyone, thus becoming a paradigm. Once the paradigm is fully established, then a period of “normal science” begins, in which research is conducted in accordance with the reference model provided by previous studies that have recorded favorable results. What in this period does not work or does not adapt to the paradigm is ignored or considered as anomalous. If, however, what is not working is recurrent then the paradigm goes into crisis: it reaches the stage defined as the revolution which leads to the emergence of a new paradigm and a subsequent period of “normal science”. Hence according to this theory we arrive at two conclusions, firstly that every cognitive discipline is punctuated and intercalated by important discontinuities. Secondly, one’s own *Weltanschauung* depends upon the commitment toward the paradigm one refers to. According

1 Deleuze (1997).

2 Kuhn (2012).

to Kuhn, innovation fully exists in a “revolutionary” context. There can be no grounding in innovation, since it exists in a purely binary logic or because knowledge has a break in its progress – and then everything changes or does not exist – nor can one talk about innovation by accumulation since the very concept of accumulation refers to a simply incremental phase, typical of a period of “normal science”. Innovation can therefore be generated by unexpected dialectical logics and can appear even if it is not intentionally produced. In short, innovation is not produced and is not rooted, is not imposed or matched, it originates and produces itself and can’t be systematized because it is already a system. The question is to understand if the new paradigms present appreciable advantages in facing problems – compared to the old ones – or are even less useful in solving those very problems. An assessment in this regard would be scientifically appreciable, and in any case would not justify renouncing to forge more adequate instruments than traditional ones. The history of science confirms the possibility of a long coexistence between old and new paradigms, which perform differently yet can continue to be usefully manipulated along with the usual tools (in the same way that the theory of Newtonian gravitation is still effective in calculating the orbits of celestial bodies, even though it has been superseded by the theory of relativity, which in turn waits to be absorbed into a more advanced Unified Theory).

The socio-cultural scope of paradigm shifts producing structural changes and transitions is vast and can’t be grasped in its complexity. Therefore, we are going to outline only some of the many possible related phenomena, presenting them as landmarks within a transdisciplinary reflection.

The paradigms introduced by postmodernity feature remarkable transitions transversal to all sectors of human thinking and acting. Every cultural action today moves within the space of a real antinomy between practical and theoretical reason, since it aggregates positions that are often ideologically distant from each other, within a globalized economy and a multi-ethnic society, which mirrors various experiences of public ethics and political participation. The space of subjectivity emphasizes the need for individual freedom along with new claims of rights, producing socio-political phases of legitimate redefinition of personal dignity.

The Twenty-first century is no longer the century of the Ego, but of the We – not of a symbiotic and totalizing We, of a We constituted by the I/You, by an alter-egoic reality. Evidence of this is the phenomenon of multiculturalism, which moves from being a static space of pure and simple coexistence of diver-

sity toward the process of inter-cultural reality which envisages a strong – albeit hard – interaction of identities. This osmosis among cultures and civilizations takes place through stages of transition by facing the syncretism or polytheism of values that cracks the canons of identity and the same personal ethical codes. We do experience the harsh reactions to this process of osmosis in the forms of fundamentalisms, nationalisms, sovereignties, populisms, localisms or glocalization which is undermining the still dominant globalization.

1.2. Social innovation and social transformation

Reflecting on innovative social dynamic we can comprehend how transition toward global integration is proceeding alongside sociocultural disintegration, the resurgence of various separatism and international terrorism. The construction of the identity as socio-cultural belonging and relational expression is significantly problematized for the defense and promotion of new freedoms, against the traditional political-regulatory stratifications. Most democratic theorists welcome and support struggles for recognition and identity movements to the degree to which they are movements for democratic inclusion, greater social and political justice, and cultural fluidity.³ Other theorists underline how democratic equality and deliberative practices are quite compatible with new legal and institutional designs that accommodate cultural pluralism. The philosopher Seyla Benhabib⁴ suggests a comparative perspective on multicultural justice to appreciate how demands of the same kind may bear different meanings and yield different results. She observes that vibrant deliberative democratic societies may succeed in realizing opportunities for maximum cultural self-asciption and collective intergroup justice. Other scholarly voices transversally recognize the phenomena of social innovation as cultural contestation within the public sphere. For Richard Sennett⁵ the profound awareness grounded in the notion of collaboration creating community and responsible views of the future is innovative. Martha Nussbaum and Amartya Sen⁶ indicate a possible action trajectory by introducing the concept of social generativity and capacity approach. The transformation of social relations can be qualified as “capacitive”, that is, able to empower, directly or indirectly, the most disadvantaged sections of the population through the capacity of action.

3 Taylor (1994); Fraser/Honneth (2003).

4 Benhabib (2002; 2004).

5 Sennett (2012).

6 Nussbaum/Sen (1993).

Since cultures are not homogeneous wholes, they are constituted through the narratives and symbolizations of their members, who articulate them as normative expectations expressed by particular social groups or by political or cultural minorities. Over the last few decades the claim for subjective and collective rights obtained, in different forms, public recognition in the context of Western political and juridical structures. (However, we acknowledge that some new rights are by now widely accepted as regulatory instruments even beyond the borders of the Western world). Some new rights – it is the case of gender rights or those aimed at protecting the new configurations of family institutions – are still in the process of full approval and adequate effectiveness. These innovative resolutions, which are still in the process of implementation, confirm how human rights cannot be traced back to a complete, static and universal regulatory complex. Sometimes, they tend to prevail over customary conventions and laws, as is the case of feminine claims from cultures where millennial patriarchal traditions are in force, or for the new instances relating to sexual, marital and reproductive relations that have dismantled structures deemed to be “sacred”. The basic pattern of the traditional family, the heterosexual couple, historically cocooned in a family network both broad and binding in its parental and patrimonial obligations, had already undergone a change, between 19th and twentieth centuries, as a mononuclear family. In the process it emancipated itself and eased from the traditional parental networks to become functional for labor mobility. The crisis of this mononuclear family during the post-industrial era has brought out its basic weaknesses and is progressively frayed by virtue of a theory of gender, that is most advanced “bio-political manifesto” of the re-engineering of “natural socio-genesis”, attested by the reproductive monogram of the heterosexual procreative couple. The demand for emancipation from traditional and natural constraints can be enacted and transcribed in social and juridical institutions. The natural bonds are no longer recognized as such because they can be manipulated by techniques, which are presumed to artificially redesign the socio-genetic relationship between sexuality and natural affiliation (see structural anthropology / Levi-Strauss).

Norberto Bobbio⁷ identifies the category of new rights by calling them rights of the third generation, thus distinguishing them from the rights of the first generation (political rights, freedom, private property) and the rights of the second generation, or social rights, including right to work, right to edu-

7 Bobbio (1990).

cation, right to health, as well as various public assistance and social security benefits, guaranteed in particular by the welfare state. According to Bobbio all human rights have historical and conflictual origins and are closely intertwined with the standards of rationality of Western culture. And yet, he observes that precisely because the doctrine of human rights presents antinomies within itself, it cannot have an absolute foundation: this foundation would entail the claim to make a right and its opposite both binding, irreversible and universal. The analysis conducted by Bobbio is perfectly in line with the reflections of contemporary anthropology (A. Gehlen) that underline how “productive” operational knowledge coincides with the confirmation of man’s capacity to transcend the given situation.

2. Processes of transition

This disposition to the manipulation of reality – that once was described as “ontologically founded” – reaches its highest expression within an epistemological scenario no more centered on totalizing notions of truth. The assertion that there is no absolute point of view to look at phenomena, is not an implicit admission of ethical relativism, but an admission of onto-ethic relativity, as well as of intellectual honesty, since knowledge always presupposes a somatic-chronologic-topologic situation. As H.G. Gadamer observes in “Truth and Method”, no one is without prejudice, since we all require some kind of prejudices to represent the horizon of our views.⁸ The recognition of the notion of truth as practicability of ideas (Pragmatism), generates a constant socio-political process of fluctuations, acceptability from levels of toleration toward actions and reciprocity. These processes are also challenged by the application of techno-sciences to the vital areas, that bring out the difficult transition of traditional ethical paradigms to the new processing of social justification: Bioethics, Biomedicine, Biolaw. The combination of computer science and genetics allowed technology to creep into the deepest folds of our lives, rewriting codes, superimposing biology and biography. Technology by transcending even the inconceivable, is becoming a human inner tool: high-performance computers that think on behalf of people, are the evidence.

In the face of the technique that seems to neutralize every sense of limit, or natural or moral boundary, there are hypotheses of revision or overco-

8 Gadamer (1975).

ming of traditional ethical paradigms.⁹ The foundation of a possible revision / ethical revolution lies in the need to bring the person back to the center of an otherwise dystopian and despotic technological development, to measure innovation according to critical parameters of social sustainability and ethical admissibility, as well as to legal and logical justifiability. In order to rebalance confidence in technology, it is necessary to think beyond technology itself and evaluate its historical impact through the experimentation of new grids of meaning that are intertwined with ethical threads, and also useful for the management of economic-productive cycles.

Internet which is the largest and most visited public space, is the new dimension in which the human dialectic of knowing and doing is articulated – or, to cite Article 2 of the Italian Constitution – is the reality in which rights are exercised or can be denied, and the freedoms can be deployed or violated. The digital transformation process invests huge value in the interactions that unfold and intertwine in social productions. The interconnection with objects, sensors, devices of daily use, feeds the treatment of large volumes of data and favors increasingly astonishing applications of artificial intelligence, destined to profoundly change economic processes and social structures. Data protection is, therefore, the necessary condition for freedom and democracy, because the data constitute the digital projection of our “persona” and manifest its vulnerability. The relationship between market and rights is also played on this terrain. The processes of work automation are almost determining a kind of dehumanization. The progressive replacement of workers – even those involved in more complex functions – with machines, is destined to have remarkable social consequences. New categories of technologies, which use natural language processing and self-learning, will escalate people and machines interactions, increasing the skills of artificial intelligences. The obscure side of digital innovation is cybercrime. Data protection is, therefore, the research target for regulations, as any private or public activity is mostly based on technologies powered by personal data. In the age of disintermediation and post-truth, new transitions often challenge the spaces of democracy. If the resolutions of justice are not available, or their application is not feasible, there emerges the extraordinary politics in which toleration plays a relevant role. Yet toleration presupposes and reserves not only the power of interference, but the discretion to define the threshold of interference.

We are entertaining a reflection on issues that, to a certain extent, pertain

9 Reichlin (2008).

to the “canon” of Philosophy of Law. The reflection on social change raises the central question of what American legal philosophers define as the “call to context”, or the need to bring law back to its historical context – also linguistic and symbolic context – from which derives the indication to observe the legal text as a cultural product involved in the construction of sense in a shared horizon. Martha Nussbaum points out that law when it is re-contextualized and desecralized – in relation to the human sciences – reveals its hidden, ambiguous, incoherent and paradoxical face, but at the same time it reveals its possibilities, its authentic function as a necessary tool to preserve human interactions. As Nussbaum points out, the greatest crisis that hit the globalized world in the last decade is not the one that occurred in 2008: the famous financial bubbles, but the progressive loss of the humanistic culture.¹⁰ It is ironic that we have also lost the sight of the reasons that hinted to its importance in public life. In her opinion law also is subject to the same process of distancing itself from the humanistic ethos and moral and ethical considerations. The social and moral concerns are the threads of the whole complex of social fabric to which law should remain destined: an area that claims conscious and critical actions.

2.1. *Transition as a practical-conceptual space-time phase*

Taking into account the relationship between conceptual transformations and their translations into social transformations, the central element is the time-space factor within transitions among juridical cultures, customs, perceptions and configurations of human dignity, amongst regulatory structures of freedom. The French thinker François Jullien refers to the concept of “*entre*”, “in-between” within human and social transitions, as the recognition of a specific time-space of dialogue in which awareness offers elements to formulate a solution which is a non-solution.¹¹ Paul Ricoeur, in his philosophical hermeneutics, had already referred to the ontological position of understanding as “the long way”, because only a long path allows to collect the analytical contributions necessary for understanding experience in its wholeness.¹² In other words, it implies to open up to a pluralism of views and partial solutions, or *ad hoc* solutions, by accepting how to manage the consequent, non-eliminable conflict of interpretations.¹³

10 Nussbaum (2012).

11 Jullien (2012).

12 Ricoeur (2010).

13 Ricoeur’s hermeneutics starts from the vision of the human condition presented

In the spirit of interpretation as a “long way”, it is necessary to recognize that we are always immersed in a phase of implementation, of transformation, and that meanings are constructed in perspective. It is precisely the possibility of genuinely different outcomes that allows us to recognize that transition is the practical-conceptual space-time phase to enact the potential of even inadequate solutions. As the historian Fernand Braudel pointed out, innovation is not the mere generation of novelties, but the creation of the conditions for a change destined to have long-lasting consequences that shift the limits of the possible.¹⁴

The “in-between” Jullien talks about, within transition, is the condition for promoting otherness: new criteria, categories and languages. Social practice is nourished by self-correction and free shared public debate and, therefore, it is able to develop an immune system against its own “deviations”. In view of an essential ethical-political, or more generally hermeneutical, component within the alleged scientific objectivity, Paolo Benanti, Italian political consultant on the ethics of technology, proposes to develop an ethics of algorithms to support the development of a national control strategy of artificial intelligences.¹⁵ By analyzing the debate that arose around the hypothesis raised by the European Parliament to attribute “electronic personality” to the robots, Benanti invites to distinguish three levels: technological, ethical and juridical. At present, the debate has been limited only to the last, that is how to regulate the use of these machines in society, but, according to Benanti, “traditional categories are no longer sufficient, new solutions must be found”. And he warns: “We cannot talk about ethics without knowing the technical

by Heidegger in *Being and Time*. For Heidegger the human condition is that of beings who try to understand the world in which they are thrown without wanting or choosing it. Every living, therefore, corresponds to an interpretation, and the resulting human condition is completely determined by the concrete possibilities available to each individual. Ricoeur accepts the Heideggerian approach and agrees with the principle that living is interpreting. However, he does not accept the conclusion that the human condition can be understood directly through the analysis of one’s own possibilities. Only in language can the human condition be discovered as a way of being. According to Ricoeur, therefore, the human condition discovers its meaning only with a long hermeneutical journey through the linguistic mediations of signs and symbols, of stories and ideologies, of metaphors and myths that determine it and in a certain sense constitute it, to end up enriched by deviations through the language of others.

¹⁴ Braudel (2009).

¹⁵ Benanti (2018).

aspects, we cannot give legal regulation without ethical principles and the competence of the technological substrate”. “These machines – he continues – work with algorithms” that today are “black boxes” protected by copyright. Hence the question: “Is it possible to maintain these black boxes or do we need to make them crystal boxes, that is transparent?”. To ensure that this innovation is truly at the service of mankind, it is necessary to “link progress to development through ethical values. A particularly demanding challenge in the case of artificial intelligence because the values on which the machine decides are numerical values and then it is necessary to create new paradigms to transform ethical values into something that the machine can decode”. For this reason, it is necessary to “formulate the new modality of the algorithm” which “must contain tables of values, principles and norms to be translated into machine language”. “A model – he explains – can be to” insinuate “a kind of uncertainty inside the machine”. Thus “in the face of a doubt the machine will call upon the person who is the bearer to validate his decisions. This leads us to create a “Human Centered Artificial Intelligence” “and to develop machines “that are integrated with human beings and together with them they seek the best solution”.

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Melancholy as a permanent transition in law and democracy

Douglas Antônio Rocha Pinheiro

1. Introduction; 2. Melancholy as the permanence of loss; 3. Legal-political melancholy; 4. Final thoughts

1. Introduction

After an unfavorable first court session, Joseph K., the main character of the novel *The Trial*, by Franz Kafka, returns to his judging court and, with difficulty, gets to access the books lying on the judge's desk. Surprisingly, flipping through the pages of one of them, he finds the vulgar, obscene drawing of a naked couple over a couch, instead of legal doctrines. This frightens the man: after all, was that the kind of education given to the person who is to judge his life? Vladimir Safatle¹ revisits this excerpt of the novel by Kafka in order to imply that the character, even if unaware of it, had found the true and only foundation of social relations: a circuit of feelings. In order to understand power, thus, it is necessary to perceive how the political body affects the subjects in their individualization processes, and how it is affected by them in return. In early modern times, according to Thomas Hobbes, fear was the main feeling that shaped the political bodies and the individuals – which is a valid way of understanding the social reality even nowadays. The State, politics and the law are not but complex forms of managing fear, within a bigger circle that moves social relations according to the same feeling. Thus, new political-juridical reforms are only feasible as long as there are conditions to “come up with a society that does not have fear as the foundation of its circuit of feelings”.²

Under this point of view, it is believable that a political-legal crisis of any order may have suffered in its origins from the influxes of a new feeling that interfered with more intensity onto the current ruling circuit of feelings connected to the processes of power organization and subject individualization. To understand that crisis, then, it would be necessary to identify the feeling

1 See Safatle (2015).

2 Safatle (2015) 20.

that stirs the consolidated circuit and how it proposes to reorder it. Considering all crises are equally marked by the asynchrony between the time of the consolidated power and the new vector of insurgent social temporalities,³ the destabilizing feeling should be the one that is capable of creating new affections, as well as synchronizing divergent social rhythms, either of the present, or from a spectral, unsolved past. That is why the thesis raised in this chapter is that melancholy, marked by a historizing attitude in which the present is confronted by the loss of real and ideal objects of its own temporality or from the past,⁴ is the key to understand the crises democracy has been facing in the world, especially in Brazil.

The proposal hereby presented has a previous counter-argument. Pierangelo Schiera openly stated that “jurists must not be melancholic”.⁵ The advice is fruit of his studies on the history of the term melancholia. This conceptual path was first traced by medicine with humoral theory, sometimes attributed to Hippocrates, sometimes to Polybius, his son-in-law (fifth century B.C.). According to it, every organism has four humors – blood, phlegm, yellow bile, black bile – which keep one healthy if balanced. However, if one of them prevails over the others, thus the temperaments manifest, respectively: the sanguine, phlegmatic, choleric, and the melancholic temperaments. The latter was seen as pathological and able to create mental alterations, misanthropy, and depression.⁶ Later, Aristotle, in his philosophical reflections, saw that melancholy had a paradoxical nature, as it was simultaneously able to generate apathy, depression and torpor, as well as the creative ability of extraordinary people, such as philosophy, art, and politics geniuses.⁷ These concepts even gained strength in medieval times via Arabian-Islamic culture, on the medical aspect (with the Salerno school in the thirteenth century), as well as on the religious aspect – with the condemnation of *acedia* and its heretical classification –, and on the philosophical aspect – with the positive aspects of melancholia and Neoplatonism for Marsilio Ficino in the fifteenth century.⁸ Finally, during the birth of the Modern State, melancholy was linked to associability, whence comes the reprimand by Schiera.

3 See Koselleck (2006).

4 See Tindemans (2016) 137.

5 Schiera (2011) 155.

6 See Schiera (2016) 43-44; Klibansky et al. (1979) 8-10.

7 See Klibansky et al. (1979) 29-35.

8 See Schiera (2011; 2016).

Political science and practice, in order to establish social cohesion and using sometimes the concepts of civilization/illustration, and sometimes the ideas of vigilance/punishment, has been in constant opposition to melancholy. This is because that feeling is seen as an innate anthropological trait that tends to social aversion and is refractory to order and discipline. In the pre-state phase (thirteenth and fourteenth centuries), the overcoming of melancholy was accomplished by compromises and obligation contracts between the classes, of the first statutes, and of the legal-theological doctrines. In the founding phase of Modern State (sixteenth and seventeenth centuries), emerging political doctrines with legal foundations, including the notions of sovereignty and the social contract, introduced the pretentious natural and rational thought to the social life in general. In the phase of consolidation of the State (eighteenth century), social life was justified, so the concert was to perfect instruments of civil and criminal organization, as a means to potentialize the disciplinary processes; to finish, in the nineteenth century, law had its legislative production, and a prescriptive pretentiousness started to command the social regulation of behaviors and the pacification of deviating melancholic bodies. The legal field, thus, accomplishes its victory against the anti-social resistance of melancholy.⁹

Schiera himself,¹⁰ however, admits melancholy gains new meanings whenever there is a new anthropology, that is, a new conception of men and their place in the world. Thus, the “brief twentieth century” started with the Era of Catastrophe – the period of the two world wars, with long-term conflicts, military technology of farther reach, and high mortality rates, in which the greatest potencies faced each other¹¹ – established a breach on the idea of constant, utopian, idealized progress. Obviously, the feelings of ruin, defeat, loss, mourning, melancholy, all existed before; however, in late modernity, these feelings come to put order to chaos, to the political narrative, to the meaning of existence and the place of men. Together with moments of euphoric mania, as in the golden years of economic recovery in the middle of the twentieth century, contemporaneity has re-signified melancholia, making it a latent feeling that, according to the proposal hereby developed, stirs a circuit of crisis.

To develop on this argument, this chapter goes over what Freud and Benja-

9 See Schiera (2011) 141-145.

10 See Schiera (2011) 131.

11 See Hobsbawm (1995).

min thought about melancholy, as an individualizing process, and as a methodological instrument to understand modernity. Following to that, come the manifestations of melancholy in power, in political ideologies, and in the law. To finish, a conclusive section establishes a dialogue with the studies of Law and Emotion and presents the final thoughts.

2. Melancholy as the permanence of loss

In *Mourning and Melancholia*, written in 1915 and published in 1917, Freud reflected on a double temporality of losses: the social one, marked by the breach of the First World War and the consequent impossibility of maintaining the “conventional treatment of death”,¹² which so far was typically concerned with separating death from the daily life and restricting it to a distant moment of life closure; and the individual temporality of loss, based on three circumstances of Freud’s personal life: the separation from Carl Jung due to their disagreement on the importance of sexuality for the beginning of neurosis, the participation of one of his children in the war, and the death of his brother Emmanuel after a train accident.¹³ The congruence of these events made Freud think to what extent the different reactions to losses might influence the constitution of *the I*.¹⁴

Mourning is the expected reaction to the loss of a dear person or of some abstraction form, such as one’s homeland, freedom, people or ideals. This first loss usually leads to other losses: loss of interest to the outside world, since it now has the absence of the loved one, inducing itself more to oblivion than to remembrance; the loss of a position one held toward the lost object, since the death of a father, for example, also makes one lose the position of a child; moreover, the loss of the ability to choose a new object to direct one’s love investment in substitution for the deceased one, opposed to the reality world in a form of psychic lingering of the lost object’s existence. However, little by little, through a thorough struggle with time and energy investment

12 Freud (2010 [1915]) 173.

13 See Peres (2011) 108-109.

14 This chapter avoids using the Latin-based terminology *Ego*, *Super-ego* and *Id* as adopted by the classic translation of the *Standard Edition*, by Ernest Jones, which designate the concepts of *Ich*, *Überich*, and *Es* – cf. Bazzo (2013) 160. Although popular, these words are far from the original intention of Freud to make his writings closer to current language, so that his patients could understand what he wrote – cf. Freud (1992 [1926]). Thus, we adopt the literal, modern translation, the *I*, the *Super-I*, and the *It*.

and that focuses more on memories and the expectations that used to connect the libido of *the I* to the loved object, the order of reality ends up prevailing. After this painful process, *the I* finally detaches from the lost object and becomes free to accomplish a new objectal investment.¹⁵

Melancholy is a pathological reaction to that same experience, defined by extracting the object's loss from consciousness. For a griever, everything related to their loss is conscious. For a melancholic person, otherwise, either the recognition that the object has been lost is lacking, or, being aware of the lost object, the person does not differ what effectively is gone together with the loss. Also, the loss is sometimes only on the ideal world, that is, the object is still alive, but is not able to be the recipient of love investments, such as the ending of relationships. For that reason, the events that involve melancholic experiences can be considering numerous. In these situations, the melancholic person blocks the libido directed to the loved object, and redirects it to *the I* itself. In *the I*, melancholy operates in the ambiguity of love to the object and hate to its going away. On the one hand, *the I* identifies with the loved object, replacing it, in denial to admit the loss of love for the object despite the loss of the loved object itself. On the other hand, the ideal of *the I*, in a critical instance split from *the I* itself, takes *the I* as its new object and insults it vigorously. Hence, self-recrimination of melancholic beings is the manifestation of the hatred against the object that is no longer present – which justifies why complaining about oneself is actually a way of complaining about another one.¹⁶

Later, in the book *The Ego and the Id* (or *The I and the It*), of 1923, Freud reaches the conclusion that the substitution of objectal investment by identification is native to every process of constitution of *the I*, which makes melancholia an individually necessary event, rather than a pathological one. *The I*, when becoming aware of the objectal investments that produce *the It*, either approves them, or, through repression, sets them apart. However, in order to control *the It*, tolerating its erotic impulses and, at the same time, establishing deeper connections, *the I* identifies itself to the lost object, which compensated *the It* of the loss by offering itself as a new loved object. Such identification may facilitate the abandonment of the object, although it might be the very condition for such abandonment. *The I*, thus, corresponds to a set of abandoned objectal investments, a residuum of all identified choices that

15 See Freud (1992 [1917]) 131-132; Kehl (2011) 18.

16 See Freud (1992 [1917]) 131-136.

were taken away, a history of its own losses. And though this conflict is stronger in the first years of life, due to the Oedipal objectal investment towards mother or father, whose necessary renouncement creates ambivalent identifications to one or the other, it continues to operate throughout the whole life of *the I*, which makes its individualization a constant experience of losses.¹⁷

Freud's psychoanalytical studies ended up granting new meanings for melancholia. However, other intellectuals also revisited the term. For Walter Benjamin, melancholia is a transversal matter that is present since his thesis on German tragical drama until his last writings on the concept of history. Although revisiting, many times, the interpretative tradition of melancholic acedia and the four humors, especially when analyzing the classic picture by Dürer, Benjamin detaches from that same tradition by seeing in loss an instrument for understanding modernity. For him, criticism, as opposed to its role in romanticism, is no longer responsible for the survival of a work of art; rather, it needed to understand that the work's ruin, death, decay, and loss are conditions for reading it. Then, *Trauerspiel*, as stillborn writings that readers have access, in their rawness and impossibility of completeness, promoted a rupture by articulating themselves as spatial simultaneity and admitting the collapse of the linear and sequential narrative. The impossibility of this traditional teleological narrative reflects the meaning loss of human actions, according to the Lutheran biblical reading that good deeds are not sources of saving grace, and the cause of the meaning emptying in the world itself. Loss, for Benjamin, does not happen within *the I*, but in the outside world, reduced to a residuum of the redeemer promise from the past.¹⁸

Although Benjamin does not differ mourning from melancholy, and uses them as interchangeable concepts, in his analysis there is a role given to loss as constitutive of the new position *the I* occupies in this modern, empty world. This makes it possible to see Freud and Benjamin in a similar hermeneutical constellation.¹⁹ Such connection, however, is not a necessary convergence of analysis, which is visible due to the way each of them sees the compromise of *the I* towards the lost object, the relation of non-intentionality and loss, and the productive aspect of melancholia. Firstly, melancholy for Freud does not

17 See Freud (2011 [1923]) 13-74.

18 See Ferber (2013) 25-32.

19 Although Benjamin had read Freud, which is evident in the theory of shock and of the optical unconscious, it is not possible to clearly trace how much of the psychoanalytic studies on melancholy may have impacted his own reflection.

give in to reality calls, as it prefers to identify with the lost object to displacing its libido towards a new object. This reveals loyalty to loss and a certain ethic dimension via stubborn responsibility, non-negotiable, and present, toward the absent object. For Benjamin, on the other hand, a melancholic person is identified with the archetype of the courtier, an ambiguous figure that sometimes is the faithful servant of the monarch, sometimes is guilty of treason. And such treason is directed not to the human figure of the monarch, but to the things that represent power, such as the scepter and the crown. These identification to royal things makes this person abandon the ruler in crisis times, changing support to a new suitor to the crown, and this does not feel like infidelity. Treason to the monarch implicates fidelity to a greater value, monarchy itself. Melancholy here exchanges the ethical interpersonal compromise for the loyalty to stuff, which, in a nutshell, represents the loyalty of the courtier to him/herself.²⁰

Secondly, melancholic loss for Freud has a non-intentional structure, which is not identifiable, and makes it impossible to develop any form of overcoming, which casts the shadow of the object over *the I*.²¹ For Benjamin, such non-intentionality has a philosophical asset as well. If the intentional structure of consciousness, as exposed by Husserl, is based on the separation between subject and object, as well as between object and the intentional act that becomes aware of it, such a structure can only generate knowledge, not the truth – as it would depend on the immersion of the subject into the object. In the senseless, mournful, empty modern world, whose diffuse loss induces melancholy, the subject cannot find a target to which to direct his/her intentions. It only remains to immerse oneself in this world, instead of reacting to it – thus, philosophically, access to the truth can take place, in a very melancholic experience.²²

Finally, Freud and Benjamin, moving away from the traditional paralysis of *acedia*, point out the productive nature of melancholy: if for the former, melancholic work constitutes *the I* as a product of abandoned object investments, for the latter, the experience of loss is a condition for the possibility of

20 See Ferber (2013) 32-41.

21 For Agamben (1993), melancholy has intentionality, since the melancholic person, on purpose, simulates the loss of something he/she never owned. Such an imaginative solution, by transforming the unattainable object into loss, creates a safe space for the melancholic person to relate to the allegedly lost object since, as an idealized and internalized object, it can never be taken away.

22 See Ferber (2013) 45-50.

philosophical work. Mosaic-making could be, for Benjamin, a good allegory of such condition, since the aesthetic value of the work remains, despite the fact that it is marked by breaches and ruins, fragmented into small pieces. Likewise, philosophical criticism, should highlight the breaches of the modern world and indicate the gaps that cannot be explained, considering the history of these losses as the only possible redemption.²³ Melancholy, hence, is not only a destabilizer possibility for the hegemonic circuit of feelings of our time, nor just a concept with integration capacity between the crisis and simultaneous temporalities. It is also a methodological instrument capable of supporting reflections on the processes of absence, loss, concealment, which are so common in the modern world. In that sake, this chapter now has the intention of mapping and highlighting these breaches in democracy and law.

3. Legal-political melancholy

The contemporary experience of democracy is melancholic, since it has been continuously crossed through by experiences, representations, and discourses of loss and absence, whose effects are not completely consciously trackable. This generates a continuous temporality of suspension, the incapacity of closing the past, and the condition of potential transition due to the constant possibility of emergence of lost objects or the call of reality – which is noticeable in many aspects of the public life. In politics, for example, melancholy hunts both the aspects of ideology, besides being a device for controlling the bodies of citizens.

The political movements on the left-wing are the most commonly related ones to the concept of melancholy, Benjamin²⁴ being the first to establish such a link. In a 1930 text, when criticizing a book of poems by Erich Kästner and the school of New Objectivity to which he belonged, the German philosopher accuses the poet of a certain tortured stupidity, a melancholic attitude of those who give up the prophetic and utopian role of literature through which future things are anticipated. With this, Kästner supposedly restricted himself to describing the present state of affairs, transforming the political struggle into commoditized hollow forms, consumer goods that, unable to awaken the revolution, reinforce the apathy and fatalism of bourgeois oppres-

²³ See Ferber (2013) 59-66.

²⁴ See Benjamin (1987 [1930]) 73-77.

sion. After Benjamin, the relation between melancholy and the left came to be invoked when movements, parties and institutions with such an ideological profile lose the ability to incite the proletarian forces.

Thus, in the late 1990s, Wendy Brown identified a certain melancholy on the left-wing that, marked by several losses – such as the fall of real socialism, the end of a unified movement, the absence of a sense of local or international community and a consistent political-moral teleology to sustain proletarian mobilization – it was no longer able to create concrete possibilities for change in the present. This same left, narcissistically identified with historically mobilizing categories and ideals, but unable to attract libidinal investment in the present, supposedly became a conservative force, which defends the welfare state instead of building non-state emancipatory possibilities, while attacking identity policies and postmodernism as the alleged culprits for proletarian dispersion and apathy²⁵.

For Jodi Dean, the diagnosis is different: the communist utopia had been lost as an object of desire, causing the left to extract its pleasure from repeated experiences of failure. This drive for the inability to win supposedly caused the left to maintain repetitive patterns of behavior, such as political practices of not forming alliances, obstructing legislative votes or formulating unworkable bills, which may even generate small victories, but long term, result in constant defeats. However, it is from this continued impotence that the melancholic left derived its pleasure²⁶. More recently, Enzo Traverso returned to the topic. The continuous defeats suffered by the left used to serve as fuel for the communist utopia. From the combination of fight experience, even if they failed, with the horizon of utopian expectation, a notion of historical time was continually reframed. The fall of real socialism, however, clouded the alternatives for the future, generating a presentism, at the same time, anchored in what had already been achieved, in the name of the principle of responsibility, and fearful of the opening for the future, which could show itself even more overwhelming. The melancholy of the left was thus due to the fidelity to the promises of revolutionary emancipation alive in memory as a way of refusing to admit neoliberalism as a call of reality – at least, while new emancipatory utopias do not present themselves as an alternative²⁷.

Although more occasional, there are also melancholy readings about the

25 See Brown (2003) 458-465.

26 See Dean (2013) 81-87.

27 See Traverso (2018) 36-48, 130-131.

right-wing. Sanford Schram²⁸, for example, when analyzing the Tea Party's performance in the United States, identifies an ambiguity in the constitution of the middle class, marked both by an ideal identification to a self-sufficient, responsible subject and, as well as for an indebted subject, to whom some kind of state support would be given. It is not uncommon for supporters of the Tea Party, a movement that proposes tax cuts, to be elderly, white, middle-class men and beneficiaries of Social Security – but who see reducing the waste of public money as the solution for reducing taxes without commitment to their own welfare benefits. The melancholy of the American middle class is thus supposedly derived from the impossibility of continuing to practice Protestant ethics, from maintaining the ideal of the entrepreneurial subject, from the increasing indebtedness rates and from the constant demands to reduce taxes, seen as the reason for personal indebtedness itself. This same melancholy prevents the middle class from seeing the call of precarious reality in the world of work, which, when reducing the standard of living, would make it impossible to maintain a lost ideal with which it identifies.

In addition to the left-right spectrum, there are those who argue that melancholy is an inherent device of power. First, because the loss of the object does not operate detached from the environment in which such loss occurs; thus, the withdrawal of the object in the psyche is accompanied by a withdrawal also of the social world, transforming *the I* into a political order. Secondly, because it is social power that establishes which losses may or may not be mourned, exercising control over melancholic identifications due to the intentional impossibility of mourning. Thirdly, the State cultivates melancholy, by manipulating these losses, as a way of concealing and displacing its own ideal authority, reducing its ostentatiousness from the outside world through the internalization of its terrifying power as an ideal of conscience. When successful, even if fits of mania allow revolutionary moments when the tyrant is removed from the government, tyranny remains structurally hidden in the psyche, allowing for new accommodations of authoritarian power²⁹.

As for constitutional history, melancholy can also be perceived. Especially in Brazil, there are those who claim the properly constitutional experience started only with the 1988 Constitution, since previous attempts were supposedly marked either by the lack of popular legitimacy or by the ineffective-

28 See Schram (2015) 38-47.

29 See Butler (2017) 189-199.

ness of constitutional norms³⁰. This resentful constitutionalism is properly a melancholic constitutionalism marked by the excess of failure memories and an evident amnesia of the struggles for rights³¹, as well as by an abstract constitutional ideal forged from experiences which, impossible to be implemented mimetically, was identified as a loss in the identity of the constitutional subject.

However, it is possible to think of the constituent experience itself as melancholy. In the face of social pluralism, it is impossible for the constituents to correspond to a perfect mirroring of the citizens they represent, along the lines of a Schmittian national identity. There will always be a gap created by the insurmountable distance between the constituents' self-perception and the image of the pluralist constitutional community. The elaboration of the Constitution would thus be the attempt to fill this void by transcending the limits of the constituents' subjectivity, which occurs through an identification with the other whose representation was lost in the electoral process of choosing representatives. A Constitution will only be able to obtain increased legitimacy if its formulators build, through the elaboration of the text, a combined identity between the I of the constituents themselves and the otherness lost in representation, to which they have to melancholically identify. For this reason, the constitutional language is not only of representatives, nor only of those represented³².

Constitutional discourse, borrowing common terms when doing politics, can be similar to the process of alienation in the identity construction of subjects, through which individuals perceive themselves by a name they did not choose. It happens similarly when acquiring the dialogic processes of communication, in which the words used by the subject are only partly possessed by him/her, since they were actually taken from a web of meaning previously given by society. The constitutional discourse inevitably brings with it the pre-constitutional experiences that were lost, just as it needs to identify, as much as possible, with the pluralities that were lost in the process of popular representation³³. Obviously, this melancholic moment of constitutional elaboration fails to account for all the losses that operate in the very constituent process. For this reason, the identity of the constitutional subject, appre-

30 See Barroso/Barcellos (2003) 327.

31 See Moreira/Paula (2017) 98-101.

32 See Rosenfeld (1998).

33 See Pinheiro (2019).

hended only by this constitutional discourse rooted in a common language that unites and links the multiple others, will always be an incomplete work, subject to constitutional construction and reconstruction, which operates from the continuous interpretive process of constitutional statements by the Judiciary up to the factual normativity that results from the experience of constitutional contents by society.

Thus, the melancholy nature of law is not restricted to public law, but also extends to private relations. According to Gilmore³⁴, the contract and its respective civil liability have always managed to remain within the theory of crime. However, more and more, legal doctrine and practice have naturalized such responsibility, replacing the theory of bargaining and consensus with a certain modern communitarianism, making the contract no longer appreciated under the specific factual conditions of its agreement in favor mechanical application of general and objective laws. In this sense, the famous thesis on the death of the contract would properly deal with a melancholy loss.

After all, using the concept of melancholy ecstasy by Rose³⁵, it should be questioned whether such a thesis by Gilmore, in stating the death of the contract, far from indicating mourning, does characterize, in fact, a melancholy statement by those who identify a loss of the classic characteristics of the contract and, attached to them, deny recognizing in its new elements the latent presence of the lost concept, maintaining melancholic fidelity to the object that was lost³⁶. Such melancholy of a legal institute, in fact, can remain strong in the magistrates' performance, when they resist applying, for example, in private relations, a new understanding of the autonomy of will, remaining faithful to the private will not tempered by limits of constitutionalism. In Brazil, this discussion could also be extended to the civil concept of family, traditionally linked to double and binary organization. This is often still used as a parameter in the face of multiple affective, homo-affective or non-binary organizations – which was evident in the prohibition of notarizing polyaffective unions, even with merely declaratory effects, as determined by the National Council of Justice.

34 See Gilmore (1995).

35 See Rose (1996).

36 See Barnard (2006) 391-393.

4. Final thoughts

If melancholy apparently installs a new circuit of affections, perhaps the jurists should consider what investigative potentialities the questions posed by this new feeling in times of new crises, temporalities and structures of the political-legal power can provide, especially to the study of past times. In this regard, the dialogue with the emerging field of research *entitled Law and emotion*, which began to be developed more consistently in the mid-1990s, could be quite fruitful. One might question the extent to which melancholy is properly an emotion. However, when *Law and emotion* research emerged in the 1990s, there was little scientific production that accurately distinguished the concepts of feeling, emotion, humor and affections³⁷, which is why such studies tend to cover the whole vast field of human reactions, conscious or unconscious, which interfere in the way the body places itself in the world and, consequently, in the way knowledge is processed and actions are taken.

There are at least six research possibilities linked to that scientific field³⁸: (I) *emotion-centered approach*: it analyzes how a specific emotion, including aspects about its origin, its purpose and its manifestations, influence or, at least, should influence the law, such as, for example, aversion³⁹, shame⁴⁰, and fear⁴¹; (II) *emotional phenomenon approach*: area which seeks to analyze how decisions with judicial consequences, produced socially or by the judiciary itself, are made based on the prospective emotional response⁴²; (III) *emotion-theory approach*: it considers the different theories about emotions and demonstrates how each can affect in particular the production and application of legal rules⁴³; (IV) *legal doctrine approach*: instead of focusing on an emotion, the analysis is restricted to a certain legal subarea, such as civil liability, and the way emotions manifest in it; (V) *theoretical approach to law*: instead of focusing on the different theories of emotion, it highlights the different legal theories and how each one of them makes room for the incorporation of emotions and the way it happens – as, for example, has been

37 See Ekkekakis (2013).

38 See Maroney (2006).

39 See Kahan (1999).

40 See Nussbaum (2004).

41 See Sunstein (2002).

42 See Blumenthal (2005).

43 See Kahan/Nussbaum (1996).

observed in the economic analysis of law⁴⁴; (VI) *legal-actor approach*: it explores how emotions influence and guide – or, at least, how they should guide – the various legal professionals (judges, lawyers, among others), as well as those who interfere in the respective jurisdictional provision (members of the jury, for example)⁴⁵.

The possibility of this dialogue seems fundamental to think about the extent of the influence melancholy has on law and democracy, since both correspond to a permanent transition because they can never assert themselves as finished projects. After all, the political-legal process is marked by several identifications with objects that were lost due to impositions, failures or impossibilities. The continuous alternative of emergence for the silenced loss, together with the call of reality, can always trigger new identification processes. On the other hand, the normalization of such losses can generate excluding vigilance processes within democracy and the judiciary, so that the lost objects never return. In this scenario, the legal historian needs to remember a certain fire alert. Benjamin says that *acedia* and sadness are characteristic of the historian who focuses only on the winning side, which makes them melancholic. However, in the ambiguity that is proper to this feeling, the historian who throws him/herself into invisible, absent and spectral narratives, lost objects of the constitutional discourse, can also be melancholic. When analyzing history, if historians are able highlight these breaches in the legal-constitutional discourse, they will contribute to the mosaic constructed by historiographical criticism.

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44 See Adler (2004).

45 See Ray (2002).

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Uses of silence in political and legal transitions: a methodological approach to constitutional history

Cristiano Paixão

1. The presence of the past: transitions, trauma, silence;
2. Understanding the uses of silence;
3. Silencing a Revolution: Nineteenth Century Brazil and the Haitian experience;
4. Concluding remarks

At the beginning of my research program, I sought to analyze the historical factors related to the presence of silence in Brazilian constitutional history. My goal was to highlight the persecution suffered by the Black population (including the Black Movement) during the military regime.¹ This is an ongoing research project, which continued in the workshops held in Macerata and Brasília in June and November 2019 and in June 2020.² I will seek to analyze the social construction of silence in relation to social groups, as in the case of the survivors of the Korean War. After that, I proceed to understand the social construction of silence more generally. For this purpose, I will observe the role of silencing in nineteenth-century Brazil, particularly with regard to the social meanings of the Haitian Revolution.

1. The presence of the past: transitions, trauma, silence

When the word “transition” comes to mind, especially in the field of legal history or political science, it is normally related to a specific time period that connects past and future. We can, for example, discuss the “Brazilian transition to democracy” or the political transition that took place in South Africa after the end of its apartheid regime. In these circumstances, transition focuses on the two poles of organized time: it is possible to emphasize the past regime, understanding its central features, its ways of oppression, and so on. It is also possible to highlight the future and to discuss the possibilities for a

1 See Paixão (2021).

2 I thank José Otávio Guimarães, Massimo Meccarelli, Renato Bigliuzzi, Hilary Levinson, Antonella Meniconi, Douglas Pinheiro and Ana Carolina Couto for suggestions and discussion. I am also thankful to all participants in the workshops for their contributions during the discussions held in Macerata and Brasília.

new regime, taking into consideration the democratic agenda of its political actors (when the case in question is one of a transition to democracy), the connections between the state and civil society, and other topics about the nature of the future regime.

But the analysis of political transitions can be useful for legal history, and not only for the “transitional” relevance of this lapse in time. Is it possible to identify different temporal dimensions of political transitions? Can the transition process create an asymmetry in time, breaking the balance between past and future—or even invalidating that balance? To what extent can transition time be influential on the future of the regime?

This paper is the product of an ongoing research project between the University of Macerata and the University of Brasília on the diversity and complexity of transition processes and their impact on legal history. In his essay in a forthcoming volume on transitions (2021), Massimo Meccarelli investigates the “ascriptive time” that can be found in transition processes, by which he means the effects on the future of the political and legal measures adopted during transitions. Observing the legal uses of amnesty in post-war Italy, Meccarelli points out the persistent effect of concepts and practices typical of the transition on legal practices in democratic Italy.³

In this paper, we will highlight the silencing of certain groups and actors during transition processes, especially when catastrophic events and unrecoupled trauma were experienced before the transition. As we know, the totalitarian and authoritarian regimes of the twentieth century were responsible for countless human rights violations: disappearances, executions, torture, and other abuses took place during many political struggles around the globe. In different ways, most of these regimes were ultimately replaced by democratic rule. That doesn’t mean, however, that the trauma experienced by various actors, families, groups, and generations was discussed or treated. Many of the violations were protected by amnesty laws, by political pacts made during the transitions, and even by the enduring presence, in the new regime, of political actors who took part in the human rights violations.

Thus, in our discussion, we will try to highlight the role of the silences produced by political transitions. Our intention is not only to demonstrate the production and persistence of these silences, but also to propose an analysis of the uses of these silences by the silenced communities themselves. In other words, from the perspective of legal history, these silences can be important

3 See Meccarelli (2021).

instruments for reading the narratives produced during and after political transitions, whether by subjects of the law or by judicial bodies and truth commissions.

Our appropriation of the past, in all its forms, is established through ambivalence and difference. Ambivalence involves the tenuous but essential relationship between the act of remembering and the act of forgetting.⁴ For every social, political, and institutional act of remembrance, there are many silences that result from forgetfulness. In addition, memory is always precarious, fragile, and conflicting. When they confront the past in their present operations, governments and parliaments are placed between different—and often directly contradictory—claims.⁵

The silences, however, stem from acts of writing. In the context of the varied forms of trauma and human rights violations in contemporary history, there are experiences to be recovered, understood, known, and reconstituted through various narratives. These points make the need for historical research on the subject even more important: Why are there such silences? What are the subtle ways in which these silencing operations are enforced and allowed to persist?

In sum, there are practices, languages, and political experiences that remain silenced, that are neither discussed nor addressed via the institutional and legal forms of recognition. Silence occurs in time and constitutes time.

When we discuss the temporal dimension in modern society, we take into account the multiple aspects of the connections among individuals, social groups, and the presence of the past. Societies can react to the past in many ways, including the selection of certain events in history for commemoration (as with holidays, for instance), the construction of memorials for remembering particular events or groups, and the exclusion of some facts from public debate (which can, in turn, stimulate people to forget parts of national or local history), among others. Politics of memory is always selective. For every act of remembrance, there is also an act of forgetting. As happens in the usual manner of all political communication, the recollection of the past is also the object of a struggle. There is no such thing as a “neutral” commitment to memory.⁶

In a provocative analysis, Jacques Rancière emphasizes the relationship

4 See Weinrich (2004).

5 See Connerton (2009).

6 On this subject, see Gensburger/Lefranc (2017); Huyssen (2003).

between time, politics, and narration. The concept of time should not be limited to the moment or to the dividing line between past and future; rather, the act of narrating involves a presence, or not, in time. Being “part of time,”—that is, participating in history—is directly connected with the narrative of things past.⁷ Silence, in the way we use the word here, means exactly that: a denial of participation in history, a denial of other possibilities for writing history—both at the same time.

Historical sources come as layers of the past. It is always a challenge for the historian to organize and classify this material. That search for the past, that task of understanding the sources, can be compared to the work of organizing an archive.

We refer here to the work of Jacques Derrida in *Archive fever*. For Derrida, an archive is a sign that concentrates several constructions of meaning. On the one hand, an archive is a commencement. As Derrida tells us, it would be something like “the principle according to nature or history, *there* where things *commence*—physical, historical, or ontological principle.” It is, then, a topography and a genealogy. It’s a place of origin. But on the other hand—and at the same time—an archive is also the manifestation of a commandment, of an order. For Derrida, the archive is also “the principle according to law, *there* where men and gods *command*, *there* where authority, social order is exercised, *in this place from which order* is given—nomological principle.”⁸

We must point out an important aspect of this argument: the updating of the archive. This is because, as Derrida says, the archons, those responsible for the organization and construction of the archive, were not only responsible for the physical security and storage of the archive: “The archons are first of all the documents’ guardians. They do not only ensure the physical security of what is deposited and of the substrate. They are also accorded the hermeneutic right and competence. They have the power to interpret the archives. Entrusted to such archons, these documents in effect state the law: they recall the law and call on or impose the law.”⁹ Therefore, in addition to guarding, organizing, and distributing its elements, there is a task—which the archive calls for—that directly summons the law: for Derrida, it is a question of the need for a “jurisdiction,” an activity of “stating the law.”

7 See Rancière (2018) 13-47.

8 Derrida (1995) 9.

9 Derrida (1995) 10.

This activity of stating the law involves, above all, being in time. Authority, that is, the power that emanates from the authority that constitutes, preserves and reproduces the archive, must respond to a demand for legitimacy. And this does not happen only because of a democratic construction - it also happens because, since modernity, the questioning of the archive is being carried out, the questioning of its elements, of its disposition and, mainly, of its own authority. So, from the archive arises the law.

Thus, together with the construction of an archive, the idea of knowledge projected on it seems to be inherent. The institutionalization of the archive and the discourses it contains and disseminates seem to be also fundamental. As Derrida says, "A science of the archive must include the theory of this institutionalization, that is to say, at once of the law which begins by inscribing itself there and of the right which authorizes it."¹⁰

And here we have a condition of opening the archive for the future. Yet for Derrida: "The archivist produces more archive, and that is why the archive is never closed. It opens out of the future."¹¹ Archiving is dialogue with the future. If we take the metaphor proposed here seriously—the past as an archive—then we must understand the Derridian reflection as a call to legal history: the history of the construction of this archive, the history of its uses, its risks, its possibilities.

Rodney Carter, borrowing from Derrida's work, presents an interesting connection between the archive and the silences we can find in it:

Archival power is, in part, the power to allow voices to be heard. It consists of highlighting certain narratives and of including certain types of records created by certain groups. The power of the archive is witnessed in the act of inclusion, but this is only one of its components. The power to exclude is a fundamental aspect of the archive.¹²

Silence, however, should not be equated with the complete absence of noise, of rumour, of any manifestation of presence, action, or interference. As Carter points out,

Silence implies voice. It does not equal muteness, that is, it is not a negative phenomenon, simply the absence of sound, speech, text, or other sign. Silence can be actively entered into or, as occurs where the power is exerted over an individual or group, it is enacted

¹⁰ Derrida (1995) 10.

¹¹ Derrida (1995) 45.

¹² Carter (2006) 216.

upon that individual or group. In the archives, silences can occur as marginal groups are actively denied entry.¹³

The reflections proposed by Carter open new possibilities for the reading of the past through the metaphor of the archive. Minority and marginalized groups, obscured in official narratives or dominant political groups, especially in authoritarian regimes, are therefore inserted in the past. It is up to the reader—in our case, the legal historian—to understand the various forms of manifestation for these actors and groups.

An example is enlightening. Thus, using research by Ramsay Liem, we now analyze the multiple meanings of a traumatic event for the Korean-origin community living in the United States of America: the Korean War.

There is one aspect of the Korean War that draws attention: the conflict, which—accounting for soldiers, volunteers, and the civilian population—left more than one million dead, is not legally closed. There was only an armistice, which established a demilitarized zone, but there was no peace agreement or surrender by any of the belligerent parties. Efforts at reconciliation or attempts to overcome the trauma have not been initiated.

This situation somewhat resembles the cases of “disappeared persons” that arose in the context of the South American dictatorships in the second decade of the twentieth century. There is something permanently unfinished about the fate of the disappeared: without information about the bodies and the circumstances of death, relatives remain in the constant postponement of mourning. In legal terms, these are permanent crimes, which continue to produce effects in the contemporary era.

The case of the Korean War brings a succession of traumas. In addition to enduring the trauma of the conflict itself, many Koreans had to emigrate. According to the careful work conducted by Ramsay Liem, who interviewed several members of the Korean community in the United States, many Koreans in the United States seem to have associated the success of migration with a ban on remembering (and discussing) war events:

Over a half a century has passed since the end of active fighting in the Korean War and Korean American survivors have established new lives in the United States. One might reasonably expect that these conditions, in combination with the national narrative of the Korean War as forgotten, might have eroded Korean American memories of this conflict. Lisa Lowe (1996) suggests that enfranchisement in the United States for Asian immigrants

13 Carter (2006) 219.

requires “forgetting the history of war in Asia and adopting the national historical narrative that disavows the existence of the American imperial project...(and) acceding to a political fiction of equal rights that is generated through the denial of history...” (p. 27). The pressure to acquiesce to the nation’s dominant self-image is experienced by all citizens, especially during periods of national crisis, as evident in the United States following the tragedies of September 11, 2001. But for immigrants, especially racial, ethnic minorities whose political and social statuses are tenuous, the ideological authority of the state can be particularly insidious. For Korean American survivors of the war, it means added pressure to suspend talk about the Korean conflict and to forget.¹⁴

However, silence did not lead to forgetfulness. In fact, an inverse effect seems to have been produced. The more that public remembrance was discouraged, the stronger it became the remembrance of individuals or groups. Liem’s examples also include survivors of other traumas generated by authoritarian regimes:

some psychological research suggests that external cues that instruct the individual to avoid focusing on a past experience may actually enhance rather than lessen memory rehearsal. “Institutional forgetting...and collective silence as a whole end up by reinforcing the strength of both individual and collective level informal memories” (Marques, Paez, & Serra, 1997, p. 257). Findings from a recent Danish study (Bernsten & Thomsen, 2005) also indicate that historical events invested with strong personal identity and emotion can be retained in memory for considerably longer periods of time and with remarkable accuracy for contextual features than previously assumed. In this work, survivors of the Danish occupation and liberation during World War II not only recalled factual information associated with the onset of these events with unexpected veracity, but those with reported ties to the resistance offered the most vivid and accurate memories.¹⁵

The marks of trauma, and their impacts on individuals, groups, and generations are complex, vary in each case and can never be generalized. Therapeutic strategies, individual and collective, may be used for healing, but they are not enough for a more comprehensive and public treatment of the theme. With that point in mind, Ramsay Lien then conceived a traveling exhibition containing works, installations, and videos that call into question some aspects of the official accounts of the trauma and, above all, the silencing imposed on survivors and their descendants. The exhibition was named *Still Present Pasts: Korean Americans and the “Forgotten War.”* He also directed a documentary entitled *Memory of Forgotten War*. It is interesting to point out the effects of the exhibition on viewers from other national affiliations:

14 Liem (2007) 159.

15 Liem (2007) 159.

More than anything else, *Still Present Pasts* is about claiming voice, breaking six decades of silence about how ordinary people experienced the Korean War in Korea and the United States. The people whose oral histories inspired our exhibit challenged the culture of silence in the U.S. that shrouds the Korean War, risked becoming targets of political and ideological conflict in their own communities, and were willing to relive personal traumas and expose them to other family members as well as strangers. For many of these people the interview was the first time they spoke openly about their war pasts and the ghosts that continue to haunt them. By permitting us to include some of their memories in a dialogue with the exhibit artists, they stepped further into the public arena. They also joined others whose public testimony has been a force for resisting and redressing social and political injustices, for example, Holocaust survivors, Japanese American internees, Argentinean mothers of the disappeared, victims of Cambodia's Killing Fields, and the thousands of human rights survivors worldwide who have testified before national and international truth and reconciliation commissions. Without their contributions, *Still Present Pasts* could not have begun a process of lifting the silence about a tragic, unresolved chapter in American history that continues to reverberate in the present.¹⁶

This case of silencing the traumas, experiences, and narratives of the Korean War is yet another example of the situation contained in a famous phrase coined by Henry Rousso and Eric Conan: "the past that does not pass."¹⁷ This presence of the past, marked by acts of silence, oppression, resistance, and the articulation of narratives, deserves to be investigated closely by legal history, especially in contemporary times.

2. Understanding the uses of silence

It is worth noting that the reflection proposed here is part of a perspective that incorporates the choices made by certain societies, in their given political circumstances—such as operations that take place in the present and involve the selection of a recomposed, rewritten, reworked past. These operations are associated with the double dimension of memory. They are located between remembrance and forgetfulness. They presuppose particular forms of remembering and forms of forgetting.

Our aim is to identify these choices and understand the role of silence in their affirmation and, especially, in their persistence. We must not directly connect silence to oblivion, just as we cannot understand silence as absence. On many occasions silence is active; it plays a role. It marks a political position

¹⁶ Liem (2009) 11.

¹⁷ See Rousso/Conan (1998).

or blocks a spoken or written demonstration. Silence, therefore, is a source of communication that circulates in society. Thus, we better understand expressions such as “eloquent silence,” “cries of silence,” or, in English, “silence that speaks so much louder than words” or “silence that speaks volumes.”

It is clear, however, that an imposed silence denotes an attitude of forgetfulness, which is often quite selective. It is worth mentioning, to this point, that an expressive part of memory studies today seems to focus on the analysis of oblivion and its various functions and forms. It is understandable that the first theoretical approaches to the memorial phenomenon, which became widespread in the postwar period and from the 1980s onwards, had remembrance as a central concern. The catastrophes experienced in the Second World War—the extreme experience of the Shoah, the *Lager*, the mass destruction planned and carried out with modern technologies, using science and rationality—all this marks the necessity of affirming the act of remembering as a demonstration of the human capacity for resistance, survival, and the power of witnessing.

Another factor, widely discussed in the field of history, was the emergence of a relevant social and political mobilization around memory, particularly since the 1980s and 1990s, with the establishment of memorial laws, the elaboration of a museological framework for memory, the multiplication of celebrations on symbolic dates, and the construction of places of memory.

The dimension of forgetfulness, however, was never absent in these manifestations, and it is natural that it should be so. After all, the act of forgetting is linked to the field of memory. It is one of its constitutive poles. The capacity of modern society to construct artifacts of memory depends on the capacity of this same society to establish spheres of oblivion.

Two important books, written by Paul Ricœur and Harald Weinrich, are directly connected to this discovery of oblivion as an essential element of human, social, and political choices. Situated in the field of history and literary theory, Ricœur and Weinrich have drawn attention to the various strategies of oblivion that unfold in the course of human experience. Amnesty, forgiveness, witness, judgment, and responsibility are key words in the postwar experience. And they belong to the domain of forgetfulness and remembrance.¹⁸

In the unfolding of these forms of forgetfulness, we perceive the role of silence as a strategy for concealment and for the suppression of social practices and experiences. Regarding the field of legal history, we observe how the demands, claims, and protests of social groups are often relegated to oblivion.

18 Weinrich (2004); Ricœur (2004).

They are silenced in an active way; that is, the silence is imposed. As Eviatar Zerubavel said, the relegation to oblivion is the expression of a “conspiracy of silence.”¹⁹

Continuing in this vein, Zerubavel also takes up the idea that silence is not the absence of speech. In the social sphere, silence involves the act of silencing, that is, an action aimed at preventing the emission of a communication that, if it were not silenced, would have happened in society:

In his short story “Silence,” Leonid Andreyev explicitly contrasts stillness, or “the mere absence of noise,” with silence, which actually implies “that those who kept silent could ... have spoken if they had pleased.” Being silent, in other words, involves more than just absence of action, since the things we are silent about are in fact actively *avoided* [...] Ignoring an “elephant” is not a result of simply failing to notice it but of some actual *pressure to disregard it*. Such pressure is for the most part a product of unmistakably social traditions, conventions, and norms of attending which we internalize as part of our socialization [...] What we are socially expected to ignore is often articulated in the form of various *taboos against looking, listening, as well as speaking*. Those who defy or even simply ignore such prohibitions are considered social deviants.²⁰

It is essential to emphasize that silences, in the perspective adopted here, are social products, related to certain political attitudes that select what should and should not be said. As pointed out by Zerubavel, “the bounds of acceptable discourse are socially delineated by normative as well as political constraints, and what we look at, listen to, and talk about is therefore actually affected by *both normative and political pressures*.”²¹ The dimension of silence is therefore a social dimension: “silence is a collective endeavor. While it takes only one person to produce speech . . . it requires the cooperation of all to produce silence.”²²

As already noted, the more recent studies in the domain of memory (and its relationship with history and the social sciences) have devoted attention to the dimension of oblivion. In the words of Anne Whitehead, there has been a kind of “discursive shift.”²³ According to Whitehead, this new attitude involves discussion of the collective aspect of forgetfulness: can we talk about collective forgetfulness, in a way analogous to collective memory?

19 Zerubavel (2010) 32.

20 Zerubavel (2010) 33-34.

21 Zerubavel (2010) 35.

22 Zerubavel (2010) 36.

23 Whitehead (2009) 154.

This question is central to our discussion. The reason is that, as we know, the present is the locus of disputes about the past. Memories are constructed and socially reiterated in a discursive dispute. What's more, as if it were the other side of the same coin, this same phenomenon also occurs with regard to forgetfulness. As Jay Winter says:

When the victims of violence have the sanction to speak out, as in a court of law or truth commission, then they become the authors not only of their stories, but also of their lives. Not speaking can entail accepting someone else's story about what happened to you [...] The central point is that the entitlement to speak about war and violence is in no sense universal. Some have the right; others do not. The difference between the two categories is a matter of social and cultural codes, which can and do change over time.²⁴

The connection between modern wars and memory disputes is evident. From competing narratives about the Algerian War to the symbolic heritage of the American Civil War (which triggered violent conflicts in 2017, such as those in the city of Charlottesville when an attempt was made to remove a statue of a general who fought for the Confederates),²⁵ the disputes over the meanings of these conflicts are unrelenting.

The possibilities for speaking, however, are not the same for all contenders. Some may speak out publicly about the conflict: others may not. As noted by Jay Winter:

Commemoration is the collective representation of a shared view of a past worth recalling. As such, it is performative; it selects elements of a narrative and necessarily suppresses other sides of the story [...] The question arose as to how to glorify those who die in war without glorifying war itself?

One way to do so is to ensure that the names of everyone – and not only the generals – are listed and honoured. And yet even this format does not solve all the problems of remembering war in the modern age. In French, a war memorial is a memorial to the dead – *monument aux morts*; in English, it is the more equivocal 'war memorial'. Which part of war does it commemorate? The justice of its outbreak? The justice of its outcome? The honourable treatment given to enemy prisoners or the wounded? No one knows the answer to these questions, and all commemorators start with the same puzzle: what do we leave out?²⁶

24 Winter (2010) 8.

25 See <<https://www.theguardian.com/us-news/2018/aug/11/charlottesville-on-edge-on-anniversary-of-deadly-white-nationalist-rallies>>.

26 Winter (2010) 20.

What's left out? What voices are silenced? How do these forms of silencing operate, and how do they reproduce themselves in time?

With these questions in mind, we will look at the role of silence in political and social disputes in nineteenth-century Brazil.

3. Silencing a Revolution: Nineteenth Century Brazil and the Haitian experience

The delayed abolition of slavery in Brazil has never been followed by any policy about the inclusion of the Afro-Brazilian population in the labor market. The abolition of slavery took place at the same time that the Brazilian government was encouraging European immigration to Brazil at the end of the nineteenth century, which was a clear attempt at whitening society. Violence and exclusion continued to affect the Black population, in the cities and in the countryside.²⁷

The vast inequality between whites and Blacks, which still persists in broad terms in Brazilian society today, was a subject of discussion at a particularly important moment in Brazilian constitutional history: the proceedings of the 1987-1988 National Constituent Assembly. On that occasion, militants in the Black Movement, especially those on the Subcommittee on Blacks, Indigenous Populations, People with Disabilities and Minorities, took an intense action to ensure that, during public hearings, the issue of Brazilian racism was openly discussed.

In an illuminating, deep, and meaningful statement made at the time, the writer and journalist Joel Rufino dos Santos stressed one point: Brazil's constant tendency to see itself as a white country has ultimately denied and concealed a vital element of its own history. In his view, this incapacity to perceive the diversity of Brazilian society "represses, conceals its black dimension, because what this country is -- it is a country of blacks, whites, Indians and other ethnicities."²⁸

Joel Rufino called for Brazil to "re-constitutionalize" itself, to rethink its own trajectory, because "one of the aspects of the Brazilian crisis is this very vision that we have of the country," which historically has silenced the culture, social practices, and the autonomy of the Afro-Brazilian population.

²⁷ See Alonso (2018) 358-364; Schwarcz (2012) 61-65; and Loner (2012) 417-442.

²⁸ Brasil, *Diário da Assembleia Nacional Constituinte*, Suplemento ao nº 63, 21.5.1987, 136.

It is evident that racial issues in Brazil are multiple and complex and leave room for many different approaches, which are not exclusive but complementary. At this point in our research, our focus turns to the reception, interpretation, and attempts at silencing that occurred throughout the nineteenth century in a landmark historical event in the context of the Americas: the Haitian Revolution.

An initial remark that we have already underscored is that silence does not imply absence, emptiness, or denial of meaning. Silences are also socially produced. These constructs indicate, before anything else, a political element that is almost agonistic: social actors occupy different positions in the debates over the principles and norms that flow in each political community when discourse concerning a regime or a specific constitutional document is produced. Debate does not occur only through speeches, discourse, and writings.

Indeed, a political dispute may be a struggle to speak, to describe, to produce meaning in discursive form. One of the tools that can be used in such debates is the silencing of the opponent, either at the place from which his speech originates or by means of language suppression and other prohibitions. Therefore, the silence produced in these circumstances is not absence. It is interdiction, blockage of the issuing of another discourse. In this context, silence is a political construction. As mentioned by Eni Orlandi:

There comes the whole question of “take” the word, “remove” the word, make it say, make it shut up, silence, etc. Because of its political dimension, silence can be considered both part of the rhetoric of domination (that of oppression) and its counterpart, the rhetoric of the oppressed (that of resistance). And there is a fertile field to be observed: in the relationship between Indians and whites, in the discussion of agrarian reform, in the speeches on women.²⁹

Here we have two dimensions that intersect. Silence is at once a social construction and a mode of dispute over meaning. It is constructed to the extent that the act of interdicting speech is imposed, enforced by certain political actors at the expense of other discourses. And, precisely for this reason, silence is also a tool activated by some actors in order to resist, to offer alternative accounts, and, in the final degree, to even exist.

In the realm of legal principles and norms, which have been defined by the production of text since the beginning of modernity, silences are generated and are also used to oppose specific discourses. Therefore, the legal historian

29 Orlandi (2018) 29.

should search for traces, clues, and fragments of political and legal practices that enable a more broadly inclusive understanding of the task of drafting legal texts—in particular the constituent processes, one of the most fertile fields in constitutional history—but also, and more importantly, of their uses by various social and institutional agents.

At this point in our discussion, we shift our focus to observe a dilemma of modern constitutionalism. In a constitutional order that appeals to equality, freedom and fraternity, how can we justify the institution of slavery? This is a question common to many countries that adopted the constitutional form in the nineteenth century, and it is very often brought up in social and political history. It is also critical to the history of constitutionalism.

Well known is the episode, narrated by Kenneth Maxwell, of a secret meeting held between Thomas Jefferson, the American ambassador to France, and José Joaquim Maia e Barbalho, who was a medical student in Coimbra. Born in Rio de Janeiro, Barbalho had written letters to Jefferson; they met in Nîmes, France, in May 1787. During the meeting, Barbalho (who presented himself with the alias Vendek) claimed that a revolution was being brought about in Brazil, which would result in its independence from Portugal. The United States would be the model, and Brazil would become a republic. Jefferson reported the meeting to John Jay, then the foreign secretary of the American confederation, but he would have been reticent about possible support to Brazil, since the United States had a good rapport with Portugal. Through devious means, the account of the meeting reached the insurgents in the province of Minas Gerais.³⁰ Furthermore, it is known that Tiradentes “carried in his pocket a copy of French translations of the state constitutions of the United States,” as mentioned by Bernard Bailyn in the preface to the Brazilian edition of his classic work on the history of the American constitution.³¹

The expected endorsement for revolutionary and republican actions, however, never materialized. It was important to the United States to have a good relationship with Portugal, and thus, nothing was done for or about the Brazilian insurgents. Furthermore, there was the question of slavery, which was central to Portuguese colonial rule. And as is well known, Jefferson, a landowner in Virginia, owned many slaves.

The quandary around the connection between revolution, freedom, and

30 See Maxwell (2016) 75-87.

31 See Bailyn (2003) 7.

slavery would become even more evident through the effects of the French Revolution. The former French colony of Santo Domingo experienced a powerful slave-led revolution that resulted in political regimes commanded by leaders such as Toussaint Louverture, Jean-Jacques Dessalines, Alexandre Pétion, and Henri Christophe. However, France refused to give up and came back to dominate parts of the island, even relying on the support of some revolutionaries, until new conflicts broke out. Haitian independence was finally consolidated only in the first few years of the nineteenth century. The Haitian Revolution was, therefore, a lengthy process, extending from 1791 to 1804. In the background of the conflict was the institution of slavery—which had been abolished by France in 1794. Haiti’s independence, however, would not be recognized by France until 1825, with a heavy cost imposed on the young Haitian republic, which had to pay financial compensation to its former colonizer for many years.³² We can thus see the ambiguity in the attitudes of the United States and France in relation to slavery, which persisted in America and in French colonies, even after the revolutionary movements in both countries.

However, the content of the slogans of the French Revolution could be interpreted differently by various political actors. In the case of the Haitian Revolution, that is precisely what happened. As observed by Carolyn Fick, the Haitian context saw a resignification of property rights. In the language of the revolution in France and in the United States, property—and the right to use it—was associated with freedom. On the other hand, in the then colony of Santo Domingo, whose population lived under a regime of slavery, the exercise of freedom required that the right to property be destroyed. That requirement was because the regime considered slaves to be property of their masters.³³

In this context, an important task for the colonial elite of the early nineteenth century in Brazil was filtering the historical narratives related to the Haitian Revolution. According to research sources, the political elite, press, and those giving official speeches deliberately avoided using the term “revolution” to describe the Haitian independence movement. Instead, they used terms such as “insurrection” or “revolt” and always associated them with adjectives carrying a negative connotation, such as “horror” or “disorder.”

As outlined by Ada Ferrer:

³² For an account of the different stages of the Haitian Revolution, see Trouillot (2015) 31-107.

³³ Fick (2007) 394-414.

Two approaches to the Haitian Revolution, apparently contradictory, have prevailed since the beginning of the slave uprising in August 1791. The first tendency is to neglect, underestimate, or let pass in silence this revolution and its impact. They mirror the first reactions to the violent events of that August and the interpretations that took place there. When faced with a revolution led by men and women slaves who came to destroy the main institutions of society, the contemporaries were incapable of seeing the possibility of a revolution led by slaves and, even more, a successful revolution, leading to the creation of an independent state. They watched and learned the facts through pre-conceived categories, explained the events and gave an interpretation, denying that enslaved people could make a revolution. Their accounts have blamed the external agitators, the detrimental effects of the French Revolution's ideology, the slave owners' miscalculations, but almost never the slaves' own will, ability, or consciousness.

This lack of understanding by contemporaries has marked even the way historians have dealt with the issue or remained silent. As stated by Michel-Rolph Trouillot, the early inability of thinking within appropriate categories challenged the historical narrative by referring it to the vision of contemporaries, thus turning the Haitian Revolution into a relative absence in history [...]

Due to the fact that incomprehension and silence have accompanied and followed this revolution, the reference to Haiti from 1791 to the 19th century was constant in all slavery societies in the New World. That being said, people talked about it, wrote about it, all those who were able or not to recognize a slave revolution in it expressed their opinion. At the time, news circulated among the slaves and their owners, while colonial authorities tried to keep "contaminated" slaves and seditious ideas out of their territories. Many decades later, the mere mention of Haiti still retained evocative power.³⁴

In the case of Brazil, an expression was created: "Haitianism." This was a word used to signify the risk of insurrection, of breaking the slave structure that was at the base of nineteenth-century Brazilian society. Some cases, which will be analyzed in greater depth in the course of this investigation, are quite emblematic of this attitude toward the Haitian Revolution. Diplomatic documentation, newspapers, historical texts, and several other historical sources reveal episodes that occurred in the period ranging from 1804 to the 1870s, in which the example of Haiti is, to some extent, disputed among social actors. While slave owners and the imperial political elite would invariably describe the Haitian case as a negative example, to be avoided at all costs, groups of slaves would, in situations of conflict, mention the Haitian Revolution as a model worth pursuing, celebrating the deeds of revolutionary heroes.

It is clear, however, that those who controlled the discourse in the public sphere sought to avoid any mention of the Haitian Revolution. When that was

34 Ferrer (2012) 38.

not possible—given a specific set of circumstances, such as, for example, the presence of any Haitian among Brazilian slaves or the concrete invocation, in cases of insurrection, of the Santo Domingo Revolution—the discourse instead qualified “Haitianism” as a negative, fearful, frightening experience.

Such attitudes were summarized by Marco Morel:

At first, it was preferable not to talk about it, at least openly or in public: to silence, hide, suffocate and ignore, so as not to draw attention to that which should not be remembered. When such a posture was not feasible, when the demonstrations became visible, then it was the case of warning and alarming against the excesses, the violence, the dangers and the horrors of such an experience.³⁵

This connection between silence and disapproval, between the prohibition of speech and the blatant repression of political action, was the stance of a broad sector of the political and economic elite of the Empire of Brazil (a stance that had already begun in colonial times). However, some sources demonstrate attempts by groups of slaves, republican leaders, and abolitionists to take over the characters and symbols of the Haitian Revolution.

One of the main reasons that the Brazilian political and economic elite sought to avoid the Haitian example at all costs was the desire to control the process of abolishing slavery. As we know, Brazil was one of the last countries to end slavery, finally doing so in 1888. This strategy of control over the process was effectively successful, since abolition occurred in a gradual way and without any public policies designed to include the then slaves in the labor market. Abolition marked the beginning of the segregation of the newly freed Black population.

This issue, which still underlies the many forms of structural racism in contemporary Brazil, is thus linked to a transition process—that is, from monarchy to republic, which occurred one year after abolition. And that process was affected by the attempts at imposing silence over the narrative of a revolution led by slaves, who took advantage of their autonomy to defeat a colonial power, to build a political community, and to enact a constitution. To grasp the echoes of this attempt at silencing, as well as the ephemeral ways of recovering the Haitian experience by those who resisted the slave regime, is a duty that deserves to be achieved in constitutional history.³⁶

³⁵ Morel (2017) 38.

³⁶ An important contribution in the field of constitutional history is the extensive research done by Marcos Queiroz, who managed to emphasize the reactions to the Haitian

4. Concluding remarks

Up to this point, our itinerary has indicated some different levels of silence.

The first level results from the reception of the Haitian Revolution itself, classified by Michel-Rolph Trouillot as an “unthinkable” event, that is, as one marked by a transformational power that exceeded, by far, the other revolutionary experiences of its time. Because of this, it received less attention, was subject to greater incomprehension, and is still, in a way, a less investigated event in modern history.³⁷

When we consider the impact of the long Haitian Revolution on eighteenth-century Brazil, more perceptions of silence arise. As stated by historian Marco Morel, such silence has two different meanings: the first is oriented to the forbidding of speech, to the blocking of the theme. It is focused on the interdiction of speech, on the prohibition of the subject. Noblemen, slave owners, and political leaders constantly attempted to avoid mentioning the events that had taken place in Haiti. When that was not possible, given the significance of the Haitian Revolution as an example of resistance and republican revolt (as in the case of the Pernambuco Revolution), the strategy involved silencing its revolutionary heritage. Haitian exemplarity was seen as dangerous and harmful and should not be adopted as a reference. Thus, as already stated, the widespread use of the term “Haitianism” in the nineteenth century.³⁸

In twentieth-century historical experience, silence took on new forms. After the abolition of slavery, with no public policies for the integration of Afro-Brazilian into the labor force, the social segregation of the Black population began.³⁹ That period was also when the first Brazilian republican governments encouraged European immigration. As a result, social and cultural practices associated with the Black population did not—and have not—become visible, even if they were reproduced in various spheres of society, just silently.

When some organizations dedicated to Black people’s rights became active, especially in the 1930s and 1940s, another form of silencing took place:

Revolution during the 1823 Constituent Assembly. Please see Queiroz (2018); Duarte/Queiroz (2019).

37 See Trouillot (2015) 27, 70-107; Ferrer (2014) 31, 150, 157.

38 See Morel (2017) 99-303.

39 See Chalhoub (2017); and Sevckenko (2010).

clouded under a veil of conceptualizations linked to a certain “harmony” between races, and other similar formulations, the struggle for the recognition of Afro-Brazilians citizens continued to be neglected—and, as Flavio Gomes and Petrônio Domingues have stated, they are still waiting for greater attention from historians and researchers in general. Certain experiences, such as the Black Front and the Black Experimental Theater, played an interesting role in Brazilian social and political issues and are still awaiting a better understanding of their significance in the light of the changes Brazil has undergone since the 1930s.⁴⁰

These struggles for recognition also unfolded in subsequent periods of Brazilian republican history and assumed centrality in the 1970s, when there were new forms of mobilization among Brazil’s Black population, which were then closely followed by the security forces of the military regime. It was in the context of accelerating the political transition and the redemocratization process that the Unified Black Movement emerged on the national landscape (it was founded in June 1978 in São Paulo).⁴¹

The Black population’s demands for recognition have comprised, first and foremost, a request for listening, for the possibility of dialogue in Brazilian society—an urgent demand that extends even to the present day. As this article was being written, protests and demonstrations directed against police violence toward the Black population erupted in Brazil.⁴² Therefore, the continued existence of structural racism and the recurrent occurrence of demands for recognition permeate the entirety of Brazilian history.

As far as the field of constitutional history is concerned, there are two potential approaches to future research on this subject. The first approach involves what Pietro Costa once termed the “spatial turn” in legal history.⁴³ The Haitian Revolution was a very complex historical experience. It was carried out in an Atlantic context in which the meanings of many revolutions were defined and redefined—beyond that which took place in Santo Domingo, the American and French experiences also were felt by the Atlantic world. One

40 See Gomes/Domingues (2013) 255-267; and Domingues (2018) 237-243.

41 See Pires (2018) and the final report of the Rio de Janeiro State Truth Commission (Brasil, Comissão Estadual da Verdade do Rio de Janeiro, Relatório Final, dezembro de 2015, available at: <http://www.memoriasreveladas.gov.br/administrator/components/com_simplefilemanager/uploads/Rio/CEV-Rio-Relatorio-Final.pdf>). See also Paixão (2021).

42 See <<https://www1.folha.uol.com.br/opiniao/2020/06/e-no-brasil-vidas-negras-importam.shtml>>.

43 See Costa (2016); Meccarelli/Sastre (2016).

can also refer to a Black Atlantic space, where enslaving practices and struggles for freedom coexisted.⁴⁴ This phenomenon is particularly interesting in Brazilian history, due not only to the evident influences of the American and French Revolutions, but also, and primarily, for the repercussions of the Haitian Revolution. There was a visible space of communication between Brazil and Haiti, which included the northern provinces of Brazil (especially that of the Grand Pará), passed through French Guyana, and then reached the Haitian context.⁴⁵ Slaves, freedmen, military men, politicians, and priests took this route, leaving behind sources, testimonies, and narratives. So a research program that includes the influence of this spatial background on Brazilian history in the early nineteenth century looks to yield promising findings.

That brings us to a second area of interest: how do we connect constituent processes with struggles for the freedom and recognition of the Black population? Such a question can be posed at certain crucial times in Brazilian constitutional history.

The first Constituent Assembly in Brazilian history was disbanded by Emperor Pedro I in 1823. The constituent proceedings, however, featured discussions around the fundamental issues to be settled by the newly independent nation. The records of the meetings are available and are a major source for histories of that period. The Haitian issue was discussed at the Assembly because one of the most influential constituents, João Severiano Maciel da Costa, had been governor of French Guiana (then under Portuguese occupation) between 1809 and 1819. As already stated, Guiana was a strategic stopover on the route connecting Brazil and Haiti. And João Severiano dealt with an intriguing situation during his time in Guiana: he was in charge of the interrogation of a Brazilian-born priest who had spent two years in Haiti. Charged with Haitianism, he was imprisoned and deported at Maciel da Costa's command.⁴⁶ Thus, at the 1823 Constituent Assembly, the Haitian Revolution was discussed, with the full involvement of Maciel da Costa.⁴⁷ As pointed out

44 See Gilroy (1993).

45 See Gomes/Morel (2003) 37-63.

46 See Gomes/Morel (2003) 47.

47 See Brasil, Segunda Sessão Preparatória, 18 de abril de 1823, *Diário da Assembleia Geral, Constituinte e Legislativa do Império do Brasil – 1823*, Ed. Fac-similar, V, Brasília, Senado Federal, Conselho Editorial, 2003, 207; and Honorato (2014). I would like to thank the researcher Fernando Henrique Lopes Honorato, PhD Candidate at UnB Law School, for this important reference. For a substantiated account of the 1823 Constituent Assembly—and the role of the Haitian Revolution in it—see Queiroz (2018).

above, the experience of Haiti was present throughout the nineteenth century in Brazil, often marked with silencing practices by the political and economic elite, but sometimes referred to in rebellions or abolitionist protests.

After the Assembly was disbanded, the Emperor decided in 1824 to enact a constitution, which remained in force up to 1889 (throughout the whole monarchical era). And, as is widely known, the Constitution of 1824 has no reference to the subject of slavery, which was the basis of economic and social relations at the time. That is another silencing process, which discloses more than it conceals, since it draws a line between what can and cannot be said. This silence was still being imposed, but it has been challenged by political and social actors. Silences leave their imprint, denote choices, and enable us to grasp the challenges of articulating concepts and ideas. As highlighted by Eni Puccinelli Orlandi, silence is not only “among words. It crosses them. An essential event of meaning, it is significant matter par excellence.”⁴⁸

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48 Orlandi (2018) 69.

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Considering Semantics

Legal concepts from the standpoint of innovation and preservation of meaning: a rhetorical perspective

Claudia Roesler

1. Introducing the topic; 2. Thinking along with Koselleck; 3. Introducing Theodor Viehweg: dogmatics, zetetics and base theory; 4. Viehweg's historical examples and what they can teach us; 5. Connecting the dots

1. Introducing the topic

The current article has the cultural innovation in legal discourse as its theme and intends to investigate it as a persistent phenomenon, explored by looking at the rhetorical and argumentative practices of jurists. It represents an initial approach to the subject and will certainly need to be further developed in later research. Therefore, we offer the reader an introduction to the topic and to its possible unfolding.¹

Its starting point is to think about the way jurists proceed with their tasks with a peculiar combination of innovation and conservation, easily noticeable if we look at legal concepts in a long-term perspective or if we compare several contemporary legal systems, preferably while representative of diverse cultures. In other words, our starting point implies showing how this particular combination is naturalized in the linguistic and operational practices of jurists and only appears when we identify a socio-legal problem, contrast it with its normative and jurisprudential regulation and denaturalize the text or, as in this paper, when we think of law in connection with language and history.

One of the transversal topics that appear in our observation of Brazilian argumentative practice is that of the legal culture that highlights the boundaries of arguments. For the purposes of this investigation, this culture is understood as the set of shared beliefs, institutions, and knowledge, which make up for a background in which arguments of legal theory and practice of a giv-

¹ This article is a revised and expanded version of the one presented at the *Workshop Innovazione e transizione nel diritto: esperienze e configurazione teoriche*, held at the *Università degli Studi di Macerata*, on June 17 and 18, 2019. I thank the colleagues who contributed to it and made it possible to improve the text, especially Cristiano Paixão, Isaac Reis and Massimo Meccarelli.

en historical time become possible. When new social problems arise, jurists start working with them implying in treating the new properly and fitting it into existing mechanisms, which are the shared and eventually disputed lexicon. A cultural innovation appears when the lexicon changes, encompassing phenomena not previously covered and it does so by the corresponding pure and simple conceptual innovation or by the evolution of the semantic content of terms.

In order to carry out the discussion, we will start from the idea by Reinhart Koselleck, presented in a text entitled “Repetitive structures in language and history”² in which the author debates the dialectic relationship between innovation and the keeping of structures. From the insight offered by Koselleck, we will be able to look at this process in a more practical way, following the suggestions from Theodor Viehweg³ about how legal knowledge is built and its different “layers”. The distinctions between dogmatics, zetetics and the common substrate that Viehweg describes as a “base theory” will be explored further in the article.

The paper is divided into three parts, the first dedicated to Koselleck; the second and the third to Viehweg, presenting his main theoretical categories and then exploring the author’s thoughts, with historical examples. Finally, it ends with closing remarks connecting the dots addressed throughout the text.

2. Thinking along with Koselleck

Taking advantage of a beautiful image about love – the unrepeatability of each story that involves lovers as if it was unique, and its repetition over time, if considered humankind as a whole – Koselleck proposes his investigation on the topic of repetitive structures as a generalization of a fact that started from two observations: in a timeline, people and their life events, their conflicts and solutions are and remain unique and unrepeatable. Even so, they occur within pre-conditions that are repeatable and, at the same time, never remain exactly as they were before. In other words: if everything was repeated endlessly, there would be boredom. If, on the contrary, everything was in constant innovation, humanity would fall into some kind of “black hole” without having a clue to where it was heading.⁴

2 Koselleck (2010); the text, with minimal changes, also appears in Koselleck (2018).

3 Viehweg (1974); also Viehweg (1995).

4 Koselleck (2010).

This frame, which bets on the combination of repetition and innovation in different ways, would allow, according to the author, to consider if historical events are accelerating or being delayed. Acceleration corresponds to faster innovation and fewer repetitions while delay would occur when repetition is more present and makes change slower or virtually impossible. The theoretical isolation of this interchange between innovation and repetition in unrepeatably historical situations would enable us to understand which would be the most recurring preconditions and, consequently, repetitive structures.

It would be possible, then, to differ what is “really new”, that is, what does not repeat anything that already existed, from what already existed and presents itself in a new form. Such a theoretical solution would allow us to review the traditional distinctions between different eras and their categorization as “ancient history”, “middle ages” and “modern age”, would remove the ethnocentric constraints present in the way in which academic institutions organize their discourse and would make it possible for intercontinental and intracontinental comparisons, organizing temporalities beyond pre-established conventions.

Koselleck is concerned with making two important clarifications in order to avoid misunderstandings or insights that are out of touch with his model intents. The first is that we must not misunderstand the idea of repetitive structures with that of recurrent cycles, present in several formulations in Western thought. The second is aimed at preventing the misinterpreting of repetitive structures with causality in historical events. Repetitive structures do not indicate a simple return-cycle of the same and, although they predict the uniqueness of events, they do not lead to causal explanations.

The next step is to show some of the preconditions at different aspects of human life. The author divides them into five categories: a) extra-human conditions of our experience, which concern the natural cycles of the earth and the universe; b) biological pre-conditions that we share with other animals; c) institutions; d) repetition structures embedded in sequences of unique or diverse events; e) linguistic repetition structures, within which repetitions and innovations are generated and recognized. In this paper, we are particularly interested in the institutional and linguistic categories.

According to Koselleck, we can think of institutions as artifacts created only by human beings and, although modern inventions evoke new experiences, the tension between innovation and repetition is nevertheless present. The role of institutions, therefore, is to deal with this tension in the course of

history based on mechanisms of repetition. Examples of these mechanisms can be found while working – whose circumstances do change but are based on the human capacity of learning and repeating tasks – and at the field of law, which interests us particularly.

In this case, the author points out, the very existence of the law presupposes its ability to be repeatedly applied to similar cases, that is, its ability to be steadily invoked as a standard option for solving social problems. This does not imply that new circumstances do not require new legal solutions and, consequently, the law does not require innovation. In those lines, modernity appears as an era of accelerating legislative innovation in opposition to a long time of regulations and customs based on traditional regulatory mechanisms, and on a successive exchange of regulation that is not only new but is enforced only for short periods of time, later followed by another innovation. The paradox is that stability, coming from a rule that is enforced regularly, requires new cases to be judged according to parameters appropriate to them. The peculiar combination of innovation and stabilization that we mentioned previously appears then in all its intensity.

Koselleck's main interest in his writings is not an analysis of law as an institutional stabilization mechanism and, consequently, the paragraphs devoted to the topic are few and basically illustrative. Law appears as one of the main examples of relevant institutions and its peculiarities are not addressed. We will return to this issue later, based on the conclusions we can make after reconstructing Viehweg's views about legal reasoning, as previously mentioned.

To end this part of our journey, we need to see how Koselleck deals with the last of the repetition categories, the language. The main point here is to show how the new always appears with the possibility of already presenting it in the language of the present, even if new terms are created or new forms of expressing it are required. Of the three linguistic planes, the syntactic one seems to be the least affected by innovation or is the most imperceptible in the short term. Semantics, on the other hand, is what allows us to see innovation happening and to see it within existing structures, that is, from shifts of meaning, often metaphorical. The author points out that many of the expressions we use to describe significant historical events are geological metaphors that appeal to our condition as beings who share their physical space on Earth – ruptures, eruptions, breaks, and revolutions are good examples of this – and we only understand them because we already have a common background given by language.

Invoking Gadamer, the term “pre-understanding” is used and the point that most interests us is the statement that this dynamic of change, which is apparently purely semantic, requires an ability to explain innovations analogically. In those lines, innovating means finding a way to project new content into semantic vehicles that, created for the sake of newness or not, can be adequately mirrored in common knowledge already shared by the community. It is not by chance that Koselleck cites Heinrich Lausberg⁵ classic work on literary rhetoric and invoke the definition of *topos*. He warns the reader that the functioning of *topoi* is not properly understood if one does not notice that they are not simply empty formulas that repeat themselves over time, but that they are also relatively stable repetitions, intertwining semantics and pragmatics.

The relationship between innovation and the keeping of older structures thus becomes more delicate due to the dynamics of language, we are now on the intersection between linguistic change and history. In other words, it's about the language's capacity to absorb and express historical events. Using political changes as an example, Koselleck points out the distance between these two planes and the relative distance between change, always induced by language before its occurrence and registered afterward, and its expression.

The relative separation between the syntactic, semantic, and pragmatic planes can also be seen from the perspective of political change. Innovation happens more quickly and clearly in semantics and is less noticeable – if it does – syntactically and pragmatically in the strict sense. The same syntactic structure and the same form of rhetorical expression may be used over a relatively long time and still mean successive political content, whose semantic meaning has been reinvented.

Claiming that it is in semantics that conceptual innovations appear more quickly does not mean that the pragmatic plane is unimportant. The tension between innovation and conservation is more evident in the pragmatic one, as it is from it that we are able to observe how the argument was imposed or a single discourse was persuasive and it depends on a peculiar, tense and unstable combination between the ability to be familiar to the audience of its time using accepted and recognized linguistic elements and, at the same time, presenting of what is unique or new.

As we have seen, Koselleck places law among social institutions capable of stabilizing structures. Although the author does not directly make this claim

5 Lausberg (2011).

in the text, as the law is linguistically articulated, its forms appear with the same characteristics of language and the constant internal semantic displacement also operates in it. The institutional capacity of the law is articulated in an unstable balance between innovation and the repetition of the enforcement of rules that are socially recognized as legal and that implies the keeping of the semantic envelope with the displacement of its content. For this displacement to work, it cannot be so abrupt or so visible as to disrespect shared parameters, especially by jurists, even if not only by them.

The main goal of this article is to better understand this process and, consequently, to clarify how innovations are produced and introduced in the legal lexicon. Now the research depends on a more detailed look at the internal aspects of the legal discourse. This research will be conducted by taking advantage of some of Theodor Viehweg's suggestions in writings after *Topik und Jurisprudenz*, in which the author drew a circular path between dogmatics, zetetics and base theory that are useful to show how this process of conceptual innovation appears in the field of law. Our project moves, therefore, in the delineation of law as a social artifact articulated intrinsically by history and language and how the former is affected by the issues that affect the latter two. Resorting to an interdisciplinary perspective that unites this knowledge across the board may be an effective way of highlighting aspects that are not very obvious in the legal practice of jurists. This is the object of our research in the next topics, starting with the presentation of the main concepts of Viehweg and then introducing some initial observations about the semantic changes in history, observed by Viehweg himself in his research.

3. Introducing Theodor Viehweg: dogmatics, zetetics and base theory

The distinction between a dogmatic way of thinking and a zetetic way of thinking is used by Viehweg in texts published throughout the 1960s and 1970s, a few years after his *Topik und Jurisprudenz* and, due to the peculiar characteristics of these texts – book chapters, conferences at events, academic papers – the definitions that interest us return several times, with different nuances and details that can vary from one text to another. We intend to reconstruct the main aspects of the distinction, throughout the different texts.⁶

6 Viehweg (1995). The articles are referred by the title and by the page range: *Systemprobleme in Rechtsdogmatik und Rechtsforschung* 97-106; *Ideologie und Rechtsdogmatik* 86-96; *Some Considerations concerning Legal Reasoning* 107-114; *Notizen zu einer Rhe-*

First, it is important to note that the author proposes the distinction as a way of understanding the complexity generated by the wide range of legal phenomena and, therefore, the multiplicity of tasks it supposes, ranging from an analysis of a certain legal system, to scientific or philosophical investigations. Viehweg proposes to consider these areas as a question and answer scheme, in his research of how areas of knowledge may emerge as specific thematic fields. Thus, a field of problems that is sufficiently describable is constructed and answers are offered that, according to the proof procedures to be specified, are finally accepted or rejected.

In the question and answer schemes, it is possible to emphasize the questions or the answers. When we emphasize the questions, the structure points to the investigation or zetetics. When we emphasize the answers, dogmatics. In the first scenario, the continuous pondering, which can make us rethink all the answers offered in the investigation (and that is why it is understood that the relevance is given to the question aspect) points to an infinite course, or at least without a specific ending. In research or zetetics, the answers are always taken as temporary, provisional, and questionable at any time. Your task is to label the range of questions in the chosen field. In the second case, when the answer is highlighted, the arguing starts from some points that cannot be questioned and its pondering is limited by the impossibility of questioning the dogmas, which “dominate” the other answers.

Explaining the distinction from a rhetorical discourse model, understood as a game between parties that propose and defend their statements, Viehweg provides us with another description of the distinction that can help clarify its scope. Assertions are treated as *dogmata* when, in theory, they are excluded from getting attacked in the long term, and therefore, they are not subject to any duty of defense, that is, to any duty of reasoning, if not simply a duty of explanation. The opposite occurs with the assertions that in all investigations are used simply as *zetemata*. In theory, they are free to be subject to any kind of attack and need to fill both duties: defense/reasoning and explanation. They are always questionable.

However, how can one explain the existence of dogmatic and zetetic thoughts? Why do both of them exist? Dogmatic thought is linked, says Viehweg, to opinion and the formation of opinion, while the zetetic thought is linked to the dissolution of opinions through investigation and its basic assumption is doubt.

torischen Rechtstheorie 191-199; *Über den Zusammenhang zwischen Rechtsphilosophie, Rechtstheorie und Rechtsdogmatik* 35-44.

It should be noted, says Viehweg, that in the everyday action and decision, dogmatic thought seems to be indispensable, because it is part of the action, forced to establish, rethink and keep a closed system of thought, a dogma. A thought that places itself as a task for continuous rethinking, as an investigation, fails to fulfill this function because actions require questions to stop and the answers provided, which are, in this sense, dogmatized. In order to act, the exercise of doubt must be carefully considered, because the urgency of decisions requires having an opinion based on data or information provided by context. Thus, the dogmatic thought is the daily thought itself as well as the formation of opinion.

Although dogmatic thought fixes the opinions, making them indisputable, it cannot abandon its inherent development. Thus, Viehweg points out, in order to maintain a cohesive and stable system of dogmatic opinions, interpretation gains importance, whose role is to make the necessary flexibility of nondiscardable dogmas, enabling their internal review without denying or deleting them. If dogmatic thought puts those basic statements (dogmas) out of question and doubt, it also develops them continuously exactly because they cannot be abandoned.

Contrary to what the usual meaning of the word “dogmatic” indicates, dogmatic thought does not work with norms as if they represented fixed, one-way conditions. Although their starting points are unquestionable, their linguistic characteristic, with the inherent connotative and denotative uncertainty, offers a relatively wide range for manipulating dogmas so that they can be continuously adapted to changing social circumstances.⁷

Dogmatic legal thinking is necessary and continually seeks to influence or provoke a set of behaviors in a more or less broad social group, with the least possible disturbance. This focus has an operative function and its cognitive aspect, although relevant, is not predominant. When referring to him, Viehweg affirms his multiple social functions and puts it in the following terms: it influences others and makes confidence become a prescription of behavior. This type of thinking, adds the author, tries to grant an operative function to what is thought and expressed.

On the other hand, a zetetic thought remains within the boundaries of a cognitive function and this is its functional role in society. Zetetic thought is an attempt because its greatest interest is in increasing the reliability of its statements and beliefs, which are subject to constant review so that the the-

⁷ See Ferraz Jr. (1996) 49.

ory can be built in solid ground. Its intent while using language is to inform and describe states of affairs. The dogmatic thought or approach, as it has an operative function, combines the informative and the directive (prevailing) characteristic of language.

Ahead of the need to legitimize the assumption of dogmatic starting points, it is necessary for them to be introduced in a rational way and this aspect is highlighted by Viehweg multiple times. Thus, the zetetic approach turns out to be essential as it provides, although this is not its primary function, premises that are immediately dogmatized and dogmatizable, especially in a society that attaches great relevance to the scientific legitimation of knowledge.

Moreover, one of the possible relationships between the two approaches is legitimizing the directive system of behaviors, dogmatic, in the absence of grounding in religion or tradition. The dilemma is that the zetetic system can only offer a partial overview in terms of content, which makes it difficult to take its knowledge as good dogmatic starting points.

This perspective shows the importance of the relationship between the dogmatic and the zetetic thought. It is decisive for the science of law – since dogmatization is considered a sequel of legislation – and it is clear that both depend on having the correct information about our complicated social world. Zetetics has to intervene continuously as a corrective to dogmatics, introducing de-dogmatizations.

The role of zetetics is to critically examine the assumptions on which dogmatics is based, hence providing it with the means to review its dogmas, adapting and rationally grounding them. For full legal knowledge, it is not a matter of eliminating or absorbing one onto the other, but of understanding them as both necessary and complementary.

If, on the one hand, social dynamics itself requires dogmatic thinking, on the other hand, the setting of this approach would lead to its own bankruptcy as guidance for action, since it would not allow the renewal of the cognitive content of its premises. Thus, the zetetic approach makes a critical contribution granting continuous correction.

In an article entitled *Über den Zusammenhang zwischen Rechtsphilosophie, Rechtstheorie und Rechtsdogmatik*, Viehweg discusses, as the title indicates, the link between legal dogmatics, the theory of law and the philosophy of law.

Viehweg notes that a sociological consideration indicates that every social group needs to establish an opinion on what it considers fair. This legal opin-

ion must be understood as a binding response to a social issue and fulfills a social function by allowing the coordination of the behavior of a diverse community of individuals.

This opinion might come from or be expressed in maxims passed from generation to generation, from an oracle, from judicial rulings or from laws. If, however, this opinion is submitted to the control of thought and, with that, rationalized, it will become a legal dogmatic.

Legal dogmatics is structurally formed by one or more fundamental dogmas, reconcilable with each other and considered as unstable, as they are taken as starting points that are not subject to questioning, and put as basic premises. Everything that is suggested as a response to a problem within this dogma must be reconciled with the meaning of these dogmas, as this way of thinking is inherent, that is, it develops internally, based on its own assumptions.

Dogmatics may take on several structures, such as deductive or classical dialectics. Regardless, when the dogmas fail to guide praxis, due to them becoming confused or insecure, that dogmatics vanishes. The question posed here is that of practice, of man's action as an indefinite being, and the structure is conditioned by the social function. Once social relevance is lost, the dogma might die, regardless of the structure with which it was built.

The references in the article we are examining suggest that there is an intrinsic link between the legitimacy of each legal dogma in its historical context and the relationship between structure and function. In order to fulfill its function of guiding praxis, dogmatics must present itself according to a structure that is acceptable to the thinking of its time.

Viehweg states that dogmatic systems always have a structure attributed to them by their social roles and, at the same time, suggests that this structure has a dimension of legitimation that cannot be disregarded, otherwise we are not able to properly observe the legal phenomenon. This means that, for the sake of legitimizing dogmatic systems, two dimensions are necessary and complementary: the content that comes from a set of socially accepted cultural references and the discourse that is accepted as reliable at that historical moment.

Regardless of whether we accept the opinion set out above, it is certain that, in order to fulfill its role of unifying and coordinating behavior in society, fundamental dogmas must have explicitly or implicitly a theory of material law that work as their ultimate foundation and this means they must have a solid answer about what is fair. In this sense, Viehweg mentions several his-

torical examples, such as the base theory of Roman jurists, so hidden that it is difficult to reconstitute, or that of Thomas Aquinas, which is quite explicit. At the same time, we can consider the positivization of fundamental rights in written constitutions as the practice of a theory of material law.

Such practice, says Viehweg in another article from 1961,⁸ embodied in written norms, solves only part of the problem, indicating what should be understood as the base theory. Praxis also requires the establishment of a dogmatic theory of interpretation, whose role would be precisely to indicate how texts should be interpreted in order to find that base theory. The interpreter is referring to a constitutional order that contains a theory of law that is not only formal but also material. If in theory, this is clear and consistent, in practice it is not always so, as this theory arises from customs, habits, ethics.

Furthermore, the unity or uniformity of a material legal theory of this type is necessarily postulated, but in reality, it is so full of tensions that its harmonization poses considerable difficulties for every jurist and, in particular, to a constitutional court. A theory of law built in those lines has the role of preventing the interpretation from becoming never-ending – although it is perfectly known that the constitution also needs to be interpreted – and indicating what is considered a problem of justice, thereby putting it on the field of possible legal-dogmatic arguments.

However, if this is the task that belongs to dogmatics, it is different from that which belongs to the philosophy of law. This is put forth by Viehweg as having a double role. The first is linked to the fact that it participates essentially in the arising of a theory of law. From the philosophy of law, a base theory is born that gives rise, in turn, to legal dogmatics. The second role is that after having generated a theory of law, it also makes the theory of law, now dogmatized, an object of investigation. What Viehweg means with this connection can be better understood by examining the historical examples that he recovers. This will be the subject of our next item.

4. Viehweg's historical examples and what they can teach us

The link between the two approaches is best seen if we turn to an article that Viehweg published in 1970 on dogmatics and zetetics in Jhering⁹ and whose objective, according to the author, is to support the epistemological

8 Viehweg (1995a).

9 Viehweg (1995h).

thesis according to which Jhering took an important step from dogmatic to legal zetetics.

To this end, Viehweg develops a brief recovery of the social context in which Jhering lived, aiming to show that the most common problem explored by Jhering's contemporary thinkers is the social problem, closely tied to the beginning of the industrial era. The idea of development has great relevance and was put forward by a partly scientific-natural and partly historicist thought.

In the perspective that Viehweg proposes, Jhering tried to treat the great historical material at his disposal with a scientific-natural spirit, seeking to practice the history of law according to the methods of natural science. When publishing *Der Zweck im Recht* he said he believed he had reached the end of his investigation of the Law, as he was in a position to show his nature. The need for Jurisprudence to present itself as an investigation of the law increased considerably with its touch to the investigation of nature.

Viehweg then seeks to demonstrate, analyzing Jhering's intellectual trajectory, that this author initially had a dogmatic relationship with Roman Law and used it as a source of solutions for the legal-dogmatic building of arguments, having created relevant theories that do not have only a cognitive component, but also an operational role.

The step from a dogmatic to a zetetic is located by Viehweg in the second section of the second part of *Geist des Römischen Rechts* that ends, according to the author, the meaning presented in *Der Zweck im Recht*, which arose from the generalization of the particularly observed conceptions of purpose and from the elevation of this category to the position of central explanation of the legal phenomenon in its entirety.

Again, says Viehweg, efforts to more strongly ground the basic doctrine of dogmatics appeared promptly and Jhering's work, *Kampf ums Rechts*, represents this point, enabling a form of dogmatic-teleological thinking.

Finally, as Viehweg concludes from his analysis, it can be understood that the industrial era was, on the one hand, facing a new and still confused reality, lacking in research. On the other hand, it sought adequate dogmatization. In this situation Jhering created in the German language, following the model of nature research, a new legal science that stimulated a new legal dogma. From that point on, within the framework of a science of law, both a sociology of law, zetetical and investigative, and a dogmatic Jurisprudence -- also sociological -- have developed.

This example shows how the double-sided relationship between the dog-

matic and the zetetic approaches can be seen in a given historical moment, inasmuch as it illustrates how a dogma was questioned by a reflexive and critical thought and how, shortly thereafter, this same critical thinking began a new dogmatic creation.

It is interesting to note that this concern with the way in which the models of arguing and the eventual contents of a base theory have been developed throughout history also appear as the main topics in the two papers by Viehweg, in addition to sporadic mentions in many others.

The article entitled *Modelle juristischer Argumentation in der Neuzeit*, in which recovers the models of arguing that were developed during the transition to modernity, emphasizing that the first major change in the way of Western jurists argued was precisely the adaptation of the traditional system to the axiomatic-deductive that dominated all arguments since the 17th century. Viehweg recovers, showing in detail, the concern of 15th century humanist jurists with the belonging of *jurisprudence* to the field of *ars* or *scientia*.

In the 16th century, jurists continued to use existing expressions, but began to express criticism of scholastic jurisprudence and to propose analyses of legal systems. The term *systema*, however, will only appear in a title in 1608 and should not be taken too seriously, since it designates, for the jurists of the time, an attempt to present the *Corpus Iuris* more properly. As Viehweg shows, the way tradition was introduced is no longer utilized, but it is not completely discarded.

In the seventeenth and eighteenth centuries, the model that inspires jurists becomes the geometric and, consequently, there is a great rupture in the argumentation model. The philosophical investigation of the Enlightenment is capable of providing the first basic principles for making deductions and for grounding a system in solid foundations. Christian Wolff, recalls Viehweg, is a key author in this regard.

The “deductivists” will decisively influence the construction of legal knowledge in the following centuries, even if their theoretical orientation is not unanimously accepted. A critical approach to the type of deduction based on fundamental principles will be offered by Montesquieu and will also have supporters in the following centuries, constituting the second major aspect of the models of argument that will confront and, in some way, still confront each other, says Viehweg.

The other article, entitled *Einige Bemerkungen zu Gustav Hugos Recht-*

sphilosophie,¹⁰ explores more closely a specific conceptual change, showing how the expression “philosophy of law” became part of the lexicon of jurists in the mid-18th century and is used by Gustav Hugo to designate part of a tripod of knowledge that would allow the jurist to cover all the aspects of his field of expertise, articulated from three questions: What is the law? Is it reasonable that it should be so? How did it become law?

The first question and the corresponding answers, according to Hugo, constitute the scope of legal dogmatics. The second, that of the philosophy of law. The third would be that of the history of law. A tripartite articulation that, according to Viehweg, had further developments that made it bipartite and, with that, coordinated legal dogmatics and the history of law among themselves, as if it were a sequence of studies, only delivered by different means. A division that separated philosophy from law and the history of law was very well received by the authors of the time, argues Viehweg, making possible both the tripartite version, as articulated by Hugo, and a bipartite version, which unified dogmatics and history, since that allowed to separate what was considered historically determined from what was understood as critical thought. Initially used in the longer-term, such as “philosophy of positive law”, then “philosophy of law” is incorporated into the lexicon of jurists and begins to describe a critical perspective on the law.

After going through the historical examples used by Viehweg to illustrate his concepts, let’s move on to the final phase of our research, bridging the gaps that were left behind.

5. Connecting the dots

Seen from this perspective, the connections between law and history that we try to rebuild from Koselleck’s text, albeit in a very approximate way at the moment, are now seen more clearly.

As we have seen, the German historian’s concern with innovation and the maintenance of structures, in the text we have explored, allows us to approach the role of law and language in these processes. Thus, the law, as one of the forms of social institution that allows a stabilization, by guiding behaviors, needs, at the same time, to incorporate the new and maintain what is usable from tradition. Language, in turn, is a mechanism for constructing meaning for historical events and its analysis - especially by observing how

¹⁰ Viehweg (1995f).

concepts are used in a given historical time - would allow us to see when the new emerges and how it is articulated, either by sliding the meaning of an existing term or by creating a new one.

The phenomenon pointed out by Viehweg when he distinguishes between a dogmatic and a zetetic way of thinking that generates sets of also dogmatic and zetetic statements, illustrates the dialectics pointed out by Koselleck between conservation and innovation, now in the legal debate. By taking some starting points as indisputable, they function as possible anchors for the institutionalization of law. Social changes, more or less accelerated depending on the historical time in which we are located, require that these dogmas have their meaning reviewed and semantically changed whenever necessary. Zetetic questioning enters, here, as a mechanism of cognitive renewal and supplier of cultural elements, categories and concepts that allow the substitution of what no longer makes sense, creating a new lexicon, or adapting what can still be used, sliding its meaning through the interpretation of premises that cannot be abandoned.

The circularity between dogmatic, zetetic and their meeting point, the basic theory, can be a way of seeing the phenomenon pointed out by Koselleck. The topical way of thinking of jurists, according to Viehweg's conception, would provide a very appropriate tool, since each *topos* in its uniqueness and a set of *topoi* in its entirety can function as formulas of meaning shared by a community and at the same time give it a sufficiently solid content to be useful. Taken out of their context, which Viehweg calls situational, the *topoi* are, in fact, formulas too broad and apparently more disturbing to communication than good semantic tools. From a rhetorical perspective, however, their malleability may be precisely the key that explains why jurists use the same concepts over long historical times, without implying in the use exactly the same semantics.¹¹

The processes of political legitimation of the content of the law, often mentioned by Viehweg, require a significant amount of attention and the invoking of the authority of tradition. As jurists are well aware, some concepts sound "eternal". While explaining the concept of property or contract, it seems possible to use the Romans. When talking about contemporary concepts, it seems necessary to start by telling the "story" of how it was created, thus generating a feeling of continuity that plays a significant rhetorical role. Rather than assuming these concepts as human creations dated in time and guided

¹¹ For further examples, see Gambino in this volume.

by political, economic and cultural debates, the use of a concept created out of time, that is, of an origin as distant as mythical, means two things. First, it is possible that we are facing one of those concepts that express a permanent structure of human life, and as such, lasts long. Second, it is possible that the invoking of its long history in Western legal thought serves to avoid the debate about the determinations of the present – facilitating its legitimation – and to make a change in the meaning happen, as effective as it is subtle. Thus, instead of proposing a new concept and having to act rhetorically to put it into the lexicon of time, something that already exists is used and its scope and content are altered.

The examples we brought in item four of this text, always invoking Viehweg, are illustrative of another movement. More than preservation, these are moments when, in fact, innovation appears. Not by chance, if the reader is attentive. Viehweg's three argumentative movements explore, precisely, the great historical ruptures that constitute modernity and its fundamental aspects: the Enlightenment, the creation of modern science, the industrial revolution. As he points out, Jhering was not alone in his concern with development, a key concept for his historical time, and his intervention was fundamental in recreating a legal dogma capable of responding to the challenges posed by industrialization.

Gustav Hugo was looking for an expression that would allow him to dialogue with the philosophy of his time, especially with Kant, and at the same time express the moment that legal knowledge was going through, that is, its need to offer elements of criticism to positive law, at the same time that an interest in history was growing. Seen as one of the founder members of the Historical School in Germany, his three questions about law as well as the introduction of the expression philosophy of law can be seen as important steps in building a separation between the functions of legal knowledge that guided the development of the science of German law in the following centuries.

Viehweg recovers several authors to show the changes in the model of argumentation used in modernity, and they all are part of this same scenario, preparing what will come, especially the discussions that will help to present legal knowledge as scientific, in the wake of the modern model of science that will impose itself in the 19th century to all fields of knowledge.

To explore more deeply these moments when innovation appears, or when we simply operate with usual concepts endowed with another semantic content, is work for the continuity of our research. The insight combining Kosel-

leck's work with that of Viehweg has guided us fruitfully so far. We hope that this will continue in other texts and in further academic dialogues¹².

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¹² A very interesting way of thinking about innovation can also be found in this volume, in Meccarelli's contribution.

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Latent innovations in a legal system and civil law categories

Francesco Gambino

1. Radical and latent innovations in a legal system; 2. The legal language in conceptual, cultural and juridical innovations. Language as a thought-forming organ; 3. Confining the semantic space of reference; 4. Principles, general provisions, new forms of reasoning; 5. Structure of a legal system and the balance of powers; 6. Authentic innovations and individual cognitive horizons

1. Radical and latent innovations in a legal system

Among the themes arising from a reflection on *innovation* and *transition* in a legal system, one in particular stands out: the most problematic, which could be defined as the theme of the “passages” constituting what is “novel” in the legal world. The law assumes many faces;¹ as many faces as the legal phenomenon can assume according to different conceptions. Therefore, in agreeing on giving transition an “ascriptive” function, as a way in which innovation can manifest itself,² it is nonetheless essential to mark a general distinction. For the purposes of this paper, in a legal system (or, if you wish, in a legal order),³ it is necessary to differentiate *patent and radical innovations* from the *surreptitious or latent innovations*.

The first – the *radical* innovations – boil down to the historical facts that

1 Simply consider the debate that took place in the early decades of the 1900s on the confusion between the different tasks assigned to legal science and to legal practitioners (in particular from the perspective of wilfully exercising a function) that produced the result whereby the former became “the featherbed of practice”. Merkl (1987) 122.

2 See in this volume the chapter by Massimo Meccarelli.

3 In this preliminary reconstruction, let us leave aside the question of what can be defined as ideal and what is real and effective in an order, namely the difference between a set of norms and the powers that produce and enforce them, turning the law into “organization, structure, the very stand taken by society”. Romano (1962) 27. The lesson delivered by Santi Romano, who reported the crisis of the hierarchy of sources and refused legal positivism. Grossi (2006; 2011) 49. In this context, we can read the essays by Gunther Teubner (2005). More recently, a number of contributions on Teubner’s thoughts by scholars in civil law, sociology, and in the philosophy of law have been published. See Febbrajo/Gambino (eds.) (2013).

gave rise to new institutions and new regulatory frameworks that are operational, binding and effective. The others – the *latent* innovations which also project new contents within given semantic formations –⁴ arise from those who take on the task of interpreting a given system (legal practitioners, legal theory, caselaw) and from the way they narrate the law, with a view to meeting the expectations and the prospected expectations of a community. Here, the difficulty – as will be outlined below – lies in understanding and recognising the *authenticity* of innovation as it arises from the meaning, dimension and stability of the *phenomenon that breaks* with the past.

To give an idea of radical innovation – and its incidence upon language and culture – we can recall a few historical events.

By way of example, let us think of the period in the mid-19th century in which Italy was getting ready to take the road of political, legislative, economic and administrative unification in the name of continuity with the experiences of the past.⁵ This was the period in which theoretical elaborations and legal categories suffered the impact of history. The cultural framework enshrining the 1865 Civil Code, which was moulded on the Napoleonic Code of 1804, features the economic and social needs of bourgeois ideology:⁶ the individual, subjective rights, the contract, succession *mortis causa*. The exegetic method, exercised in compliance with the order laid down by the civil code, results from the closely-knit intertwining between legal theorizing and law-making activities, “gathered together in the unity of the liberal State”.⁷

To make another example, reference can be made to the changes brought about to the political and legal order through the introduction of a Constitution.⁸ In Italy, the Republican Constitution of 1948, by placing itself at the apex of the legal order, downgrades the *Provisions on the law in general* to a

4 If we trace the reasoning of Koselleck (2010) 51-66, we can clarify the fact that “innovating, in this sense, means finding a way of projecting new contents within semantic formations that, whether created for the sake of innovation or not, can be adequately mirrored in already shared understandings”, as explained in the chapter by Claudia Roesler in this volume.

5 The widespread concern of preserving continuity with the past especially in administration matters is highlighted in the essay by Cassese (2011) 305 ff., whose title quotes the words that Camillo Benso di Cavour wrote in a letter of 19-10-1860 (306, nt. 4).

6 Irti (1990) 4.

7 Irti (1990) 5.

8 The relationship between the law and the Constitution is cited as an example of *transition and innovation* in the contribution by Meccarelli in this volume.

lower-ranking legal source. The soundness of the normative method spread among scholars and practitioners of law up to that moment was fatally shaken. The coming into force of the Constitution marked a new philosophical approach – the philosophy of values –⁹ which opened up to the prevalent interests enshrined in the Constitution. The “value-based” points of view supporting the argumentations dictated by socially recognized values¹⁰ meet the axiological need to control the jurist’s interpretative and constructive efforts.

We can ultimately backtrack even further in history and recall the abolition of the *nexum* with which the debtor was enslaved to the creditor, who was “entitled to keep the *nexus*, i.e. the *obligatus*, in chains, beat him with a cane, and oblige him to work for him”.¹¹ The “terrible effectiveness” of the *nexum*, which was the cause of unruly fights between patrician creditors and plebeian debtors, persisted until the passing of the *lex Poetelia* in 326 BC, which abolished the institution. This is the point in history in which the modern sense of obligation arose:¹² the transition from the personal and coercive subjugation of the debtor to a relationship of a pecuniary nature. The “obligation” loses its original connotation and is normalized, if I may use this term.

The word, stripped of its etymological halo and acquiring a new evolutionary phase of meaning, frees itself of the material person of the debtor.

It is the very first trace of the full objectification process that, with the full development of a legal culture, will ultimately end up by anchoring the liability arising from the obligation to the debtor’s assets.

2. The legal language in conceptual, cultural and juridical innovations. Language as a thought-forming organ

In what we here define as *innovation*, both patent and latent, the common ground is laid down by the language.¹³ It is within the linguistic structure that innovations – forms of thought capable of stabilizing and prevailing in solving legal and social problems – are created and recognized.¹⁴ The stabilization process – in the presence of an authentic conceptual, cultural or legal inno-

9 To explore this approach, which in Italy will follow other paths of reasoning, see the reconstruction made by Irti (2011) 98-100.

10 Mengoni (1996) 85.

11 Bonfante (1946) 372.

12 Bonfante (1946) 304, 372.

13 See Roesler’s chapter in this volume.

14 See Roesler’s chapter in this volume.

vation – is made possible by the interaction of a given language with our way of conceiving and perceiving the world. Because language, as we can read in the writings of Humboldt, is “the thought-forming organ” and must exist in close connection with the laws of grammar and the laws of thought.¹⁵ In my opinion, by following this line of thought – developed in the studies of Franz Boas and Roman Jakobson –¹⁶ we can affirm that the legal language does not function differently from other languages and can also say that it – exactly like any other language – is not so much characterized by what it enables one to think as much as by what it “habitually obliges given types of information to think”.¹⁷ In Guy Deutscher’s reconstruction, when a language “obliges its speakers to pay attention to certain aspects of the world every time they open their mouths or prick up their ears, at the end these linguistic habits can translate into mental habits that produce consequences on memory, perception, associations or even practical skills.”¹⁸ In the light of these findings, we could say that the stability of an innovation in the world of law is marked by the conversion of a linguistic option into a linguistic habit. It is a sense of constraint that, in the totality of meanings in which we live, leads to increasing or decreasing our possible options.

The meaning of certain things on our lives and goals manifest themselves in a new way. We could even speak of a new form of usability¹⁹ of legal things. Thus, for example, with the abolition of the *nexum*, the concept of obligation begins to lose its material connotation and enters a new domain of constitution and validity,²⁰ generates new rules for use, and launches new theoretical processes. With the abolition of the institution of the *nexum* or, in more recent times, of the arrest for debt (provided for in the civil code of 1865) or of

15 Wilhelm von Humboldt’s insight on the theme of the influence of language on the mind is cited in the writings of Deutscher (2016) 151-158.

16 See the Boas-Jakobson principle as recalled in the words of Deutscher (2016) 173-179.

17 Deutscher (2016) 175.

18 Deutscher (2016) 175.

19 Gianni Vattimo (2000) 23, dwells on the German term *Zuhandenheit*, used by Martin Heidegger (1971) 88-92 in the context of the “worldhood” of the world, in which the usability of the meaning of things in connection to our lives “is their way of giving themselves a more original meaning, the way in which they *first* come up in our experience”.

20 See the reference made to the studies conducted by Georges Canguilhem on “transformations” and on the “shifting” of concepts, Foucault (1999) 7.

the “stone of shame” used in a little town in Sicily up to the 1920s,²¹ debt is necessarily destined to assume a less afflictive and menacing meaning, psychologically remote from being synonymous to social guilt and shame.

Both in radical and latent innovations, words, concepts, and their variations in meaning, penetrate the legal system, modifying its features.²² While in radical innovations, the construction of a new symbolic space is achieved in the sign of an evident break with the old world,²³ in latent innovations, it is the hidden measure of the break with the past that indicates the degree of authenticity of the innovation. In my opinion, in the latter there is the decisive need – pointed out by Koselleck – to effectively prove their newness and what results to only be a new way of appearing of unvaried structures.²⁴ Here, the sense of constraint underlying a new mental habit arises from an unspecified point of intersection between a certain way of narrating and of interpreting the law through the expectations of communities in a given historical period.

3. Confining the semantic space of reference

In the perspective outlined by scholars of the language, reference should now be made to the evident tendency in civil law to replace solid and age-old categories of the past with new paradigms and conceptual orders. In an approach that also involves other disciplines, it becomes essential to confine the semantic space of reference. This space – against which the system’s latent innovations are measured – is occupied by judicial decisions in which the selection of the legal judgment criteria, by reflecting on the ways in which right or wrong is awarded in the trial, carries the weight of an underlying cultural responsibility. We are here referring to the context of wilful acts that, by deciding the outcome of a controversy, require control techniques over the argumentations used to justify the soundness of the decision. The matter of the fact is that civil law, not always necessarily bound to the facts, presents the possibility of inventive elements in a situation in which the *audience*²⁵ is

21 See in this respect the *lectio brevis* titled *Dalla «pietra del vituperio» al «bail-in»* delivered by Portale (2016).

22 Here, we see the return of the idea of the “ascriptive value” of the transition as an innovation: “a temporal condition capable of attributing specific regimes and contents to the law” as is explained in the chapter by Meccarelli in this volume.

23 See Foucault (1999) 6-7.

24 See on this point the chapter by Claudia Roesler in this volume.

25 In the development of the new rhetoric propounded by Chaïm Perelman (1966) 21,

commonly made up by the parties to the trial, the higher-ranking judge and the scientific community.

4. Principles, general provisions, new forms of reasoning

It is now twenty years that in Italy the idea of a “factual” law – already present in our studies and in our Courts of justice – has been growing. The third party that decides on the case is no longer “the mouth of the law”. He or she is reluctant to keep to the letter of the law and, in awarding right or wrong, does not hesitate to base his/her decision on constitutional principles, general principles, extra-judicial judgment criteria, the new *lex mercatoria*, the law of the European Union and also on foreign legal orders. A rigidly hierarchical system is being challenged by a flexible and heterarchical system, more in line with the cultural environment of *common law* systems. General principles and general provisions operate as “flexible things” that, by penetrating the judges’ decisions, threaten the primacy of the law, making it inconstant and uncertain. It is the consequence of an overall conception of the law that, reflecting the erosion of the juridical nature of the State, sees the law as a phenomenon in perennial movement, in which the balance in the legislator-judge relationship changes, the general provisions become the conceptual crux from which a new law evolves, and general principles penetrate the norms and overturn their interpretation. In certain approaches, the design is to adjust the law to social, economic and natural facts and to adapt legal forms to the specificity and urgency of the case at hand. This can be done in a variety of ways. From the perspective of the interpretation activities carried out within the framework of Italian legal theory and caselaw, notice should here be taken of two new phenomena: *a)* general principles and provisions applied against the norms; *b)* building a legal paradigm on principles. In the first case, general provisions and principles prevail over legislative regulation. The second case raises the problem of building a legal paradigm in the absence of a norm.

The following pages will focus attention on the future application of the general good faith provision on the basis of the definitions given by Italian caselaw. The decision of a district court states that Art. 1375 of the Civil Code, which lays down that “the contract must be executed in good faith”, must be

the *audience* is defined as “the group of people that the speaker wants to influence through his argumentations”.

understood as referring to the principle of objective good faith which, as it regulates every phase of the contract – from its formation and interpretation to its execution – configures a general provision grounded on the duty of solidarity laid down in Art. 2 of the Constitution and functions as a criterion of reciprocity, regardless of the existence of contractual or legal obligations to this effect.²⁶

Here, the reasoning can unfold in simplified and intuitive terms, more open to intercept the application of other disciplines.

To act in good faith in executing an agreement means to honour a general duty – which applies to all the parties to any contract – to safeguard (or, if you like, to protect) third party interests to the extent that this does not entail a significant sacrifice of one's own interests. The general good faith provision is grounded on the idea that contractual agreements are incapable of expressing everything. They are necessarily incomplete programmes. The approach taken by some legal practitioners in tackling economically relevant contracts is to clarify and specify a multitude of required behaviours (stating the definition of the terms used in the contract in the recitals to analytically indicate the content of contractual clauses). The most common approach is to leave it up to the interpreter to fill in, so to speak, some of the effects of the contracts by applying the general provision. This is what makes the principle of good faith in contracts contentious. Under the legal relationship of a contract and lacking the indication of the importance of a given behaviour therein, the parties are given ample scope of discretion. If the parties reach an agreement on a controversial behaviour in the execution of a contract, then there is no issue. If, on the contrary, they come into conflict, it will be up to the judge to decide by denouncing, so to speak, the legal existence of the behaviour that, deemed relevant from the point of view of the good faith principle, will oblige the wrongdoer to reimburse the damage.

Let us imagine a first situation. Is the contracting party obliged to tolerate that – for unexpected reasons, extraneous to the will of the parties – the goods purchased are delivered to a different address not far from the one indicated in the contract? The law tends towards proportionality and therefore the answer here is positive. In this case, by virtue of the good faith principle, the creditor is obliged to tolerate a defective performance of contract. Already the words “tolerate” and “defective” performance (not “non-performance”)

²⁶ Court of Appeal of Rome, Section II Ruling N.5300 of 16 December 2010, here in summary, in the databank of *De Jure*.

well express the idea underlying the contractual good faith principle of protecting third party interests to the extent that this does not entail a significant sacrifice of one's own interests.

Different is the case, pursuant to the general good faith provision, of the recognised possibility of extinguishing one's pecuniary obligations with a cashier's check²⁷ (which, according to an approach taken in caselaw, opens the door to the use of alternative means of payment other than cash). This is an innovative solution that overlaps the literal wording of Art. 1277, Para.1, of the Italian Civil Code which reads as follows: "pecuniary debts are extinguished with the legal tender in the State at the time of the payment and for its nominal value". From the perspective of interpretation, there is the problem of understanding if contractual good faith – as the specification of the constitutional principle of social solidarity – is capable of converting the expression "legal tender" (meaning money in cash) into a more generic expression (for example: "monetary value") in order to attribute to the debtor the faculty of paying with a means other than in cash. Relying on a constitutionally-oriented interpretation of Art. 1277 of the Italian Civil Code, the Court of Cassation, in joint session, imposed on the creditor – who is obliged to behave in good faith – the obligation to accept means of contractual performance that are alternative to the delivery – at home – of money in cash.²⁸ This interpretation of Art. 1277 of the Civil Code – according to the Court of Cassation – "goes beyond the literal wording and, by grasping its authentic sense, adapts it to the changed reality".²⁹

This is an approach that – although sensitive to the new and increasingly sophisticated money circulating instruments – raises the problem of a new form of reasoning or, if you prefer, of a new legal argumentation technique. The term of reference in the selection of the criteria for the judgement – criteria ultimately aimed at awarding right or wrong in a trial – is no longer the "sense made patent by the specific meaning of the words" used by the legislator, meaning thereby the literal meaning to which the interpreter is bound pursuant to Art. 12 of the *Provisions on the law in general*,³⁰ but rather the

27 See – on the issue of cashless payments – the ruling of the Court of Cassation, Joint Session, N. 26617, 18 December 2007, in *Corr. giur.*, 2008, p. 500 ff., with a note by Di Majo.

28 Court of Cassation, Joint Session, Ruling N. 26617, of 18 December 2007, op. cit.

29 Court of Cassation, Joint Session, Ruling N. 26617, of 18 December 2007, op. cit.

30 In the case at hand, the univocal meaning of the words "legal tender" contained in Art. 1277 of the Civil Code.

fundamental duty of social solidarity enshrined in Art. 2 of the Constitution, which is useful to strengthen the argument of contractual good faith in the case at hand.

Let us now turn our attention to legal disputes over the abusive nature of exercising the faculty of withdrawing from a dealer agreement without cause.³¹ Can the licensor (in this case, automobile manufacturer *Renault*), holding an entitlement attributed to it by a clause – considered to be valid – withdraw from the agreement (in the case at hand, with notice) without being obliged to compensate the damage caused to the dealers³² thus excluded from the contractual relationship?

According to the Court of Cassation, also in this case, good faith, fair play and the “fundamental duty of social solidarity” (Art. 2 of the Constitution) are the arguments that disclose the judicial control over the performance behaviour of the parties (in this case, the abusive nature of the licensor’s concrete exercise of the right of withdrawal).³³

As the Italian legal order lacks a provision on the abuse of a right, Courts are recognised the power to control the aims and ways also of a withdrawal from contract that was agreed to be free and unconditioned. In the ruling cited, the Court of Cassation relies on the general good faith provision in judging the reasons of the withdrawal, to establish if the formal legal framework was used for an end other than the reason for which it was developed and if the exercise of a right was actually abusive.

This conclusion, which raises some perplexity, waters down and downgrades the argumentative value of some civil law categories, age-old conceptual orders, and well-grounded interpretative approaches to legal problems (also present in the decision of the Court of Appeal of Rome quashed by the Court of Cassation). For the trial judge, the reasons of the automobile manufacturer’s withdrawal are unquestionable or, if you prefer, unpierceable because upheld by the concept of *validity*, the notion of *potestative right*, and the principle of *private autonomy*.³⁴ To declare a clause (the withdrawal

³¹ Court of Cassation ruling No. 20106 of 18 September 2009, in *Giust. civ.*, 2009, I, p. 2671.

³² Note should be taken of the investments made by dealers and of other economic losses.

³³ See on this point Court of Cassation ruling No. 20106 of 18 September 2009, in *Giust. civ.*, 2009, I, p. 2671.

³⁴ In this sense, the Court of Appeal of Rome (No. 136/2005, Sect. XI, of 28-9-2004-13-1-2005, in the ruling quashed by the Court of Cassation) laid down that “if autonomy

clause) *valid* means evaluating it to be in compliance with the higher-ranking norms contained in the Civil Code, marking it as belonging to the legal system which, through its rules, approves the content of the clause. In other words, the act of withdrawing in conformity with a valid clause, does not fall under the protection of the good faith provision.³⁵ In line with a traditional school of thought, University courses teach that a potestative right (in the case at hand, the right of withdrawal) is the power to produce a change in another person's legal sphere. It is not a right of claim which, in order to be fulfilled, needs the cooperation of the debtor, but a potestative right. Exercising this right puts the other party in a position of subjection: he/she cannot avoid being subjected to the effects of the changes in his/her legal sphere. Lastly, reference is made to the private autonomy principle which, in a liberal order, also arises from the power to freely determine the content of the contract (Art. 1322, Para. 1 of the Civil Code).

These are the arguments relied on by the Court of Appeal of Rome to form its legal judgment on the concrete exercise of withdrawal without a cause. However, as has been pointed out, the reasoning developed by the Court of Cassation takes a different direction. The performance behaviour – in exercising the right of withdrawal – is no longer narrated according to the conceptual order with which jurists were accustomed to govern legal phenomena (the category of validity, the notion of potestative right, the principle of autonomy) but is placed in a new perspective in which the terms of reference change in formulating a judgment and awarding right or wrong (general good faith provision, duty of social solidarity, the specific case).

5. Structure of a legal system and the balance of powers

In the light of this approach we can now draw some conclusions. The scope of inquiry into the innovations in a legal system bear the effects of the historical relevance of particular determinations (a constitution, legal institutions, the interpretation of a law, the legal category of a people at a given point in time). It does not – or at least not yet – involve the radical question in the phi-

recognised the possibility of withdrawing from the contract, there is no need to control the cause of the exercise of power”.

³⁵ Relatively to the problem of the extent of the application of general good faith provisions, reference should be made to my book. See Gambino (2015) 207-239.

losophy of law: *quid ius?*³⁶ It does not intend to include what remains beyond the space-time conditions of particular determinations.³⁷ It does not – or at least not yet – question why law exists in Man; nor does it single out, establish or confine conceptual autonomy within the “juridical” activity proper. The area of *legal innovations* or *transitions* is a field of research that delves into the knowledge of what belongs to the law (*quid sit iuris*) in a given place and time.

In this perspective and in illustrating the sense of latent innovations in a legal system, focus has been placed on the new ways of reasoning in certain judicial decisions in order to justify a well-grounded solution. It will always be possible to uphold the argumentative prevalence now of the law, now of a constitutional principle, now of a traditional category and now of the specific case to be decided. These oscillations often conceal single cultural stands, ideological principles, comprehensive conceptions of the law. The underlying problem is to establish the *place of certainty* that harbours the possibility of legally measuring our behaviours; which means establishing the rules of the game so that individuals may know what to do.³⁸ This symbolic space – as revealed with respect to the issues put forth above – is at times disputed by the univocal words used by the legislator, at times by the programming force of the words with which private individuals commit to future actions and express their autonomy from the legal order, and at times by the judicial precedent³⁹ which, as we have seen, is increasingly sensitive to historic occurrences, concrete cases and performance behaviours.

36 In raising this fundamental question (*quid ius?*), Immanuel Kant (2009), in his famous introduction to legal theory, makes it a point from to distinguishing it from the question on “knowing and stating what falls under the law (*quid sit iuris*)”, which means “what the laws in a given place and given time say or have said”, warning people to abandon “a merely empirical theory that is void of rational principles,” and “searching for the sources of such judgments, in order to lay a real foundation for actual positive legislation”.

37 This would only have the purpose of establishing why all that is commonly qualified as the law exists. Cotta (1985) 13-14.

38 In respect of the different conceptions of the law, it will always be possible to question the criteria of legality but not the indeclinable need to be able to *predict, control, and foretell* the legal consequences of our actions. The law, by its very nature, considers and plans the future in the prospect of giving a new direction to the actions of Man.

39 Already in the ‘90s, Luigi Mengoni (1992; 2011) 253, perceived the need, in Italian law, of the urgency of a theory of judicial precedents compatible with the legal orders of *civil law*.

In a democratic system based on communicating vessels, underlying these different ways of reasoning thrives the balance of power and conflict between the legislative and judicial powers, between the “word” of the legislator, who always reasons on general and future things, and the “word” of the judge, who represents the place in which the law, by deciding on particular issues, is made *ex post*.⁴⁰ If, on the one hand, the idea of an *ex post* law – increasingly present in modern judicial systems – of a judicial phenomenon disconnected from the political power, and of creative and incalculable judicial decisions, in some cases becomes a *defence*,⁴¹ on the other hand, it raises the problem of the *limits of compatibility* between the expanded scope of freedom of a power and the survival of a given social system that we confide will continue functioning.

6. Authentic innovations and individual cognitive horizons

Once the paradigms now making their way into the Courts of justice become permanent, repetitive, uniform structures, they will end up involving the structural elements of the legal system. It will be the longevity of the effectiveness of persuasion of new language formations and conceptual orders or, if you prefer, *of the continuance of the break with the past over time* that will qualify the innovation as authentic. The problem remains of matching a certain way of interpreting the law with the expectations of a society. We could say that an unspecified number of individual narrations⁴² of a historical, cultural, or legal memory, made at a given point in time, matches the

40 Cassese (2009) 34, wrote: “today the law is, to a large extent, fruit of the *ex post* research into sets of separate rules deriving from the multiplication of norm-producing centres”.

41 Nowadays, note should be taken of the ambiguity of legislative language, the wording of texts that does not correspond to the intended political action, and the introduction of obscure, inaccessible norms difficult to understand.

42 In commenting European humankind, religious incredulity and the attitude to give up philosophy up to scientificity, Husserl (2014) 41-42, wrote: “Man is only capable of developing an idea from his own position, from his own cognitive and sentimental horizons, thus forming paths in which to believe, as they constitute his vision of the world, provide him with personal evidence of an idea and of a norm of the action guided by what is thought and believed to be absolute. This attitude exists in human groups that share the same original tendencies which subsequently concretise in a common way of feeling and proceeding”.

sense expected by a community. However, the degree of intensity of those expectations is impossible to know and to prove. The correspondence between individual cognitive horizons – where ideas develop and psychological drives and feelings thrive⁴³ and where judgments are formed and facts and laws are interpreted – and widespread consensus within a society, even if supported by quantitative indexes and statistical data, can only be inferred. After all, the process by which the unfolding of certain things over time is represented or narrated is not typical of science but of artistic creation.⁴⁴

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43 The psychoanalytic experience recalled in the chapter by Douglas Pinheiro in this volume, dedicated to melancholy as a method to understand modernity, has long revealed the error of considering “our intelligence as an autonomous force”, independent from “emotional life” and affective interests. Freud (1976) 134-135.

44 It is useful to consider here the findings of Croce (2017) 33-37, on reducing history under the general concept of art.

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The words of Justice and the long Italian transition (1943-1958)

Antonella Meniconi

Discourse is not simply that which translates struggles or systems of domination, but is the thing for which and by which there is struggle, discourse is the power which is to be seized. (M. Foucault, *The Order of Discourse*).¹

1. Introduction; 2. To speak in a courtroom; 3. Judicial speeches of transition; 4. To write judgments in times of change; 5. Conclusion: words matter

1. Introduction

My paper explores how the language of magistrates is one of the keys to interpreting the Italian transition to democracy. The period between 1943 (the fall of Fascism) and 1958 (when the new Superior Council of the Judiciary, the *Consiglio Superiore della Magistratura*, was created) was decisive for the construction of the new Italian democratic system. In the debate at the Constituent Assembly (1946-47) the “democratic” integrity of the judiciary was much discussed. In particular, the credibility of the upper ranks was questioned especially by left-wing anti-fascist parties, also in relation to the dilatory attitude of the Corte di Cassazione (Court of Cassation) in proclaiming the results of the referendum, on the choice between monarchy and republic. Those judges, and especially those at the top of the judicial pyramid, had been trained and had operated during Fascism thus it was asked: what would be their degree of “loyalty” to the new democratic system?

First of all, the purge of the magistrates closest to the regime (as more generally happened in the administration for senior officials) was not at all incisive; indeed, on the basis of accurate research, historiography has now ascertained it was limited to a few cases and not always exemplary. During the entire period, about four hundred magistrates out of a thousand cases examined were subjected to purge proceedings, which amounted to bringing about ten percent of the entire judiciary to trial before the commissions. However,

1 Foucault (1981) 52-53.

of these only a few dozen were effectively expelled from the judiciary, while some preferred to avoid the shame of going to trial by requesting and obtaining a retirement from the judiciary, but then returned, in some cases, to the judiciary in subsequent years.²

Moreover, it was a curious game of parts; those who participated, *ratione officii*, in the purging commissions of the various administrations (special rules provided for this) were magistrates which created a sort of double role difficult to interpret, even though it was to give the judiciary an undoubted centrality.³

The issue of democratic integrity was strongly re-proposed because of the role that the judiciary itself played concretely in the application of the Togliatti Amnesty of 1946 (launched only a few weeks after the referendum), where the Court of Cassation (in particular Section II) was accused of excessive leniency towards those who were accused of collaborationism.

More generally, as far as the application of the sanctions against Fascism was concerned, starting from a stricter approach by the Corti d'Assise Straordinarie (Extraordinary Assizes Courts) and the special section of the Court of Cassation of Milano near the end of the war, the orientation of the judiciary soon tilted in favour of a moderate application of the new sanctions, despite the circulars issued by the various Ministers of Justice (Umberto Tupini and Palmiro Togliatti) ordering the application of the legislation against Fascism "with speed and rigour". A sort of "resistance" by the judiciary to the punishment of crimes committed by Fascists marked the transition phase between the old and new regime. A difficulty, which can even be described as "human", of the high magistrates to distance themselves from the mentality, network of relations and extra-legal considerations with which they were imbued during the Fascist era, emerged with force. In this sense the continuity between Fascism and the new Republic did not only pass through a continuity of rules and regulations, but also of mentality, of culture. Moreover, also the power relations within the judiciary and the relationship with politics were marked by continuity, even if in a different constitutional system. Ultimately, the relationship between justice (State) and citizens, i.e. an authoritarian one, changed almost not at all.

Thirteen years after 1948 (the year of the new Constitution), in 1961, a

² Meniconi (2017), also for the bibliography.

³ As Massimo Pilotti (see below) president of the purge Commission of the Ministry of Foreign Affairs.

young magistrate and future founder of Magistratura democratica (Md), the left-wing judiciary's part (1964), Marco Ramat, would speak of a problem, also generational, of the high magistrates, trained during Fascism (if not before) with constitutional innovations. The young judge emphasized the different visions at stake as:

leaps into the unknown, according to the former, democratic evolution according to the latter; let's adapt the Constitution to the previous laws, says (and tries to do) the former; let's adapt the previous laws to the Constitution says (and tries to do) the latter.⁴

Furthermore, Alain Bancaud, referring to the French judicial system – somewhat similar to the Italian one at that time – highlights that the high magistracy “does not stand for immutability. But for social position and family origin it is predisposed to stability and the reproduction of the past”. The point – according to him – is not so much resistance to innovation, but prudence, circumspection: “in the judicial, and therefore legal habitus, change as permanence is in fact written”. As a high French magistrate pointed out in a speech at the inauguration of the 1962 judicial year, the language used by judges could only suffer from this “circumspection”, from this resistance to neologisms, to fashionable formulas, to the point of being tinged with traditionalism and capable of receiving innovation very slowly (at the pace of a lowland infantryman, a “*fantassin de plaines*”).⁵

However, also in relation to the recent authoritarian past, at the time of the election of the Constituent Assembly and during its proceedings, the issue of justice was on the agenda in both the political and legal fields.

As we know, the principle of autonomy and independence of the judiciary was explicitly acknowledged in the Constitution of 1948. It was thus possible to achieve a strong guarantee of the “external” independence of the judiciary from the other branches of power, on the basis of a model of a non-bureaucratic judge freed from the executive and endowed with its own self-governing body. The principle of the “judge subject only to the law” (art. 101 Const.), which Piero Calamandrei, more than anyone else, wanted included in the constitutional text, opened the door to the “internal” autonomy of the judiciary, that is, the autonomy of each individual judge in the exercise of jurisdiction and in the application of the law.

However, much remained to be done to bring about this disruptive consti-

4 Ramat (1961) 849-850.

5 Bancaud (1993) 111 ff.

tutional innovation, inasmuch as two major obstacles persisted: the hierarchical constraint in relation to the exercise of jurisdictional power and the implicit conditioning of magistrate' careers by superiors, in part residual from the 1941 judicial law, implemented by the Minister of Justice, Dino Grandi.⁶

In fact, after the end of the war, shortly before the institutional referendum in 1946, all or almost all of the most repressive provisions of the Fascist judicial system of 1941 had already been eliminated, with the so-called *Guarentigie Law*, at the initiative of the Minister of Justice, the secretary of the Communist Party Palmiro Togliatti. In particular, the hierarchical relations of dependence of the "pubblico ministero" (Public Prosecutor) on the minister were abolished at that time and were replaced by supervision, but the hierarchy of the organisation of 1941 was not altered at all. Togliatti and his collaborators decided, in that delicate phase of transition, not to question the prerogatives of the high judiciary. No overall reform was therefore carried out, but only the "surgical" removal of certain parts of the 1941 law, which thus "purified" remained for a long time the fundamental text for the Italian judiciary.

The "internal" independence of the judiciary thus remained a chimera for many years. The existing structure – with the high judiciary sitting in the seats of the Court of Cassation, at the head of the entire judiciary and, above all, responsible for checking constitutional legality – remained unchanged for a long time. Thus, the articles of the constitutional text, which called for the establishment of the *Corte costituzionale* (Constitutional Court) and Superior Council of the Judiciary, were not implemented. The two bodies intended to change the legal and institutional framework were not created until 1956 and 1958, respectively.⁷

In this context the judiciary (especially the high ranks) undoubtedly played an important role, although not free from ambiguity and resistance to change. Above all, the language used by them is a telltale sign of continuity, and sometimes ruptures, in the judicial system.

In fact, the persistence over time of a language that resisted the constitutional innovations of 1948 is evident at least until the end of the 1960s. Only in that period of social and institutional changes, a new model of magistrate would begin to emerge not without many struggles, a model more aware of the constitutional interpretation of the law and less conditioned by legal formalism.

Within this general framework, the first aspect that I will deal with is the language used by the "procuratori generali" (public prosecutors) in public oc-

6 R.d. no. 12 of January 30 1941.

7 For a bibliography see Meniconi (2018b).

casions, such as the speeches pronounced during the solemn inaugurations of the judicial years in the courtrooms of the Corti d'appello (Courts of Appeal) and Cassation. The second aspect I focus on is instead less evident and more difficult to explore, and it concerns the writing of the judgments, which, even if intended for publication, were written instead by judges in the privacy of their studies. Here they worked on the basis of precedents, legislation and doctrine, but also on the basis of the cultural, political and social values of the time that they and their colleagues at the board perceived as such; values that were not only reflected in the substance of the decision but are also translated, consciously or unconsciously, into the use of certain styles and formulations over others. Finally, I will draw some brief conclusions on the difficult path of democratic innovation during the long Italian transition.

2. To speak in a courtroom

During the inaugurations of the judicial year a real “theatre” is staged. A theatre with costumes (the togas of ermine), decorated armchairs, and a well-informed audience (authorities, other magistrates, experts, journalists), and where, using a theatrical word, a representation or rather a self-representation of justice takes place.

The reference to the theatre is not accidental: the scenic aspect, the placement in space of the main characters, the costumes, the division of parts between those who “act” and those who “assist” as spectators, is required by the very nature of the judicial institution. As Michel Foucault reminds us, the judicial institution “solemnises beginnings, surrounds them with a circle of attention and silence, and imposes ritualised forms on them, as if to make them more easily recognisable from a distance”⁸. In a courtroom one waits in religious silence as if one were in church for the word of the magistrate who carries out justice, but also who communicates the “secrets” of the exercise of jurisdiction to the public. Foucault describes it as a ritual:

Ritual defines the qualification which must be possessed by individuals who speak (and who must occupy such-and-such a position and formulate such-and-such type of statement, in the play of dialogue, of interrogation or recitation); it defines the gestures, behaviour, circumstances, and the whole set of signs which must accompany discourse; finally, it fixes the supposed or imposed efficacy of the words, their effect on those to whom they are addressed, and the limits of their constraining value. Religious, judicial,

8 Foucault (1981) 2.

therapeutic, and in large measure also political discourses can scarcely be dissociated from this deployment of a ritual which determines both the particular properties and the stipulated roles of the speaking subjects.⁹

In Italy, under the 1865 law, judicial speeches were originally intended to present “an account of the way in which justice was administered throughout the jurisdiction of the Court and the tribunal”¹⁰ but soon became increasingly significant, especially for the solemn place where they took place (the monumental palaces of justice, the courtrooms decorated with flags).¹¹

It is no coincidence that the ritualistic, symbolic, and even religious element has been highlighted not only by Foucault but also by many scholars (such as Antoine Garapon and Michele Luminati) with reference to the very nature of the judicial function (which needs its own ritual for its legitimacy) and to the figure of the magistrate (the so-called “Priest of Themis”, the ancient Greek goddess of law, to quote the title of a book by the magistrate Guido Raffaelli appeared in 1948 to “instruct” the new judges).¹²

But it is mainly the judicial speeches, pronounced on the public occasions of the inaugurations, that constitute – in my opinion – a decisive moment in the process of building a professional identity. Depending on the period, they changed in nature and content (but not in their external form), sometimes limiting themselves to reports, other times hinting at interpretations, while in some cases rising to real statements in terms of politics of law, or politics tout court.¹³ Since 1959 the Superior Council of the Judiciary has, however, by means of some memoranda, made the inaugural speech obligatory, establishing the subjects who are entitled to speak, the timing and themes of the report.¹⁴

To begin with, the speeches pronounced in the Liberal era (1861-1922) appear in a rather free and personal format and with a certain variety, both in the structure adopted and in substance. There was not yet a rigid and defined *cliché*, although of course there were rules.

Among the sample of speeches I have examined from the Liberal period,

9 Foucault (1981) 62.

10 Art. 150 of the judicial law of 1865 (r.d. no. 2626).

11 Da Passano (1991).

12 Raffaelli (1945).

13 For judicial speeches from the 1990s in the climate of competition between the magistrature and politics see Sarzotti (2006) 13 (which quotes Bourdieu, 1986).

14 Sarzotti (2004) 139.

unsurprisingly references to national unity and the myths of the Risorgimento are prominent, as well as the principle of legality to be kept “always inviolate”. For example, in 1877 the ancient motto “*Sub lege libertas*” appeared as an epigraph of the first speech to the newly established Court of Cassation of Rome by its Public Prosecutor, Senator Giuseppe De Falco. He appeared to take care to justify the pronouncement of the speech itself saying it was “*vestigia costumanza*” (vestige of an ancient Roman custom) born in Rome as “any custom useful for civil coexistence” that the first day of the exercise of public administration opened with “an oration intended to specify its duties”. And the high magistrate followed by recalling the importance of these speeches, and above all the importance of the new Court born as “the first truly national court (...) to complete and guarantee national and legislative unity”.¹⁵ The double combination “national unity and legislative unity” and the hendiadys “fulfilment” together with “guarantee” (*guarentigia*) gave a sense of the task that the jurists, and in particular the practical jurists as magistrates, felt responsible for themselves in 1877, during Italy’s nation-building.

Following the early 1900s, as has been noted, the problem of adapting the law to the new political, social and economic reality quickly became a focus of reflection,¹⁶ such as happened in the eloquent speech in 1912 by Lodovico Mortara, Public Prosecutor of the Court of Cassation of Rome.¹⁷ Here, the celebrated jurist took the opportunity to carry out an accurate analysis of the situation of the judicial body, expressing his fears of the risks that it would become a “particular oligarchy”, if an overall “judicial reform” was not carried out. Without entering a discussion on the matter (later in 1919 Mortara was able as minister to propose this reform which was however rejected), we can observe here the words of the high magistrate-jurist which constituted an actual manifesto of judicial policy, even in opposition to the approved reforms of the Minister of Justice Vittorio Emanuele Orlando (note, for example, the expression used by Mortara of “democratic institution” always with regard to the judiciary).¹⁸

15 De Falco (1877) 6. All the cited judicial speeches of the Courts of cassation and, from 1923, the unified Court of cassation are accessible at the websites of the *Biblioteca centrale giuridica* and of the *Corte di cassazione* <https://www.giustizia.it/giustizia/it/mg_22_4_4.page>; <http://www.cortedicassazione.it/corte-di_cassazione/it/archivio_storico.page;jsessionid=F79DDE3B2C2469DF323E946B2D4BFBFB.jvm1>.

16 Cazzetta (2013) 19.

17 On the figure of Mortara see: Meccarelli (2012) and Boni (2018).

18 Mortara (1912) 25.

But it was not only eminent personalities such as Mortara who dared to speak out in a context intended, at least formally, for the modest task of presenting judicial statistics. Indeed, during the First World War and immediately afterwards, other public prosecutors showed an awareness of the new times and, in relation to them, the new tasks of justice; they became increasingly conscious that the contingent changes imposed by the war on the legal system would become permanent.

The patriotic emphasis obviously resonated (such as the list of the fallen of the war from the various courts pronounced at the beginning of the speeches) or the reference to the “communion of ideals and intentions” between the different Courts.¹⁹ But there were also observations and even timely references to the necessary transformations of the law, for example, the recognition of certain patrimonial rights for women (in fact the abolition of marital authorisation dates back to 1919), which aimed at a certain openness, even if often accompanied, in the style of the time, by prudent specifications. For example, the speech of 1918 which proclaims itself “certainly without feminist propaganda”, and goes on to say:

these lofty womanly virtues in all social gradations, from the royal Majesty to the modest, humble worker of the factories and fields, constitute the best titles of merit for the homeland and cannot fail to open the way to the greater demands and realisation of the gentle sex’s civil aspirations.²⁰

In short, the speeches full of doctrinal references, read as a whole and even in their variations, allow us to understand how the numerous economic and social upheavals caused by the war and their impact in the legal field were perceived inside the judiciary as well as how they were represented externally. Furthermore, struggling with the swirling transformations in the civil and criminal fields, the high ranks of magistracy came to propose a “systematisation” of the tumultuous war legislation, an unprecedented phenomenon that was already creating a new jurisprudence.²¹

Everything or almost everything changed, however, during the Fascist period, when the preambles of the speeches were transformed into an occasion of celebration of “Fascist justice”, with precise ritual themes (references to the Homeland, to the Duce and to the House of Savoy). Now, the “new” in-

19 De Blasio (1918) 23-24.

20 De Blasio (1918) 18.

21 Meniconi (2018a).

augural addresses presented a very rigid structure, almost a pre-established and, given the occasion, predictable “plot”. The introduction inevitably began by greeting the authorities and paying homage to the regime and to the Savoy family. Then followed the “greetings and memories of magistrates”, always invariably, “outstanding”, especially if deceased or retired, and then to the “illustrious lawyers” and other figures who had left the district in the past year. Then came the more “ideological” core, linked to the events of Fascism and its achievements (the Empire in the years 1935-36, for example) and to their implications in the sphere of justice (e.g. the institution of the Judge of minors and that of the Labour Tribunals were greeted with great approval). The central part of the speech (generally separated from the rest, which was a constant element of some importance) was more technical and was usually dedicated (as in the past) to the jurisprudence of the judicial offices of the district, not only with reference to statistical data, but also observations and judgments on trends in civil and criminal justice. This was the part of substance or content, and was in its own way, the most useful. Then followed the figures for judicial affairs of the district.²²

If the rhetorical motifs followed one another repeatedly on a predetermined scale, they were nevertheless often (but not always) encased (almost “encapsulated”) in the part of the speech intended for them, which was generally the introduction. It was almost as if the rhetoric should not be supposed to invade the space dedicated instead to the more technical aspects, in which the language remained more aseptic and “professional”. As was also noted in the case of bureaucratic communication between administrations, the permeability of the linguistic system was not total during Fascism, instead a sort of invisible division seemed to combine style and vocabulary according to the topics.

Moreover the speeches were obviously influenced by the language of the time, expressing the “pivotal units of the semantic system” around which Fascist ideology and culture centred with a series of canonical themes that were continually drawn on in public communication, such as vitalism, virility and physical strength, war, mysticism and mythology, moralism, greatness and defence.²³ Frequently a pragmatic homage to the “moralising and pacifying” action of Fascism permeated the whole report or was put before the beginning of the individual parts. But sometimes the speech continued in the oppo-

²² Meniconi (2014).

²³ Among others: Leso (1978).

site direction by highlighting the structural changes in crime and not, as the regime would have liked, of its disappearance.

At the same time, the speeches of the period were still characterised by linguistic expressions that originated not only from Roman Law but generally from ancient and traditional classical culture. This was typical of the training of the magistrates (and of the jurists in general) who wrote the speeches who reached maturity mostly at the end of the nineteenth century. For example, in 1934 the whole preamble in the speech made by the Deputy Public Prosecutor Piredda in Cagliari, together with extensive references to the specificity of his native Sardinia and its people, was punctuated with quotes from Dante and Virgil.²⁴ And this was not untypical.

On the other hand – as has been noted –²⁵ the degree of adherence to Fascism (and its styles) on the part of a public prosecutor could already be inferred from the title of the speech. There was a clear difference between those who simply and aseptically entitled their speech *Inauguration of the Judicial Year* (like the Venice Public Prosecutor Carlo Alberto Mandruzzato in 1934–35), and those who instead evoked *Fascist Justice* in the “second decade of the march on Rome” as did the very Fascist Public Prosecutor Marongiu in Ancona that same year.²⁶ Again, in the report by Palermo Public Prosecutor Carlo Bartolini in 1934, the central part was soberly entitled *Court Jurisprudence*, avoiding any reference to Fascism, but rather focusing exclusively on the decisions taken in 1934.²⁷

In 1938 the inaugural speeches of the various Courts of Appeal were suppressed, perhaps to avoid that minimum of internal debate and freedom of expression that the inaugural rhetoric had nevertheless let seep out in the previous period. The only survivor was the report of the Public Prosecutor of the Court of Cassation. What was the reason for this radical decision? Perhaps the public – and in some way political – nature of the inaugural speeches, in which the bare judicial statistics district by district were exposed (albeit mediated through rhetoric which dispersed and in some sense hid the meaning), was not congenial to Fascism.²⁸ The same judicial statistics could appear in

24 See Piredda (1934).

25 Focardi (2012) 58.

26 Mandruzzato (1935); Marongiu (1934).

27 Bartolini (1934).

28 In fact, in 1937 there had been the case of a Public Prosecutor of the Court of Appeal, Francesco Saverio Telesio, who had been dismissed from his office in Bologna for mentioning the growth of crime in that district. See Archivio centrale dello Stato, Minis-

themselves “dangerous”, even if they only showed the reality of crime or litigation in implicit contrast with the idea of public order and social coexistence propagated by the regime.²⁹

3. Judicial speeches of transition

After the fall of Fascism in Rome in 1943, judicial speeches were progressively reinstated. At this time, their language was one of transition. The first inaugural speech was made on 4 January 1945, after the pause caused by the Nazi occupation of Rome, in the Aula magna of the Court of Cassation with the “traditional solemnity” (as is written in the introduction to the official text in italics), but was significantly entitled “Justice and national reconstruction” (this same title was also used in 1946). Even though its author, the new Public Prosecutor, Massimo Pilotti,³⁰ recognised that something had changed, if only because of the presence, duly noted, of many high-ranking officers of the Allied forces in uniform, his emphasis was on “continuity”. The word recurs twice in the speech. He asserted to the Supreme Court (and through it to the whole judiciary) the merit not only of having refused to take the oath to the illegitimate government, but of having “represented the continuity of the State and justice” in a moment of deep crisis, almost as if to mark – he emphasised with pride – the “solidity of the ethical conscience of our judiciary”. It should be stressed, however, that he used the words “democracy” and “democratic” (government) three times, referring to the need to repeal the laws of the past regime that were incompatible with the new system.³¹ Pilotti concluded his speech with a paragraph on “The citizens, the State, the judges”, underlining the value of the respect of human personality and the role of judiciary (“the judges are the State”) in defence of the citizens. His whole speech was punctuated with ample quotations in latin from Dante (again!) and the Gospels (“we cannot but call ourselves Christians” were also his words, perhaps aware of his consonance with Benedetto Croce).³²

tero della Giustizia, Ufficio superiore del personale e Affari generali, Ufficio II, Magistrati fascicoli personali, IV versamento, b. 55, fasc. 69707.

29 In 1941, the discretionary power was given to the Minister of Justice to allow or not the speeches of the public prosecutors (art. 88 r.d. no. 12 of 1941). See Neppi Modona (1997) 823.

30 See his biography: Meniconi (2015).

31 Pilotti (1945); Pilotti (1946).

32 Pilotti (1945) 20f.

In fact, the calming wind of continuity was blowing in that courtroom; after all it was also felt in the same professional path of the high magistrate. According to Prime Minister De Gasperi, Pilotti was an “internationally renowned jurist” who represented the Italian government in the League of Nations from 1933 to 1937 (at the time of the Fascist conquest of Ethiopia in 1935 and the subsequent sanctions against Italy), and was, in the words of Justice Minister Togliatti, “a person of trust in the regime”. According to others, however, the magistrate had not made a career during the regime. What was not said at the time of his confirmation as prosecutor by the Parri government (September 1945) was that the high magistrate was a monarchist.³³

In the meantime, however, in the inaugural speech of the following year in 1946, a fearful caution seemed to mark the words of Pilotti, caution especially towards the nascent democracy. Therefore, in the context of a “circumspect revision” of Fascist legislation, the Court of Cassation had taken on the responsibility of “expressing from the experimental nature of individual cases the trends of the new democratic legal conscience”. Ample space was then devoted to the political justice of the time, i.e. the activity of the special courts (Alta Corte di giustizia, Corti di Assise Straordinarie and the Sezione Speciale della Corte di Cassazione di Milano) set up to judge the crimes committed by the Fascists during the Repubblica Sociale Italiana (Italian Social Republic, which was the puppet government set up by the Germans after they reinstated Mussolini as leader in northern Italy). Finally, after the usual doctrinal and comparative excursus (from Corpus Iuris to Machiavelli), the Prosecutor hoped that a parliamentary assembly would soon be elected, as a full expression of the will of the people and the judiciary would be guaranteed full independence.³⁴

However, it was Pilotti’s subsequent preamble of his speech in January 1947 that demonstrated that even (and above all) during the time of the transition the words spoken in the “temple of justice” carried weight throughout the country. The speech, entitled *Justice and constitutional reform*, stood out for the almost total and deliberate absence of “textual” references to the new Republic (result of the referendum of 2 June 1946) and to the new the Head of State Enrico De Nicola, causing one of the first Republican scandals. De Nicola, present in the courtroom and in the front row, was deeply and visibly irritated. At the beginning, Pilotti’s speech limited itself to a general reference to the need to engage in common work (which “was concord”) and

33 Meniconi (2015).

34 Pilotti (1946).

to go “forward for the Homeland” as “the Italian people with many lives” were accustomed to do. The next part, relating to the institutional referendum on the form of a monarchic or republican state, stated only:

The Supreme Court intensified its activities considerably compared to previous years. Its work was delicate and extensive, and included the opportunity of carrying out a task of verification of the highest manifestation of popular sovereignty.³⁵

That was all. That reticent almost provocative prose and especially the vulnus of the absence of homage to the head of state was much discussed in the now free press and even at the Constituent Assembly.³⁶ It ended with the removal of Pilotti from the Supreme Court and his transfer as President of the Water Court, which was presented however as a “promotion”.³⁷

The post-war period did not mark a turning point with respect to tradition as far as the inaugural speeches were concerned (apart from the absence of some controversial episodes), however some small changes can be noted. The first thing that can be noticed is the attention paid now to the Constitution (the word is often quoted in 1948 and 1949 speeches) and the new bodies of the Republic (the President of the Republic and the Superior Council of the Judiciary, above all).³⁸ Another element is the re-proposal of a structure which – as we have seen – originated from the past. Thus, at the beginning, the greeting to the authorities, the mention of the main political and institutional innovations of the year (e.g. in 1950 and 1951, Italy’s participation in the first European Union)³⁹ and the commemoration of the deceased colleagues. Then followed the sections dedicated to civil and criminal jurisprudence of the Court which generally referred to the necessity to strengthen the role of the judiciary. Furthermore, from 1949 the Court of Cassation’s report also included data from the various Courts of Appeal, providing a more complete picture of the justice situation in Italy, although there were specific speeches of the different Courts. The necessity of a judiciary reform began to appear in

35 Pilotti (1947) 2. Another paragraph was dedicated to the central role of the Court of cassation in the forthcoming Constitution.

36 Archivio storico della Presidenza della Repubblica, Fondo Enrico De Nicola, Corte di Cassazione. Inaugurazione Anno giudiziario.

37 In 1952, Pilotti was the first President, representing Italy, of the Court of Justice of the European Coal and Steel Community (ECSC) until 1958.

38 Macaluso (1948); Miraulo (1949).

39 Miraulo (1950); Miraulo (1951).

1950 (and continued to be present) with reference to the increasing number of judicial affairs (and the “self-sacrifice” of the magistrates) and the problem of a skilled recruitment of young magistrates. In any case, sometimes – as in the pre-Fascist period – the preambles were the opportunity for the high magistrate to present his own point of view of the justice’s problems, to reiterate that the judiciary was almost a “religious ORDER” (in capital letters) that requires “sacrifice” and “absolute dedication”.⁴⁰

Reading these speeches one can understand the self-representation of the Court of Cassation in those years, of a body that saw itself at the centre of the State not only as the highest jurisprudential interpreter, but also as a constitutional judge (conferred to it by the Constitution pending the establishment of the Constitutional Court). As is well known, already in 1948 the Court of Cassation tried to dilute the most disruptive constitutional innovations for the existing system. It elaborated, within the Constitution, the famous distinction between preceptive rules (that is to say, preceptive rules of immediate application and preceptive rules of deferred application) and programmatic rules, in which only the former were able to be directly applied, while the latter required the subsequent intervention of the legislator. This was not all. Through the cautious and technical (almost aseptic) words of the public prosecutors the difficulty of adapting, despite the statements of principle, to the new democratic order can be understood. A new order in which, for example, a licence for the bill posting of political posters was yet necessary because article 21 of the Constitution, which guaranteed freedom of expression of thought to all, was interpreted as a programmatic rule;⁴¹ or the measures concerning police confinement (legacy of Fascism) were not subject to appeal to the Court because they were administrative and non-judicial decisions. In this case and in others a strict notion of “personal freedom” seems far from article 111 of the Constitution. In general we can perceive a tendency to maintain the law from the Fascist period, even if this was expressed according to democratic principles.⁴²

40 Eula (1954) 33. The speech is very long indeed (69 pages instead of the usual 30-32), because from this year statistical data and analytical description of the jurisprudence are put apart.

41 Eula (1954) 29. Article 113 of the T.U. on Public Security of 1931 was later declared unconstitutional by the Constitutional Court in its first decision in 1956. Another example is the art. 53 Cost. on the progressiveness of taxes, which was judged also to be a programmatic rule. See Manca (1955) 13-14.

42 Manca (1955) 18; Eula (1950).

In 1952, the inaugural address of the judicial year was pronounced by Antonio Azara, the new Public Prosecutor of the Court of Cassation, at the time also senator of the Democratic-Christian Party and future minister of Justice (1953-1954). Azara had been a member of the National Fascist Party from 1932 and he had supported its movement, ideas and doctrines with words, writings and action. As a member of the scientific committee of the journal "Diritto razzista" ("Racist Law"), in 1945 he was subjected to the purge process for "the apology of Fascism", from which he came out unscathed and managed to prove, among other things, that he had served "not a party" but his "country"⁴³. In his speech of 1952 the high magistrate explained the rulings issued by the Court in matters of the right to strike guaranteed by article 40 of the Constitution⁴⁴. After correctly recognising that article 40 was a preceptive and non-programmatic rule, and therefore immediately applicable, Azara went on to present other rulings, which had placed limits on the right to "political" strike. And then, by way of comment, he added:

The Supreme Court observes that the strike, whether or not it is a crime, as a purely economic-social act, determines in any case a disruption and an imbalance in the orderly development of the relations of associated life; in the worsening of the contrasts between the opposing categories (in the case of an economic strike) and between the various social classes (in the case of a political strike). There may, then, be widespread discomfort, an eventual exaltation provoked by verbal and press propaganda, an easier suggestionability, so that, also due to the feeling of greater difficulty of the police bodies in protecting the public and private rights of the citizens, fanatical and audacious strikers can draw incentives to commit damages which, in addition to violating the right of others to property, can endanger and cause serious injury to the entire community.⁴⁵

These strong words, among which the expression "fanatical strikers" stand out, reveal much of the underlying values of the high judiciary of those years, but also, obviously, of its instinctive reactions, so to speak, to the political and

43 Archivio centrale dello Stato, Ministero della Giustizia, Ufficio superiore del personale e Affari generali, Ufficio II, Magistrati fascicoli personali, IV versamento, b. 193 bis, fasc. 70689.

44 Art. 40, "The right to strike is exercised within the framework of the laws that govern it", but see also art. 39 "The trade union organization is free. No other obligation may be imposed on trade unions other than their registration at local or central offices, in accordance with the provisions of the law".

45 Azara (1952) 17-19.

social conflict taking place in the country (it was the time of the occupation of the lands in the South; the massacre of Portella della Ginestra had taken place on May 1, 1947).⁴⁶ From the highest bench of the Italian justice apparatus the words of Azara sounded like a very clear pro-government position.

In the first twenty years of the Italian Republic, the speeches were (and continued to be) moments of exaltation of the vision of the world and of the values placed at the base of the judicial decisions, more than a public account of the activity carried out by the various organisms, as prescribed by the new Superior Council of the Judiciary. It could be affirmed that the “interdict” (in the Foucauldian sense) of those years consisted in the absence of references (or in the presence of only negative references) to the social and political changes that the Italy of reconstruction was facing.

Meanwhile, the structure and terminology used remained practically unchanged compared with the previous model in their “stylistic lexical stereotypes”. One cannot be surprised, for example, if in the speech of 1953 the words of condolence for the death of Vittorio Emanuele Orlando echoed the rhetoric of the early years of the century (the Homeland ecc.); or if the family (with the emphasis placed on the value of “family cohesion” against divorce) remained the pivotal unit of the social order represented in those courtrooms; or if the concern for modesty, pornography and minors were always present in those complicated and contradictory 1950s.⁴⁷ This was the case in a speech of 1954, pronounced by Ernesto Eula,⁴⁸ Public Prosecutor who would become the first President of the Court later that year. He, another magistrate who had been closely tied to the Fascist Regime, underlined the importance of the “Christian morale” for the “strengthening of the Nation” and the pure “italianissimo” love of the Homeland.⁴⁹ We could say that also in this case tradition seemed to win against innovation.

As was highlighted by Antonio Santoni Rugiu and Milly Mostardini in their book from 1973, in these speeches the language remained “immobile, outside time and historical space” and took care to transmit “principles and

46 In 1950-51, 62 workers were killed by the police, 3,000 were wounded, more than 90,000 were arrested and 20,000 were sentenced to a total of 7,598 years in prison. See Scarpari (1976) 136; Spriano (1986).

47 Macaluso (1953) 4; Miraulo (1951) 6; Miraulo (1950) 26.

48 Archivio centrale dello Stato, Ministero della Giustizia, Ufficio superiore del personale e Affari generali, Ufficio II, Magistrati fascicoli personali, IV versamento, b. 497, fasc. 81806.

49 Eula (1954) 5.

values” that were considered “universal, immovable and immutable”. In this regard the public prosecutors felt as though they were yet “priests of Justice”, while society was – in the 1960s and 1970s – in full ferment.⁵⁰ Therefore, the words pronounced in this “theatre” constitute an important window on judicial life, where continuity and ruptures were harshly confronted (at least, from the end of the 1960s). From 1969, indeed, “counter-inaugurations” were organised to coincide with the official speeches of Public Prosecutors, which were defined by the young protesters of the Magistratura democratica as “rancid choreographic representations, made of tinsel and pompous disguises”. These demonstrations were also the symbolic expression of an iconoclasm – sustained Michele Luminati – which aimed to undermine the myth of the magistrate-priest and to put the judiciary in relation with social change, not without contradictions.⁵¹

But prior, when the new Constitutional Court was finally established in 1956, the speeches also reflected the conflict, albeit softened, that was arising between the two bodies,⁵² defined, in the usual classical way, the “Vestal of the Law” and the “Vestal of the Constitution”.⁵³ The prosecutors tried to react to the loss of the central role of the Court of Cassation in the system and to the growing criticism in the only way they could outside the judiciary openly, and that is in these speeches.⁵⁴ The same speeches, that since 1865 had constituted the official but also freer way to express the high judiciary’s point of view on the world, for a determined historical period became the seat of this extreme resistance: the last bulwark of a model of magistracy that was by now fading.

4. To write judgments in times of change

In his famous *Elogio dei giudici scritto da un avvocato* Piero Calamandrei wrote that the judgments should be composed by the magistrate “with his head in his hands gathered and motionless” in his office, sheltered from outside influences.⁵⁵ As is well known, however, these acts are intended, if issued by a collegiate body, for discussion in the council chamber (secret discussion,

50 Santoni Rugiu/Mostardini (1973).

51 Luminati (2002) 307.

52 Manca (1956); Pafundi (1957).

53 Pafundi (1957) 14-15.

54 See also Pafundi (1958); Giglio (1959).

55 Calamandrei (1999) 32.

in which dissenting opinion is not allowed, contrary to what happens in other countries) and then for publication. The judgments should – according to Calamandrei – avoid any extraneous influence (here the jurist was referring above all to the Fascist regime that had just fallen), but in reality beyond their specific object and content they reveal how much the magistrates had welcomed and shared (or not) the new democratic values in the years of transition.

Certainly, judgments constitute a very different and more complex source compared to judicial speeches destined as they are to affect people's subjective situations, while the latter are limited to describe the orientations of jurisprudence and, if necessary, indicate the limits of judicial policy. Also, the form is obviously different with the former intended only for reading, the latter enjoying instead a public performance, an orality (although they are then corrected and eventually amended for publication). Yet, if we disregard the content of these acts and focus on the style, some complementary traits emerge; traces of a common judicial language, marked by the era in which it was articulated, but also by a permanence in time beyond the political (and constitutional) changes that seems undeniable. However, a study on the style of judgments would require – as is evident – much greater research than what we can and propose here. Hoping that more in-depth and systematic research will follow from this work, we will limit ourselves to provide some suggestions for further reflection.

In Italy, but not only, in the last twenty years the language of judgments has been thoroughly analysed by numerous scholars, jurists, but also recently linguists. Different types of judgments (criminal and civil, of merit and legitimacy) have been examined, a corpus of databases have been built with new computer tools.⁵⁶ Recently, conferences promoted by the University of Florence and the Accademia della Crusca, as well as by the Scuola Superiore della Magistratura (High School of the Judiciary), have focused on the language of judgments.⁵⁷ After all, the attention is more than justified if, using Bambi's acute definition, it is true that the trial represents a real "forge of a new vocabulary",⁵⁸ or a container of a plurality of levels of discourse (of lawyers and judges) in the civil trial⁵⁹ and,

⁵⁶ Mortara Garavelli (2001); Bellucci (2002); Cortellazzo (2003); Ondelli (2006); Ondelli (2012); Dell'Anna (2013). From an historical point of view, see Mazzacane (1998).

⁵⁷ Bambi (2016); since 2004 first the Csm then the High School of the Judiciary have organised courses on the language of jurisprudence for magistrates.

⁵⁸ Bambi (2016) 8.

⁵⁹ Dell'Anna (2013) 100.

again, a linguistic “melting pot” (the criminal proceedings).⁶⁰ It is also worth remembering the perhaps most complete definition that belongs to the greatest scholar of the Italian language, Tullio De Mauro, according to whom the trial is a true “linguistic amalgam”, in whose different phases “all types of texts and speeches, all types of linguistic acts and all possible types of (in)comprehension are crowded and pressed”. From what De Mauro calls a “crucible without equal” he claims the “judge must know how to extract the crystal of the sentence”.⁶¹

Before the recent profusion, there were two seminal studies each different from the other, that provided the foundation for subsequent in-depth work. In 1970 a book edited by a magistrate engaged in the running of Magistratura democratica, Federico Governatori, entitled *State and citizen in court. Political evaluations in the judgments*, critically examined the interpretative schemes used by the Court of Cassation and several courts of merit in some judgments concerning the “political” crimes (e.g. outrage, violence, resistance to public officials, vilification of constitutional institutions, demonstration and seditious gathering).⁶² The intent was to investigate the “socio-cultural values expressed in jurisprudence”; the work was also part of a wider research including the themes of family ethics, labour relations and obscenity: in particular it was an analysis of the political-ideological conception of magistrates as it emerged from the 613 judgments analysed.

The subject matter chosen was clearly delicate and sensitive in its own right, capable of revealing the complex relationship between the authority of the State (not only the judicial apparatus but also the police apparatus, among other things) and the individual, in what is called the authority/liberty dialectic.⁶³ In short, the researchers who collaborated in the book edited by Governatori – magistrates, sociologists, for the most part (the research was promoted by the National Center for Prevention and Social Defense of Milan, founded in 1948 and very active in the field of sociology of law throughout the 1960s and 1970s) – analysed the rulings of judges issued against the same crimes, in different historical periods: the liberal period (1905-1915), a decade of the Fascist period (1925-1935), and the first twenty years of the Italian

60 Bellucci (2016) 117.

61 De Mauro (2002) XI.

62 Governatori (1970) 5 ss. and 109f.

63 A theme in the same years at the centre of another book by Giuliano Amato, dedicated to the figure of the public prosecutor: Amato (1967).

Republic (1949-1963). Although well aware of the limits and difficulty of the analysis they hoped that it could be a road to be explored in depth, so that it could be demonstrated – these are their words that also reveal the ideal intent of those years – “in concrete terms that justice can and must be for man and not vice versa”.⁶⁴

What were the results of this “experimental” work aimed at revealing the inspiring “values” of judgments as keys to interpreting the law? It was found that the value judgements denoted a continuity in the decisions that went beyond the specific historical-political moment (certainly important all the same) in which the judgments were pronounced. Indeed, what emerges is a degree of the judges’ adherence to the ideology transfused into the current legislative system they were called to apply, but also, and most interestingly, that it involved all judges. It also concerned the vision of the values to be protected and defended by the State, which were already present in the current legislative system of the period prior to the one under examination. More explicitly, among the particularly significant interpretative attitudes what stood out was an authoritarian and classist vision of the role of the State that did not seem restricted to the Fascist era, but extended from the liberal period up to the first twenty years of the Italian Republic. However, a strange yet justified time misalignment also emerged, so that in the first years of Fascism the judgments for opinion crimes had been milder, while in the first part of the Republican age the punishment of these crimes had become more severe. In short, it was not only the political time that mattered, but also the culture of the individual magistrates formed in the different eras which evidently influenced their judgments.

What always prevailed, in reality, was the cultural formation of jurists over the existing legal systems, therefore, without any doubt, the upper echelons of the judiciary in the 1950s were more conservative than those of the 1920s and 1930s, which had formed in the liberal culture between the late 19th and early 20th centuries (for example, having been taught by a professors such as Lodovico Mortara). If this factor – the cultural climate of the judges’ formative years – is not taken into proper consideration, one cannot understand the delay and slowness with which the Italian judiciary, in the first decades of the post-war period, would assimilate and implement (in its jurisprudential activity) the new constitutional values.⁶⁵

64 Governatori (1970) 276.

65 Borgna (2017).

The second early study is the one carried out by Giuseppe Barbagallo and Mario Missori, who analysed a sample of the civil jurisprudence of the Courts of Cassation from 1870 to 1923 (and, in another study, the decisions of the Council of State),⁶⁶ also based on the important considerations of Gino Gorla on the “style of judgments”.⁶⁷ They defined seven criteria through which to read the form of the judgments, among which – we point out – the one related to “value judgments”, and reached some conclusions that – in extreme synthesis – leaned towards the “detached style rule”, that is, the judgments examined did not present value judgments, at least in civil matters, “while more frequent exceptions are found in criminal matters”.⁶⁸ But here further judgments should be analysed on a sample basis to verify the presence or absence of extrajudicial evaluations. Some surveys carried out on criminal judgments produced instead by bodies of the so-called transitional justice, such as the Extraordinary Assizes Courts of 1945, show how – perhaps unsurprisingly – “the detached and technical style” gave way to “the political passions of the time”, that is, there was no lack of personal or value judgments expressed at the juncture of the war that had just ended.⁶⁹ Moreover, it is also true that – as the antifascist jurist Mario Bracci wrote in 1947 – from the orientations of the Court of Cassation in relation to the application of the sanctions against Fascism and the subsequent amnesty of 1946 there appeared an “ill-concealed dislike” for the “new” world, which perhaps emerged disorderly, but which wanted to revive the country from its ruins. Above all the high judiciary seemed almost to practice a sort of “isolation” from the turbulent reality, within the well-guarded fortress of law and tradition against an alleged revolution.⁷⁰

From these two analyses, as confirmed by more recent work (here I am thinking of that of Maria Vittoria Dell’Anna),⁷¹ emerges a tendency, almost a permanent character of the sentence, of the so-called “hiding” of the judge in the traditional and outdated legal syllogism (in his being the *bouche de loi*, the “mouth of the law”). This was in order to affirm more clearly the impartiality of the law and its neutrality with respect to all parties involved

66 Barbagallo (1998).

67 Barbagallo/Missori (1999). See Gorla (1968a) and Gorla (1968b); and the pages that Tullio De Mauro dedicated to legislative Italian language: De Mauro (1963) 424 ss.

68 Barbagallo/Missori (1999).

69 D’Alessandro 53. See also Di Massa (2019).

70 Bracci (1947) 1107.

71 Dell’Anna (2013).

through the use of the impersonal “the question is unfounded” in itself;⁷² or in the “total” choice of the historical narrative past continuous tense, with which the facts of the controversy and the reasons given by the parties are reported, which serves to distance the judge from the questions and exceptions of the lawyers, but which flattens the events in an indistinct past, not being used, as would be correct, to express an action of duration (e.g. “riteneva Tizio, disponeva Caio”).⁷³

The structure of the criminal sentence, as has been noted from an examination of a corpus of documents, appears to be the product of a historical tradition that resists in particular in those of the Court of Cassation, fully confirming the self-preserved and self-repeating force of what is considered a sign of sociolinguistic prestige within that professional and social community.⁷⁴ Moreover, more generally, an analysis of the “physiognomy of the sentence” (civil) has confirmed the tendency of Italian judges toward linguistic conservation. According to Michele Taruffo, this is almost a cultural habitus, which often ensures that they do not even identify value judgments that they make for the purposes of the formulation of their decisions.⁷⁵ For example, in their rulings, they give little space to facts, referring when necessary to experience or common sense in order to avoid an analytical evaluation that implies a value judgment. After all, this would be the result – besides an ancient tradition of the Rotal Tribunals of 1600 and 1700 (as pointed out by Gorla in his studies) – of the “bureaucratization of justice” and of the judge who would find his archetype, according to Taruffo, in the Napoleonic reforms. The judgment, therefore, as a bureaucratic act, at the level of style, referred in an abstract way to the office and not so much to the subject who resolved the controversy, becomes “the formal justification of an impersonal decision”. The “impersonal” *stylus curiae* would obviously reverberate in the language, which still presents today (beyond the different jurisdictions and attempts at reform) a strong uniformity, to the point of moving away from common language even when it would be possible (in the part of the narration of the facts, for example).

The continuity of this cultural and ideological model of the judgment perhaps also explains the persistence – even in the phases of constitutional in-

72 Sabato (2016) 80.

73 Cortellazzo (2003) 83.

74 Ondelli (2012) 349-350.

75 Taruffo (1989) 1097.

novation – of an ideal type of magistrate who is merely a law technician, detached from the political temperament and value judgments, extraneous by his nature from social conflicts.⁷⁶

To verify how much this has corresponded to reality in the Italian transition is a very difficult task if you want to start from the judgments. On the other hand – as mentioned above – in judicial speeches the model of magistrates indifferent to political passions and the values of society seemed not be predominant, and, on the contrary, their active participation in the innovation-continuity debate would stand out.

To confirm these considerations, the characteristics of the Italian judgment can be synthesised as follows: the summary of the narration of the facts presented by the writer in a selective way (the higher the degree of judgment the more the facts are intertwined with the law); great importance attributed to the jurisprudence, to the related intertextual references and to articles in the codes; the compulsoriness (the only imposition of the code) of the reference to the laws (and therefore other intertextual references); finally, the impersonality (it has been said) of a system – as Cortelazzo points out – in which judges hide their personal opinion and subordinate it to a collegial vote (if the judge is not monocratic). This entails, in Cortelazzo's words:

a quantitative and argumentative prevalence of the legal motivation over that relating to the facts which are almost exclusively instrumental in the construction of the ruling and reflect the dominant concern of the judge in demonstrating that the judgment always derives from the consistent application of the laws.⁷⁷

Of course, here too we need to distinguish between civil and criminal proceedings, between judgments of merit and legitimacy, and – I would stress – between different historical periods. I have in mind some magistrates' judgments of the 1970s (which at the time were not published in legal journals) published in the first issues of "Qualegiustizia", the magazine of Magistratura democratica. Some of them from 1972 were about "Police authority and freedom of assembly", while the police continued to crack down on unauthorised marches, despite the decisions of the Constitutional Court, even by force. Beyond the merits (i.e. the acquittal of defendants for having promoted the assemblies), what is striking is the language used by these magistrates which aims to criticise legislation ("the legislative discipline of these social facts is

⁷⁶ Taruffo (1989) 1098-1099 and 1103.

⁷⁷ Cortelazzo (2003) 83.

often inadequate and inapplicable”) and which, in general, appears to be very similar to common language.⁷⁸

In short, from these young magistrates came not a “pernicious esotericism” (according to Bellucci’s definition), not an “anti-language”, as stigmatised by Italo Calvino in a well-known article for “Il Giorno” in 1965,⁷⁹ but a language that was plain, and comprehensible to all, and moreover was inspired by democratic criteria and constitutional values.

5. Conclusion: words matter

Since the 1960s, the judicial world has been clearly divided into two blocks (the conservatives and the innovators), and the “words” of the judges’ speeches, albeit in a different way to their decisions, have become one of the topics of confrontation, even symbolic.

After this “long” transition, with the lost war, the fall of Fascism, the division of the country in two, the Resistance, the establishment of the Republic and the promulgation of the Constitution, the field of confrontation was undoubtedly represented by the application of the Constitution as a disruptive innovation in Italy. Once the ideology of the judiciary, organised in a unitary way, had been blurred, starting from the 1950s, the model of the bureaucrat judge, of the law technician dedicated exclusively to the formal interpretation of the law and detached from political and social change, also entered into crisis. Whether the model was also in the past a real one or just an ideal type can be questioned even in the light of the most recent studies, but it remained thus fixed in the ideology of the judiciary for many years.

Therefore, the commitment of the judge regarding the value and meaning to be given to the implementation of constitutional innovations is at the centre of this analysis.⁸⁰ We have tried to understand how much of the innovative project elaborated by the constituents in 1948 has been filtered in the judgments, in the judicial speeches, therefore in the words

⁷⁸ *Qualegiustizia* 1, (1972) 16 ff.

⁷⁹ “The main characteristic of the antilanguage is what I would define ‘semantic terror’, that is, the escape in front of every word that has a meaning in itself, as if ‘flask’, ‘stove’ ‘coal’ were obscene words, as if ‘go’, ‘find’, ‘know’ indicate foul actions. In the antilanguage the meanings are constantly removed, relegated to the bottom of a perspective of words that in themselves do not want to say anything or want to say something vague and elusive”. Calvino (1965).

⁸⁰ *Governatori* (1970) 112.

of the judges, until it has become a common, widespread discourse within society.

In reality, the democratic “discourse” struggled to establish itself especially in the first twenty years of the Republic. Well-established permanence and recurring styles were not only verbal tics, but they were expressions of a real ideology, almost a narrative, that favoured continuity over innovation in the democratic sense. In short, the technical-bureaucratic style in the opinion of the rulings (but also in the speeches) may have excluded a “widespread control over the exercise of judicial power, entrusting it in reality only to the class of jurists”. The nature of the judgment that has been described may have ended up becoming the main instrument for “the occult exercise of power and for removing responsibility from the judge”, conditions that, according to some, continue today.⁸¹ One may wonder if and to what extent the constitutional principle of autonomy of the judiciary itself, often recalled and extolled in judicial speeches, found application in judicial practice in those early Republican years. Or again, one may wonder if the same autonomy has remained a screen behind which to conceal the close consonance with the power that once again characterised the high judiciary. Ultimately, the rise of the centrist governments from 1948 certainly had the effect of “freezing”⁸² the scope of innovation contained in the constitutional norms. But this happened also with the active collaboration of an old (and entirely male until 1965) judiciary class, which reached the top of its career passing through the rules imposed by the Fascist regime, often shared by the magistrates themselves.

Perhaps it is no coincidence that in a speech in 1957 the prosecutor Pafundi began with the “bimillenary lesson of Roman wisdom” namely “Servants of the law to be free”, claiming that it was echoed in the precept of Article 101 of the Constitution: “Judges are subject only to the law”.⁸³ A motto which, on closer inspection, had been recalled, albeit not literally (“*Sub lege libertas*”), by Procurator De Falco in 1877.⁸⁴

81 Taruffo (1989) 1104-1105.

82 Calamandrei spoke of “freezing” of the Constitution: Calamandrei (1955).

83 Pafundi (1958) 3.

84 De Falco (1877).

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Rhetoric, technological innovation and legal audiences: the case of the Brazilian Supreme Court

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1. Introduction; 2. Which Rhetoric?; 2.1. The importance of the audience; 2.2. The Empirical-Rhetorical Analysis of Discourse – ERAD; 3. The live broadcast of the sessions and its effects; 4. The rhetoric of the Brazilian Supreme Court (STF); 5. Conclusion

1. Introduction

Traditionally, theories of Law and legal adjudication do not usually include pragmatic elements in the description they make of their objects. Since they are not a product of empirical research, their descriptive and prescriptive intentions normally appear mixed.

Any person, however, lay or trained in Law, would agree upon the fact that legal practice is strongly influenced by elements of empirical nature such as the structure of the courts (amount of cases, formalism, internal bureaucracy), the mindset of the judges (ideology, pre-comprehension, prejudices, tempers), the procedural paths, the intellectual submission of the judges to rhetorical habits, influences and personal connections with the lawyers and parties, social pressure (public opinion), submission to mechanisms of hierarchical control, adequacy to the productivity rules, political connections with the other powers, search for social legitimation etc.

Fortunately, it has built the consciousness that these factors need to be studied, to the extent that they contribute to the definition of the characteristics of rhetorical communities in which the Law, as a social practice, is produced and reproduced. In many countries, this awareness has its origin in the openness to interdisciplinary approaches that have produced the notion of “legal field”¹ as an object of research, which now has priority within Law Schools, especially around the movement entitled “empirical research in law”.²

1 It is important to highlight the importance of Pierre Bourdieu’s work, *The Force of Law: Toward a Sociology of the juridical field*, in the conception that Law could be thought of as a space for competitive struggles, with relative autonomy in relation to the other fields. Bourdieu (1987).

2 Cane/Kritzer (eds.) (2010).

Empirical research in the legal field has increasingly drawn on a set of approaches and techniques for the production and analysis of data ranging from quantitative to ethnographic perspectives. In this universe of distinct epistemological foundations, Rhetoric, as millenary knowledge, provides solid bases for the development of studies focused on the discourses of jurists as cobwebs in the production of a reality (the “world” of Law) that is artificial, dynamic, conflictive and precarious.³

This chapter aims to analyze the relationship between the rhetoric of the Brazilian Supreme Court (Supremo Tribunal Federal – STF) and the live broadcast of the plenary sessions, as an example on how technological innovation can influence the rhetorical patterns of an institution.

The main goal is to analyze how judicial rhetoric and, consequently, the Law itself can be conditioned by this technological element and how it contributes to change the audience (albeit ideally) to whom the judicial discourse is addressed.

In addition to this introduction and a conclusion, this chapter is organized in three parts. In the first, it lays some foundations on how to situate the approach in the universe of perspectives that can be considered “rhetorical”, with a special focus on the concept of audience and the exposure of an empirical model of analysis of legal discourses. In the second part, it analyses the meaning and the effects of live transmissions of the plenary sessions of the Brazilian Federal Supreme Court. In the third and last part, it seeks to show, from data obtained through rhetorical analysis, how the transmissions of the sessions condition the speech of the judges and how this technological innovation can bring considerable changes to what we understand as the production of Law.

2. Which Rhetoric?

Rhetoric comprises a very old set of knowledge. Its origins are customarily traced back to Sicily (now Italy) around 485 B.C. with the first manuals addressed to the people who had to write speeches for the citizens who, in defense of their rights, had to face each other personally before the assemblies.⁴

In Athens, throughout the 5th century Rhetoric became a topic of debate

³ Sobota (1992).

⁴ Breton/Gauthier (2001); Barthes (2001).

between the Socratic Philosophers and the Sophists.⁵ The negative and limited image that it has until the present day was introduced in the History of Philosophy mainly by Plato's texts. In the most striking of them, Plato calls Rhetoric "the art of flattery" (Κολακεία), a set of artifices by which the speaker convinces the ignorant people, seeming to be wise without being so: "The orator need have no knowledge of the truth about things; it is enough for him to have discovered a knack of persuading the ignorant that he seems to know more than the experts".⁶

Aristotle was responsible rescuing (even if partially) the dignity of Rhetoric. Conceiving it as an art, Aristotle denies giving it the same status as the Philosophy, even though he does not conceive it merely as an "art of flattery" (pandering), as his master Plato. In his work Rhetoric, Aristotle describes it as "the faculty of discovering the possible means of persuasion in reference to any subject whatever."⁷

Aristotle's Rhetoric had influence not only among Greek thinkers, but also among the Romans, such as Cicero (106-43 BC) and Quintilian (35-96), who will produced works (*De Oratore* and *Institutione Oratoria*, respectively) that were the basis for several Rhetoric handbooks, containing the canons of the composition of persuasive discourse that are valid until today.

With the end of the Western Roman Empire, the decline of Rhetoric begins. During this long period of hibernation, it became progressively disconnected from its argumentative part moving towards literary criticism, with priority given to figures of style and the ornamentation of discourses.

In the Middle Ages, Rhetoric is still maintained in education through the *Trivium*, the first part of the Seven Liberal Arts, containing the disciplines related to the written word (Grammar), speech (Rhetoric) and thought (Logic/Dialectics).

Rhetoric then arrives in the 20th century, when it experienced a new emergence in the 1950s. This resumption took place mainly through the works of Theodor Viehweg (*Topics and Law* - 1953) and Chaïm Perelman, in a partnership with Lucie Olbrechts-Tyteca, in *The New Rhetoric: a Treatise on Argumentation* (1958).

The Treaty was one of the most important works of the 20th century for the resumption of the tradition that goes back to Aristotle's *Rhetoric*. Its au-

5 McCoy (2008).

6 Plato (2004) 459b.

7 Aristotle (2006) 1355b.

thors maintain that, unlike Logic, the field of argumentation is that of plausible, of probable. They want to refuse the idea that, in cases where it is not possible to reach an absolute truth, we should accept the irrationality of brute force, or violence.

Since rhetorical arguments do not include demonstrations of evident truths, the reference to an audience, that needs to be persuaded, gains importance.

This emphasis on the notion of an audience is central to Perelman's theory and will be the subject of the next topic in this chapter.

In turn, Viehweg's *Topics and Law* marks the rhetorical turn in Law Theory. According to him, our way of reasoning with the Law is the same as that of the former jurisconsults. We start with a problem (and not with a ready and complete system) and seek a good answer to solve it. In this search for answers, we collect starting points to build reasoning that is credible and acceptable to those involved in the practice.⁸

Viehweg's conception caused much discussion in an intellectual environment still shaped by legal positivism. Such discussions projected two less major blocks of theories which, despite their differences, can be considered as consequences of Viehweg's "rhetorical turn".

One of them, of a more rationalist nature, began to develop in the 1970s with the publication of works such as *A Theory of Legal Argumentation* by Robert Alexy and *Legal Reasoning and Legal Theory* by Neil MacCormick, both from 1978. Other authors such as Aulis Aarnio, Aleksander Peczenik and, in the Latin context, Manuel Atienza contributed to the formation of what was called the *Standard Theory of Argumentation*.⁹

These theories have, as background, a concern with the rationality of judicial decisions-while seeking to develop ideal parameters that allow defining a certain decision as justified. They have had a strong influence, although not always with the due deepening, on the decision-making process of part of the judges in some Latin American countries.

The other block of theories and authors is the so-called Mainz School (*Mainzer Schule*), formed by disciples and collaborators of Viehweg, in Germany. With a less prescriptive profile, the authors linked to it will seek to develop perspectives of decision analysis, but without the strong rationalist component of *Standard Theories*. Here, the tendency is to identify rhetori-

8 Roesler (2018).

9 Atienza (2003) 119; Roesler (2018) 28.

cal strategies that characterize the legal discourse, without limiting itself to arguments and without the concern to propose structures and rules with the pretension of universality. This description often exposes the use of common places that are often sought outside the formal sources of Law. Along these lines, it is possible to mention names such as Ottmar Ballweg, Thomas-Michael Seibert, Waldemar Schreckenberger and Katharina Gräfin von Schlieffen (formerly Katharina Sobota).

From this last block of theories, this chapter seeks to highlight the effect that factors considered external (such as technological innovation) have on the discourse and decision-making process of judicial bodies. Understanding Law means, to a great extent, knowing (and being able to analyze) the rhetorical practice of theoretical jurists and, above all, of practitioners. The perspective of this chapter is inserted in this last rhetorical tradition.

2.1. *The importance of the audience*

The entire tradition brings the attention to the importance of the audience in the rhetorical situation.

Aristotle, in the Book II of Rhetoric, argued that the manner by which the speaker places himself in front of the audience makes a great difference in persuasion. This way, by making his qualities clear and demonstrating what can be expected from it, makes the listeners adopt a certain state of mind before him.¹⁰

Perelman and Olbrechts-Tyteca emphasize that the establishment of a connection between the speaker and the audience is a condition prior to the argumentation, even though, sometimes, the latter is a construction of the former. A wrong image of the audience by the orator, resulting of the ignorance or of an unforeseen set of circumstances, may have the most unpleasant consequences [for the speaker]. In their own words:

In real argumentation, care must be taken to form a concept of the anticipated audience as close as possible to reality. An inadequate picture of the audience, resulting from either ignorance or an unforeseen set of circumstances, can have very unfortunate results. Argumentation which an orator considers persuasive may well cause opposition in an audience for which “reasons for” are actually “reasons against.”¹¹

¹⁰ Aristotle (2006) 1377b.

¹¹ Perelman/Olbrechts-Tyteca (1971) 20.

This emphasis on the importance of the audience for the effectiveness of communication and the success of persuasion is perhaps one of the greatest contributions of the rhetorical tradition to language studies. It is not, however, free of difficulties.

The first one concerns the possibility of classifying or even ranking the types of audiences.

Aristotle's classification of discourses according to the different types of listeners and the time in which the discourse is delivered is well known: the spectator of a discourse in the present (epideictic gender), the judge of a past situation (judicial gender) and the judge of a future situation (deliberative gender).¹² Above all, his classification takes into account the already mentioned adequacy of the speech to the audience.

Another well-known classification of the audiences is that made by Perelman and Olbrechts-Tyteca in universal (ideal concept, formed by "all beings gifted with reason") and particular (concrete audiences, which occur in each rhetorical situation situated in time and space). The notion of universal auditorium is what justifies the distinction, assumed by the authors, between persuading and convincing. Persuasion is applicable in front of a particular audience, while a convincing argument is intended to be valid for all.

The idea of a universal auditorium presupposes an idealized group of adults, well informed, educated people not subjected to any type of constraint, for whom the coerciveness of rational arguments would be irresistible. This idea, even if unrealistic, works as a counterfactual ideal that serves as a parameter for evaluating the rationality of a given discourse.¹³

As seen in the previous topic, the concept of Rhetoric adopted in this work does not adopt as a central concept the assumption of a universal audience, as a measure of rationality of a speech. Not only because it is unreal, but above all because it is not necessary, since every concrete community (such as the legal community to which the discourses analyzed here are addressed) has its own criteria about which discursive actions are acceptable or not, tolerable or not. On the contrary, the idea of an audience, embodied, as in Perelman's work, in the discourse of Philosophy (European, white, male), that is able to produce "universal rules of correction and rationality" represents a strong threat of "epistemicide".¹⁴

12 Aristóteles (2006) 1358b.

13 Perelman/Olbrechts-Tyteca (1971) 26-31.

14 "However, if theory emerges from the conceptualization based on the social/his-

The second difficulty concerns the way in which the relationship between speaker and audience is conceived and used. The role of the audience is used by some authors to differentiate between Rhetoric and Dialectics. In a dialectical debate, both speaker and interlocutor would have an active role, while in the rhetorical situation, the role of the audience would be predominantly passive.¹⁵

This accusation, directed towards Rhetoric, of a refusal to dialogue in favor of the pure and simple attempt to persuade seems to be another of the negative senses inherited from the Platonic tradition and should be viewed with reserve.

First of all because, as Atienza mentions, even when the orator speaks or writes, he/she - if he/she is a good orator - considers the reactions of the audience, whether real or imagined. More than that, if we imagine the daily rhetorical processes, we will find that the audience - expanded here to the notion of rhetorical community - conditions the very formation of the subject as a speaker. It is in this coexistence with concrete rhetorical communities (which act and react) that we form ourselves as subjects of discourse.

Secondly, the platonic dialogues do not seem to be a good example of *di-aléquesthai*, since they were produced by a single subject who, as Plebe and Emanuele point out, “resorted to the [rhetorical] strategy of writing dialogues with interlocutors that were convenient to him, always condescending, so that the author is both the one who questions and the one who answers”.¹⁶

This remark is important because it will represent a position to be overcome in the defense of the central thesis of this chapter, that is: that the change in the audience, due to the live broadcasting of the plenary sessions of the Brazilian Supreme Court is a relevant element in the configuration of the rhetorical strategies adopted by the Justices, although they cannot know who, in fact, is watching them during the judgment.

Indeed, the audience is what will define the rhetorical strategies that may be efficient and what types of arguments can or cannot be convincing. Sometimes, identifying the features of the audience can be a complicated task. It

torical experiences and sensibilities as well as world views of particular spaces and bodies, then social scientific theories or any theory limited to the experience and world view of only five countries in the world are, to say the least, provincial. But this provincialism is disguised under a discourse about ‘universality’.” Grosfogel (2013) 74.

¹⁵ Atienza (2017) 88.

¹⁶ Plebe/Emanuele (1992) 16.

is possible that the speaker intentionally adopts the strategy of changing the audience, from a real to a virtual one, broader (for instance: the dead, the ancestors, the homeland, the gods, the society, the “good people” etc.) or reduced (through restricted or specialized linguistic codes), in order to produce feelings of identification or exclusion.¹⁷

In the case of legal discourse,¹⁸ the judges and courts have, as addressees, very diverse groups (lawyers, parties, public opinion, media etc.) and a great challenge consists in determining for which of these audiences is the discourse really oriented towards.

Nevertheless, the judges are trained, in the most Constitutional States, to adopt a rhetoric oriented to the professionals, for whom strategies of technicality, objectivity, coherence and logical unity are valued.¹⁹ Any change in this audience may promote, as this research hypothesizes, considerable shifts in the way legal discourses are rhetorically produced.

2.2. *The Empirical-Rhetorical Analysis of Discourse – ERAD*

As mentioned in the introduction, Rhetoric embodies a tradition of knowledge that is solid and fertile enough to offer a variety of research tools for discourse analysis, alongside a Philosophy and a set of persuasive strategies.²⁰

This topic presents, albeit concisely, an instrument of analysis, inspired by the work of Sobota, under the name of Empirical-Rhetorical Analysis of Discourse - ERAD.²¹

The model, developed in other works, has as central objective to define the rhetorical profile of a legal text, a decision or the practice of a court. It shows that the discourses - especially the judicial ones - are rhetorical-strategic, that is, they seek to conform, even if this is not their central objective, a given general reality, as a symbolic artifact, and another specific one, the legal field, with its language and its constraints.²²

From a “rhetorical reading” of decisions, rhetorical indicators are produced which, in turn, are grouped into one of three dimensions: *ethos*, *pathos* and *logos*.

17 Perelman/Olbrechts-Tyteca (1971) 163-164.

18 Shecaira/Struchiner (2018).

19 Sobota (1990).

20 Adeodato (2010); (2011); Leach (2007); Sobota (1992a); (1996).

21 Reis (2014); (2018).

22 Sobota (1992b).

Ethos (E) refers to the character of the speaker, when the discourse is delivered in a manner that makes the audience believe he/she is reliable. In the ERAD, *ethos* includes, besides the credibility, strategies that seek to ascribe authority and legitimacy. Some examples of *ethos* indicators, common in the Brazilian Supreme Court decisions are: personal opinions, authority arguments, digressions to teach etc.

Pathos (P) concerns, in Aristotle, the attempts of persuasion through the audience's passions, since the judgements one emits vary depending on whether one experiences feelings of anguish or jubilation, friendship or hostility.²³ In the ERAD, *pathos* includes strategies that explore emotions and feelings, as well as the production of images and sensations mainly from the use of rhetorical figures. Hyperbolic language, *ad terrorem* argument and personification are some indicators produced from the decisions of the court.²⁴

Finally, the strategies of *logos* (L) are those that seek to produce an impression of objectivity, rationality, acceptability, coherence and internal logic of the discourse, producing the effect of meaning that these characteristics are independent of the sender. Normally, references to tradition, universality, and neutrality are the means by which the strategies of *logos* are most effectively presented in legal practice.²⁵ Examples of *logos* indicators are: codification arguments, hermeneutical arguments, quotation of jurisprudence from other countries (especially at the Supreme Court and Constitutional Courts) etc.

After identifying the occurrences of *ethos*, *pathos* and *logos*, they are quantified, which allows identifying the rhetorical profile of the analyzed decision. This empirical data may allow understanding a characteristic of the court's rhetoric at a given moment, or in relation to a specific theme, but it also authorizes the construction of new research hypotheses that seek to identify possible causal factors that condition a given profile.

Applied to a broader set of decisions or extended research over time, the results of ERAD may allow us to produce the rhetorical profile of a court, of a type of trial (for example, declarations of unconstitutionality in abstract control) or even of a country's legal community.²⁶

23 Aristotle (2006) 1356a.

24 Reis (2014).

25 Reis (2018).

26 Reis (2018).

Based on this methodology, one seeks to observe the effect produced by contextual shifts, such as the introduction of technological innovations in the rhetorical profile of the Courts and, in this case, of the Brazilian Supreme Court.

That will be the subject of the next topic.

3. The live broadcast of the sessions and its effects

Studies have shown the connection between the live broadcast of the plenary sessions and significant shifts on aspects of the decision-making practice of the courts. For the analysis of these effects, the studies consider categories such as the extension of the opinions, argumentative quality, length of debates, relationship between Justices etc.²⁷

These surveys are part of a tendency to make the acts of the Judiciary visible. It should be understood as a response to the crises of legitimacy that culminated in reforms that sought to broaden external control and ensure faster decisions, supposedly increasing credibility and legal certainty, especially in economic relations.²⁸

In this context, the transmissions have started in Brazil with “*TV Justiça*” (TV Justice), in 2002. It was a clear response to the crisis of the Judiciary Power, considered the less transparent and democratic. On the court’s digital page on the internet, the *TV Justiça*’s goals are presented as being “to inform, to clarify and expand the access to Justice, aiming at making its acts and decisions transparent.”²⁹

Since then, the country can watch the live transmissions of the plenary sessions, including the debates and the opinions of the Justices with comments made by journalists.

The transmissions of trials on TV, in real time and without editing, are an initiative found only in a few countries. The Brazilian Federal Supreme Court’s website informed, in 2011, that *TV Justiça* had been the first in the world to adopt this practice. Inspired by its example, other countries, such as the United Kingdom and Mexico would have followed the same path.³⁰

²⁷ Hartmann et al. (2017); Fonte (2013).

²⁸ In Brazil, this Reform of the Judiciary took place in 2004, through the Amendment to Constitution n.º 45.

²⁹ Brasil (2017).

³⁰ Brasil (2011).

Carter reports that the Supreme Court of Canada began broadcasting 10 years before Brazil.³¹ However, this author reports no other experience outside of the English-speaking world, although his article was published 10 years after *TV Justiça* started broadcasting the court sessions in the Brazilian Supreme Court.

The existence of the *TV Justiça* and, mainly, the live transmissions of the plenary sessions are far from having unanimous approval.

There are those who focus on the advantages of the channel: it presents approaching topics related to the Law in an informal way, making it possible for the general public to get acquainted with legal professions and the Judicial Power, aside from spreading the knowledge on topics which are of immediate interest of the population.³²

Some of the biggest supporters of the broadcasts can be found among the Justices themselves. One of them expresses the association between the broadcasts and values like transparency and publicity: “Public visibility contributes to the transparency, to the social control and, ultimately, to the democracy.”³³

In the discussion about the American Supreme Court, in the long run, Carter argues that broadcasts can help to promote “...the educational and civic participation benefits for the public, plus the strategic and public relations benefits for the Court”.³⁴

Many, however, caution that there are more problems than advantages in the live broadcasts. One of them is the fact that the written decisions have become longer, even when unnecessary. An empirical research concluded that the average number of pages of the decisions has grown around 58% after the creation of *TV Justiça*, in comparison with the period between 1990 and 2002. If before its existence, the decisions had an average extension of 18.16 pages, between 2003 and 2011 this average went up to 28.82.³⁵ The study by Hartmann et al. confirms, even though partially, this increase.³⁶

Another disadvantage would be that public exposure could highlight divergences, leading to the confrontation and verbal aggressions among

31 Carter (2012).

32 Freitas (2012).

33 Barroso (2009) 2.

34 Carter (2012).

35 Fonte (2013).

36 Hartmann (2017).

Justices, which could lead to undesirable effects: instead of increasing the trust, it can leave an impression of lack of emotional control and personal disagreement.

One last observation to be emphasized has to do with the fact that the extreme publicity hinders judges to “test arguments” or even of changing their opinions, worried about not transmitting an image of insecurity or of someone who has been defeated in a debate.³⁷

Keeping this discussion in mind, it seems to make sense the idea that the live broadcast of the plenary sessions may have effects over the rhetorical practice of the Court, i. e., the set of strategies the Justices use to persuade the broad audience which is reconstructed by *TV Justiça*. This will be the subject of the following and last topic.

4. The rhetoric of the Brazilian Supreme Court (STF)

Previously limited to the parties involved in the cases or to the specialized legal community, the discourses of the Justices of the Supreme Court has been targeted to a much broader audience since *TV Justiça*'s live transmissions began.

This fact has considerable effects on the type of language and on the rhetorical tools used by Justices, aside from formal aspects such as the length of the opinions and the duration of the debates, as mentioned before.

Previous researches³⁸ showed that the decisions of the Court³⁹ have presented a profile of high rhetorical intensity, i.e., a large number of occurrences of rhetorical strategies, and followed certain patterns in terms of indicators and dimensions.

Indeed, the analysis of the case ADI 3510, of 2008, which judged the constitutionality of the use, for research and therapeutic purposes, of embryonic stem cells, showed a rhetorical profile in which 54% of the occurrences were situated in the *ethos* dimension. 30% of these occurrences of *ethos* corresponded to a single indicator, which represents the “references to the legitimacy and competence of the Court, as well as defense of the legal field.” The

37 Silva (2013) 582-583.

38 Reis (2013); (2014); Coelho/Ramalho (2013).

39 In Brazil, complete decisions (*acórdãos*) contain the opinions of all Justices, before the final decision and its grounds.

occurrences of *pathos* and *logos* was, respectively, 15% and 31%”.⁴⁰

Another analyzed decision was that of the case ADI 3999-7, published in 2008, which disciplined the loss of elective mandates due to party infidelity. In this decision, despite the difference in relation to the object, the similarity of rhetorical profile emerges as remarkable: 51.86% of *ethos*, 19.26% of *pathos* and 28.89% of the *logos* dimension.⁴¹

In different decisions, it was evidenced a defined rhetorical profile, centered in the use of rhetorical strategies of reinforcement of legitimacy, something that, at first sight, should be unnecessary, since the Justices argue before a specialized legal audience.

Other research also identified the use of *pathos* and *ethos* strategies by STF Justices. It also recognizes the expansion of the original audience beyond the parties interested in the decisions:

Judges presumably care about public opinion and the judgment it will make on their decisions. Therefore, their argument is addressed to the media, scholars, class associations, parliament. [...] This way, Supreme Court Justices use rhetorical arguments to persuade “real judges” of the reasons for their decisions. “Real Judges” [...] are those who in public debates [...] give their opinion on the most controversial issues.⁴²

In fact, the question of the legitimacy of constitutional jurisdiction gained prominence in Brazil in the first decade of the 2000s due to the Court’s attitude considered “activist”. Not infrequently, its decisions invaded the spheres of competence of the democratic legislator.⁴³

In another work,⁴⁴ the very establishment of *TV Justiça* was considered a strategy of self-legitimation of the Court. To what extent, however, is this characterization possible? To the extent that it “popularizes” the knowledge of the Law, making people without legal training feel like participants in the institutions or even able to interfere in them. The transmissions of the plenary sessions of the STF, with the explanations of a journalist in non-specialized language in the breaks, transmit the feeling of belongingness, dilute the strangeness and the impression that the Judiciary is a “black box”, communi-

40 Reis (2013).

41 Reis (2014).

42 Coelho/Ramalho (2013) 5641; 5654.

43 Waldron (1999); (2006); Bayón (2000); Vieira (2007).

44 Reis (2013).

cating the *pathos* of familiarity.⁴⁵

It is undeniable that *TV Justiça* fulfills a role in the democratization of information and legal knowledge, clarifying the meaning of institutes and expanding the community's knowledge of the rights and guarantees inscribed in the constitutional text.

Another great advantage of TV Justice is undoubtedly a certain desacralization of the highest court in the country. Instead of the usual stiffness and excessively formal language, the Justices often lose their emotional balance, insult each other, have laughing moments, show weariness, take an unintended nap in the Plenary, and finally, show common reactions like any human being, therefore losing the aura of Olympian Gods, without this taking away their authority as competent and respected jurists.

But the achievement of this "social capital" depends on a performance that is persuasive and therefore needs to make use of other rhetorical strategies than that of a logical-dialectic character (*logos*), as would be expected by an audience composed only by professional jurists. In the dialectics of the relations between the speaker and the audience, the transmissions also end up leading to a certain imprisonment of the Justices' rhetoric to a supposed public opinion, as well as the stimulus to a sometimes exaggerated performativity in the judgments.

It may not be possible to precisely correlate the transmissions of the plenary sessions and the change in the rhetoric of the Supreme Court towards a speech of self-legitimization. Other factors certainly influence this change as much or more strongly, and the healthy skepticism of the rhetorical tradition tends to suspect monocausal correlations.

However, to ignore it would be to assume that such a considerable change of audience, even if (or above all because) it points to an undetermined and not immediately known audience, would have no effect at all on the manner

45 The resistance to the acceptance of broadcasts at the Supreme Court of the United States was criticized by McElroy as an inexcusable reinforcement of its aristocratic and sacralized character: "Just as the Oracle at Delphi was for the Greeks, the Supreme Court appears to most Americans to be a mystical, majestic mouthpiece making pronouncements about important social and governmental issues for the benefit of the American public. For as long as the Justices continue to prohibit cameras at the Court, however, the American public will be guided in its perceptions by the stories that the Court's rituals and policies, its images, and architecture tell. Without at least virtual access to the Court's work, the public cannot easily and directly learn about the Court's democratic story." McElroy (2012) 1898.

in which, rhetorically, Justices are engaged in public discussions and trials of the Supreme Court.

The maintenance or suspension of transmissions is not under discussion in this chapter, but, above all, the perception of how elements considered external can profoundly alter the way the Judiciary acts in the production of Law. Fundamentally, the data and research done so far on the subject contribute to demystify judicial practice and call the attention of jurists (especially academics) to the way in which the concretization of Law by the courts is transposed by empirical elements that formalistic and prescriptive views seem to ignore.

5. Conclusion

Usually, when one thinks about technological innovation and its effects on judicial activity, one imagines some great invention, robots and artificial intelligence deciding cases in times and according to superhuman patterns of justice. However, the insertion of already known technologies into new environments and processes can produce many times greater consequences that significantly alter the way judicial activity is carried out and, above all, the way it is conceived both by its practitioners and the general public.

The goal of this paper was to expose how the introduction of an external element, considered as a kind of technological innovation, has influenced the rhetorical practice of the Brazilian Supreme Court.

The exposition did not include an evaluation of the rhetoric of the Court, influenced by *TV Justiça*. Nor affirmed, unquestionably, that the live transmissions could cause similar shifts in other countries. As mentioned, the rhetorical perspective adopted here tries to escape the confusion between prescription and description in its analysis, in addition to avoiding the temptation of *post hoc, propter hoc* fallacy.

However, the research has contributed not only to clarify the current rhetorical profile of the Brazilian Supreme Court, but will have shown that theories that do not consider the effect of external factors in the legal practice produce an excessively idealized Theory of Law.

On the other hand, the consideration of pragmatic aspects of the legal practice puts the rhetorical perspective as a privileged point of view with regard to the characterization of legal communities (as rhetorical communities).

If there is any merit in empirical research of this kind, it is to insert jurists

into discussions about their own professional practice in debates that are already advanced among sociologists, political scientists, linguists and communication scholars. Being responsible for the production and reproduction of the webs of Law, and being daily called to reflect on the pretension of social and democratic legitimacy of their work (since Law does not belong to jurists), this seems to be a question worth taking seriously.

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Dealing with Experiences

Constituent power and constitutional change in Brazil's transition to democracy (1945-1946)

Raphael Peixoto de Paula Marques

1. Introduction; 2. The crisis of the *Estado Novo*: political and constitutional re-configurations; 3. Democratization and constitutional change: The debate over the legitimacy of the 1937 Constitution; 4. From constitutional reform to constituent power: the end of the 1937 Constitution?; 5. Concluding remarks

1. Introduction

This paper discusses the debate over constituent power and constitutional change during the Brazilian transition to democracy from 1945 to 1946. The objective is to examine the passage from an authoritarian regime to a democratic one and how that transitional time has constructed or redefined certain legal content, especially in the constitutional field. The intention of this paper is not only to investigate the connection between the democratization process and the forms and times of constitutional change, but also to explore to what extent this political transition allowed the construction of certain constitutional content that persisted beyond the transition.

Placing this process of political and legal change in historical perspective allows us to problematize the transition and helps us to interpret in a more complex way the dynamics between rupture and continuity in the field of politics and law. Looking historically at processes of democratization requires that the term transition be considered not only in its common definition. In its usual meaning, the term is linked more to change than to continuity. By valuing exclusively the moment of transition—a *before* and an *after*—the term is reduced to a “linear, almost inescapable image of the historical process.”¹ A democratic transition should not be interpreted in a one-dimensional, teleological way; on the contrary, it should be seen as something fluid, contingent and complex.²

The practice of constituent power is an interesting object of study for discussing the relations between political transition and constitutional innova-

1 Baldissara (2009) 1.

2 Van Marle (2002) 66-67.

tion. The constituent moment, as Maurizio Cau states, is a temporal space “in which the traditional linear succession of completed temporal structures jumps and in which a meta-narrative process strongly projected into the future takes shape.”³ This disruptive temporal process makes it possible to go beyond descriptive, chronological observation, since it represents an example of what Massimo Meccarelli calls *attributive time*, a “time that affects the content that the law incorporates.”⁴ My objective here is to contrast the temporal dynamics that have emerged between democratization process, constituent power and constitutional change (formal and informal). The thematic and temporal frame chosen here will be analyzed via the lens of constitutional history, understood as the history of “conflicting interpretations” of a constitution.⁵

2. The crisis of the *Estado Novo*: political and constitutional reconfigurations

Estado Novo is the term created by Getúlio Vargas to describe the dictatorship established in November 1937. Until his deposition at the end of October 1945, Vargas ruled without a parliament, employing emergency measures and repressive criminal legislation. During that period, Vargas took on the title of “father of the poor,” due to the social bonds he established with workers by using a political discourse that exalted labor legislation. The ambiguity of the *Estado Novo*, as well as its plurality of meanings and temporalities, makes its historical interpretation a complex and difficult task, even in the constitutional field.⁶

The regime began with a *coup d'état* and a new constitution. Its ideological assumptions were made explicit by Vargas in his “Proclamation to the Brazilian people,” a manifesto read on the radio on the same day of the coup.⁷ For Vargas, the “democracy of political parties” should end, because it “subverts the hierarchy, threatens country unity and endangers the existence of the Nation, radicalizes the conflicts and ignites the torch of civil discord.” Direct voting would be, in Vargas’s words, a decoy, a “mask that conceals the

3 Cau (2018) 149.

4 Meccarelli (2018) 18.

5 Jouanjan (2014).

6 On the “Estado Novo,” see Carone (1988); D’Araújo (2000); Gomes (2005; 2010; 2019); Martinho (2006); Capelato (2019). On the “Vargas Era,” see Bercovici (2009).

7 Vargas (1938) 19-32.

conspiracy of private economic forces.” The previous constitution, based on classical forms of liberalism and the representative system, was “outdated in relation to the spirit of the time”; it was destined for “a reality that no longer existed.”⁸

This ideological justification was probably written by Francisco Campos, Minister of Justice and author of the Constitution put into effect on November 10, 1937.⁹ In Campos’s interpretation, the nation was living a time of transition, in which “the spiritual forms of the past, with which we continue to dress the image of the world, reveal themselves to be inadequate, obsolete or non-conforming.”¹⁰

This political belief influenced his writing of the 1937 Constitution. The new constitutional text was a clear exemplar of the illiberal constitutionalism of the interwar period.¹¹ Indeed, as the 1937 constitutional preamble clearly stated, the aim of the new regime was to put an end to the disorder generated by political parties and to the “communist infiltration.”¹² In an interview given to newspapers in November 1937, Francisco Campos explained the constitutional guidelines of the new political regime. For him, the new Constitution was “profoundly democratic”: the “incorporation of the masses into the political horizon” modified intensely the essence of political institutions. Thus, the democratic character of the new constitution, in the words of Campos, would lie in its “concrete dimensions”—in the expression of the identity between the will of the people and that of the President of the Republic.¹³

Additionally, and still in accordance with Campos’s thinking, the acceleration of political time had changed the functions of government and reformulated the division of powers, giving the executive a new role. Since the law had lost its “exclusively political character” and assumed a “technical content,” the legislative branch was now incapable of dealing with the world’s

8 Vargas (1938) 20-23.

9 On Francisco Campos and his constitutional ideas, see Santos (2007); Seelaender (2010); Seelaender (2013); Pinto (2019); Bueno (2019).

10 Campos (2001) 13.

11 On the category of “Brazilian illiberal constitutionalism,” see Santos (2007). For the European context, see Caenegem (1995) 293-346; Pisarello (2011) 121-457; Stolleis (2018).

12 Diário Oficial da União, *Constituição dos Estados Unidos do Brasil*, seção I, 10/11/1937.

13 Campos (1938) 14-15.

new challenges.¹⁴ According to the logic of a “strong state,” the dimensions of public and private were reconfigured. The state’s duty to provide “goods and services” would be at the core of the new declaration of rights, a provision that would therefore demand that the state have “control of all social activities—the economy, politics, education.”¹⁵

The 1937 Constitution was rooted in a complex mechanism that enabled Vargas to govern in a discretionary and centralized manner until 1945. It came into effect with state of emergency that had been declared, and during this conditional period, the judiciary could not regulate the actions of the government.¹⁶ In addition, the functioning of the parliament was dependent on approval by plebiscite, to be held at the president’s convenience any time during his tenure (which would end in 1943). As long as the country’s population did not ratify the text of the new constitution, the legislative bodies would remain dissolved. In his book *Brazil under Vargas* (1942), Karl Loewenstein called this constitutional device a “double constitution” and a “ghost constitution,” which means a constitution that does not limit political power.¹⁷

To comprehend the *Estado Novo* fully, however, we must look beyond its authoritarian structures. It is also important to consider how the Vargas dictatorship gained support and legitimacy within society—that is, how its “social construction” occurred.¹⁸ As historiography on the period points out, the *Estado Novo* cannot be interpreted in a homogeneous way.¹⁹

In a first phase of the *Estado Novo* period, a “demobilizing authoritarianism” prevailed that was based on coercion and carried out via censorship and repression.²⁰ Brazil’s entry into World War II alongside the Allies in 1942 took

14 Campos (1938) 9-14.

15 Campos (1938) 15-16.

16 On the 1937 Constitution see Cerqueira (1997) 63-94; Bonavides/Andrade (2008) 335-352; Santos (2009); Abreu (2016). On the analysis by the constitutional doctrine of the period, see Berford (1944); Almeida (1940); Castro (1941); Lins (1938); Pontes de Miranda (1938).

17 Loewenstein (1942) 46. The historical observation of the “perversion of the constitution by modern autocracies” allowed Loewenstein (1979) 213-222 to formulate his ontological classification of constitutions: normative, nominal and semantic. In such a classification, the 1937 Constitution would be a kind of semantic constitution.

18 On the “social construction of authoritarian regimes”, see Rollemberg/Quadrat (2010).

19 D’Araújo (2000); Gomes (2005; 2010; 2019); Martinho (2006); Capelato (2019).

20 Gomes (2005); Capelato (2019).

the regime into a new phase in terms of the relationship between government and society. According to Ângela de Castro Gomes, the governmental project of transitioning to democracy was mediated by the construction of a political pact between the state and the *people-workers*, which was based on a symbolic dimension (the creation of a discourse that appealed to the figure of the “great president Vargas” as responsible for social legislation) and on an organizational dimension (an institutional mechanism that intended to integrate corporate unionism into the political party system). Such aspects constituted what was designated as *Trabalhismo*.²¹

The shift in the political context opened a new horizon of expectations, creating the conditions for criticism of the 1937 authoritarian project.²² The declaration of war in 1942 against totalitarian regimes, though it did not imply Brazilian democratization, nevertheless created favorable conditions for the rise of political opposition by revealing the discursive contradictions of the dictatorship. Criticism of the regime’s authoritarianism was not only carried out by a liberal-conservative elite, but also by popular protest movements (including students, workers, communists).²³

From that moment on, the authorities began to think about the most appropriate way to change the political system. Preparing for the transition to liberal democracy became a point of concern on the *Estado Novo*’s agenda, as the idea of authoritarian democracy was becoming unsustainable.²⁴ In the government’s view, however, dispensing with the authoritarian regime should not necessarily mean losing political power. Thus, it was fundamental “to generate new ideas about its political continuity in a democratic order.”²⁵

The prospect of the end of the World War II had intensified discussions about the democratization process, especially about the legal aspects of the forthcoming elections for president and parliament and the creation of new political parties. The debate over the transition to democracy also included the so-called constitutional question. From the government’s point of view, the process of democratization should be initiated through the realization of the plebiscite anticipated by the 1937 Constitution. That option, however, would require some modifications, since the plebiscite had not taken place

21 Gomes (2019) 197; Gomes (2005) 237-294.

22 Gomes (2005) 186; Almeida Júnior (2009) 275.

23 Calil (2013); Ferreira (1998); Vannucchi (2019).

24 Gomes (2019) 195.

25 Gomes (2005) 186.

during the period originally established in the constitutional text (i.e., the end of the presidential term in 1943), due to the declaration of the state of war.²⁶

The alternative proposed by the government was revealed in February 1945. The transition to democracy would be initiated with the implementation of a constitutional reform that would adapt the 1937 Constitution for the new international situation and provide for presidential and parliamentary elections. For Vargas, the return of the elections implied the creation of a political party that would essentially translate the social legacy of the *Estado Novo*. Using these strategies, the government intended to take charge of the transitional process, carrying out its ideological reconfiguration and controlling any debate with its critics.

3. Democratization and constitutional change: The debate over the legitimacy of the 1937 Constitution

The change in political regime was not the result of the military coup that overthrew the President in October 1945 but an initiative of the Vargas Government itself. The general discussion about democracy vs. dictatorship was replaced at the beginning of 1945 by a clash between the various projects related to the country's democratization and (re)constitutionalization. In this scenario, the constitutional discussion was rooted on three major debates: (a) constitutional change (reform of the 1937 Constitution or a new constitution); (b) direct elections for president of the Republic and parliament; (c) amnesty for exiles and political prisoners.

The first step toward democratic politics was a reform to the constitutional made in March 1945, known as *Lei Constitucional* n^o 9 [Constitutional Law no. 9].²⁷ A set of justifications guided this change to the constitutional, which

²⁶ According to art. 171 of the 1937 Constitution, during a state of war, the president of the Republic could suspend the constitution. Decree n. 10.358, of August 31, 1942, declared a state of war throughout the country and suspended Article 175, which established the presidential term.

²⁷ *Diário Oficial da União, Lei Constitucional n. 09, seção I, 01/03/1945*. The legal figure of *Lei Constitucional* enacted by Vargas was widely used during the *Estado Novo*, although there was no such provision in the 1937 Constitution. The *Lei Constitucional* was equivalent to a constitutional amendment and was adopted based on a broad interpretation of Article 180 of the Constitution: "Until the national parliament is convened, the President of the Republic will have the power to issue decree-laws on all matters of legislative competence of the Union".

clearly demonstrated the regime's new ideological rhetoric. The preamble of the *Lei Constitucional n. 9* stated that "in view of serious world events" and "public opinion trends," the conditions had been created for the representative bodies referred to in the 1937 Constitution to begin functioning.²⁸ It was said that only direct elections would provide the "necessary degree of authority" to the executive and legislative powers, which would be "the total and unequivocal expression of popular sovereignty."²⁹

Initially, the government did not intend to convoke a national constituent assembly. The proposed elections would only serve to provide the parliament with "special powers" to approve a constitutional *amendment*, if one was found to be necessary.³⁰ The objective was only to "correct, perfect, improve the institutions and adapt them to the new times" without, however, replacing the 1937 Constitution.³¹ The abolition of the state of war was not a priority either.³²

This constitutional amendment was strongly criticized. Two documents are of interest for us to understand subsequent developments, especially the debate over constituent power and democratic legitimacy. The first document is an interview given by the former Minister of Justice and author of the 1937 Constitution, Francisco Campos.³³ According to Campos, the "political perception of the world" had changed. For him, it was necessary to know whether the Vargas constitutional reform was sufficiently adapted for this new zeitgeist. The answer was clearly no. Moreover, there was a "de facto government situation" because the 1937 Constitution was no longer valid: it was "a document of purely historical value."³⁴

The basis for Campos's conclusion was the non-execution of the plebiscite. Thus, the constitutional reform put forth by government would be unconstitutional because, in Campos's words, "it is a new constitution edited as an

28 Diário Oficial da União, *Lei Constitucional n. 09*, seção I, 01/03/1945, p. 3313.

29 Diário Oficial da União, *Lei Constitucional n. 09*, seção I, 01/03/1945, p. 3313.

30 Diário Oficial da União, *Lei Constitucional n. 09*, seção I, 01/03/1945, p. 3313.

31 Revista Forense, *Exposição de Motivos apresentada pelos ministros de Estado ao sr. Presidente da República*, junho de 1945, 190.

32 Revista Forense, *Exposição de Motivos apresentada pelos ministros de Estado ao sr. Presidente da República*, junho de 1945, 187.

33 Diário Carioca, *Entrevista de Francisco Campos*, 03/03/1945; Correio da Manhã, *Entrevista de Francisco Campos*, 03/03/1945). The interview is also published in Porto (2001) 39-52.

34 Diário Carioca, *Entrevista de Francisco Campos*, 03/03/1945.

abusive exercise of constituent power.” For Campos, the only solution would be to remove the president from power and appoint an assembly with the authority to make “fundamental constitutional decisions.”³⁵

The other document of interest is a legal opinion prepared by Law School of Rio de Janeiro.³⁶ The professors who wrote the opinion portrayed the moment as an “instant of transition and crisis” created by the end of war and the illegitimacy of the government. Articulating the concepts of constituent power and democracy in a very innovative way, the professors argued that the Constitution of the *Estado Novo* was illegitimate, since it came out of a coup d’état that usurped popular sovereignty. The constitution was simply a “de facto norm.” The professors argued that because the constitution was based on a “permanent constituent power,” any reform decreed by the president would correspond to “a complementary coup d’état.”³⁷

Regarding the *Lei Constitucional n. 9*, the professors argued that it was unconstitutional. From a legal perspective, the 1937 Constitution did not authorize constitutional amendments put forth by the president.³⁸ In addition, Vargas’s constitutional reform would not have fulfilled any “democratizing objective.” It did not restore the separation of powers nor did it promote the “transition of the country from an authoritarian to a democratic regime.”³⁹ The professors concluded that was necessary: (i) to remove Vargas and to appoint the president of the Supreme Court (STF) to the presidency; (ii) to hold direct elections; and (iii) to elect an assembly that would draft a new constitution.⁴⁰

In the following months, the thesis of the “de facto government” and the

35 Francisco Campos continues: “We cannot, militarily victorious in war, adopt reasons that put us, from the ideological point of view, in the field of the defeated” (Diário Carioca, *Entrevista de Francisco Campos*, 03/03/1945).

36 Correio da Manhã, *Parecer dos professores da Faculdade Nacional de Direito*, 03/03/1945. The text is also published in Porto (2001) 53-62.

37 Correio da Manhã, *Parecer dos professores da Faculdade Nacional de Direito*, 03/03/1945.

38 Correio da Manhã, *Parecer dos professores da Faculdade Nacional de Direito*, 03/03/1945. This argument was anticipated by jurist and politician João Mangabeira (Correio da Manhã, *Entrevista de João Mangabeira*, 02/03/1945).

39 Correio da Manhã, *Parecer dos professores da Faculdade Nacional de Direito*, 03/03/1945.

40 Correio da Manhã, *Parecer dos professores da Faculdade Nacional de Direito*, 03/03/1945.

attendant argument for convening a constituent assembly was adopted by a significant part of the opposition, such as those in the Law School of the University of São Paulo,⁴¹ the *Instituto de Advogados do Brasil* (IAB) [Institute of Brazilian Lawyers]⁴² and the new political party *União Democrática Nacional* (UDN) [National Democratic Union].⁴³ These arguments gained further popularity after a press interview given by UDN candidate Brigadier Eduardo Gomes. In his statements, he argued that the 1934 Constitution had never been repealed. Gomes also defended new elections, with the removal of Vargas and the transfer of power to the president of the STF, thus creating the slogan “all power to the judiciary.”⁴⁴

The constitutional debate described above changed after July 1945. The reason for its change in character was the growing popular support obtained by Vargas through the so-called *Queremismo* movement.⁴⁵ The initial support for Vargas was represented by the expression “we want Getúlio”; later, the slogan became “constituent with Getúlio”. This popular movement had the backing of the communists⁴⁶ and was based on the symbolic and organiza-

41 “The 1937 Constitution and the new *leis constitucionais*, which modified it, imposed by a *de facto* government and without popular ratification, are not a Constitution” (Correio da Manhã, *Manifestação da Faculdade de Direito da Universidade de São Paulo*, 10/03/1945).

42 “For the crisis of legality and trust to which the head of government has led the Nation, the only remedy lies in the immediate organization of a new provisional government which, basing its powers on the 1934 Constitution, will restore public and private freedoms and make the necessary arrangements for the election of a Congress, with full powers for its revision, or otherwise of a Constituent Assembly” (Correio da Manhã, *Parecer do Instituto dos Advogados Brasileiros*, 13/03/1945).

43 Correio da Manhã, *Entrevista do brigadeiro Eduardo Gomes*, 17/04/1945. On the *União Democrática Nacional*, see Benevides (1981).

44 Benevides (1981) 25; Correio da Manhã, *Entrevista do brigadeiro Eduardo Gomes*, 17/04/1945. For Eduardo Gomes, the judiciary was the only constitutional power with any legitimacy after the 1937 coup. In defending the reinstatement of the 1934 Constitution, Gomes also defended the enforcement of the line of succession envisioned in that former constitutional text (art. 52, § 8).

45 On *Queremismo*, see Gomes (2005) 238-288; Netto (1996); Ferreira (1998); Ferreira (2010); Macedo (2014); Queler (2016).

46 After the amnesty, the communists began to support Vargas based on a “national pact against Nazi-fascism”. Ferreira (1998); Netto (1996). Although the communists did not advocate for Vargas to continue in power, they understood that the establishment of a democracy could only succeed through a Constituent Assembly freely elected by the Bra-

tional dimensions of *Trabalhismo*. The idea of fighting to maintain social and labor rights was at the heart of this movement. It was imperative that Vargas have a presence in the government while the constituent assembly was functioning, both for the guarantee and the expansion of labor rights.⁴⁷ Thus, for the *Queremismo* social mobilization, the preferred order of proceedings for the transition was different: first, the immediate installation of a national constituent assembly, with Vargas in power and then later, the holding of elections in which the president could be a candidate.

The opposition began to interpret the defense of a “Constituent with Getúlio” as a “mere expedient of continuism”.⁴⁸ In the opinion of the UDN, the suspension of elections and the defense of an immediate constituent assembly represented a “coup in disguise.”⁴⁹ The constitutional discussion was thus reoriented. The UDN and the military began defending the legitimacy of Vargas’s constitutional reform and the decision to hold, rather than suspend, elections. Furthermore, the opposition had crafted an argument that the parliament’s “special powers of reform” could be interpreted as the “constituent power” necessary for drafting a new constitution. This interpretation was ultimately carried out in a very unusual manner: with a judicial resolution.

4. From constitutional reform to constituent power: the end of the 1937 Constitution?

The dispute over the future parliament’s constituent powers was decided by the *Tribunal Superior Eleitoral* [Electoral Justice Tribunal]⁵⁰ in October 1945. The Court’s understanding was not an innovation, but rather a recognition of something that had been discussed previously.⁵¹ In fact, the judicial

zilian people. Prestes (2006). For the Communist Party, presidential elections should be held only after the ratification of a new constitution, in order to avoid the simple replacement of one de facto government by another that was equally armed with the vast and arbitrary powers of the 1937 Constitution. Prestes (2006).

47 Ferreira (2010) 35.

48 Diário Carioca, *O mais é golpe*, 02/10/1945.

49 Diário Carioca, *Golpe de morte contra o golpe da “constituinte”*, 28/09/1945.

50 The Electoral Justice Tribunal was created by Getúlio Vargas in 1932. It was abolished by the Constitution in 1937 and re-established in 1945 by *Decreto-Lei n. 7.586*. On the creation of the Electoral Justice, see Zulini (2019).

51 The argument that the future parliament would also have constituent powers can be identified in a legal opinion elaborated by the *Sindicato dos Advogados do Rio de Ja-*

ruling was a response to an inquiry brought by the Brazilian Bar Association (OAB). In that context, the association was effectively President Vargas's opponent.⁵²

The debate in the court reflected the dispute that was also taking place in the political arena. There was no unanimity on the court.⁵³ In his dissenting opinion, the judge Edgard Costa concluded the subject was not related to election law, but to constitutional law, which would exclude the court's legal competence.⁵⁴ In a broader sense, the Prosecutor-General, Hahnemann Guimarães, argued that the case did not involve the mere "interpretation of legislative texts" but would represent a "solution to a political problem".⁵⁵

The majority opinion was written by Judge Sampaio Dória, a professor at the São Paulo Law School with political connections with the regime's critics.⁵⁶ For Dória, the *Lei Constitucional n. 09* had granted constituent powers to parliament, although not expressly. The new parliament would therefore be a specific type of constituent, a "constituent congress". According to Dória, unlike an "absolute constituent assembly", a congress with constituent powers would have the task of judging an existing constitution and—if it did not approve the existing constitution—of drafting a new constitution. With both constituent types, however, there was a common element: the exercise of sov-

neiro in May 1945. According to that document, any parliament could "institute a new political order and reform the existing one", because "the exercise of constituent power by the people does not need a determined form or an express declaration" (*Correio da Manhã, O Sindicato de Advogados atribui poder constituinte ao futuro parlamento, independentemente de convocação expressa*, 12/05/1945). The legal opinion was written by lawyer Alberto Rego Lins.

⁵² Vannucchi (2019).

⁵³ The composition of the *Tribunal Superior Eleitoral* was established by the *Decreto-Lei n. 7.586*. The members were as follows: José Linhares (president of the Supreme Court), Sampaio Dória (professor of law), Waldemar Falcão (a Supreme Court judge), Edgard Costa (a state court judge), Lafayette de Andrada (a state court judge). The judges of the *Tribunal Superior Eleitoral* were appointed by the president of the Supreme Court.

⁵⁴ *Diário Carioca, Além de funções ordinárias, o parlamento terá funções constituintes*, 04/10/1945. Judge Edgard Costa and Electoral Prosecutor Hahnemann Guimarães did not agree with the majority.

⁵⁵ *Correio da Manhã, A réplica do professor Sampaio Dória ao parecer do procurador-geral do Tribunal Superior*, 03/10/1945.

⁵⁶ During the *Estado Novo*, Sampaio Dória was punished with compulsory retirement for criticizing the Vargas government. For a short biography of Sampaio Dória, see Paula/Lattman-Weltman (eds.) (2010).

ereignty.⁵⁷ Based on the opinion of Judge Sampaio Dória, the Court concluded the following: “the national parliament, which will be elected on December 2, 1945, will have unlimited constituent powers in addition to its ordinary functions.”⁵⁸

This unlimited constitutional sovereignty would not have a long life. After the military coup that removed Vargas from power, the new president, José Linhares,⁵⁹ decreed several new *leis constitucionais*. The issue of the parliament’s constituent powers was addressed in two of them, notably to ratify the earlier decision of *Tribunal Superior Eleitoral* decision and to “protect” the results of the presidential elections.⁶⁰

First, *Lei Constitucional n. 13* established that the new parliament should meet sixty days after the elections as a “Constituent Assembly” to draft with “unlimited powers” a new constitution.⁶¹ The new parliament would no longer have “unlimited sovereignty” to decide to ratify the 1937 Constitution instead of drafting a new constitution. Second, *Lei Constitucional n. 15* established that the elections results “should be respected” by the constituent assembly. In addition, the constitutional amendment authorized the elected president to legislate until the new constitution was enacted.⁶² This legal rule allowed the next president, General Gaspar Dutra, to legislate on “sensitive” matters, creating legal content that remained after (and against) the 1946 Democratic Constitution.

Moreover, the judicial and presidential recognition of the constituent powers of the parliament did not lead to the immediate repeal of the 1937 Constitution. The authoritarian constitutional order continued to be reaffirmed on several occasions before the enactment of the 1946 Constitution. Although President José Linhares revoked the state of war and the National Security Court,⁶³ one of his first decisions was to uphold the 1937 Constitution, even

57 Correio da Manhã, *Contra a convocação de uma constituinte*, 28/09/1945.

58 Tribunal Superior Eleitoral, *Resolução n. 215*, 02/10/1945.

59 José Linhares was the president of the Supreme Court and the *Tribunal Superior Eleitoral*. He was appointed to the Supreme Court by President Getúlio Vargas in December 1937. For a short biography of José Linhares, see Dias (2010).

60 The rules of procedure for the initial meetings of the constituent assembly were also created by President José Linhares (Diário Oficial da União, *Decreto-Lei n. 8.708*, seção I, 18/01/1946, p. 836).

61 Diário Oficial da União, *Lei Constitucional n. 13*, seção I, 13/11/1945, p. 17409.

62 Diário Oficial da União, *Lei Constitucional n. 13*, seção I, 13/11/1945, p. 17409.

63 Diário Oficial da União, *Lei Constitucional n. 14*, seção I, 24/11/1945, p. 17837; Diário Oficial da União, *Lei Constitucional n. 16*, seção I, 30/11/1945, p. 18069.

though there was already a draft of a temporary constitution prepared by his Minister of Justice (Professor Sampaio Dória).⁶⁴ This decision was intended to “avoid legal complications,” since the Supreme Court had already ruled as lawful the acts of Vargas’s government.⁶⁵

But it was during the initial proceedings of the Constituent Assembly that the debate over the permanency of the 1937 Constitution proved most intense. The core of the discussion concerned the extent of its constituent powers, i.e. whether the Constituent Assembly could also issue provisional constitutional acts. The objective of some constituents was to repeal the 1937 Constitution, thereby limiting the legislative power of the elected President of the Republic.⁶⁶ That legal dispute, as we can see, concerned the validity President José Linhares’s of *Lei Constitucional n. 15*.

In the end, the argument defended by President Dutra’s party (PSD) prevailed: the Constituent Assembly could not issue temporary constitutional rules.⁶⁷ Consequently, the 1937 Constitution and its authoritarian structure remained in force until September 1946, when a new constitution was enacted for the country.

5. Concluding remarks

The transitional process to democracy that took place in Brazil from 1945 to 1946 was marked by an intense debate about the forms and times of constitutional change. This discussion cannot be adequately covered without a look at the political and social context of the era. In this regard, it is not possible to understand the process of democratization in Brazil without pointing to the broader legal and cultural changes represented by new social legislation and to the symbolic dimensions constructed under the *Estado Novo*.

The mass mobilization in favor of “constituent with Getúlio Vargas” and, later, the forced removal of Vargas in October 1945 had a considerable impact on the direction of the democratization process. Those events made possible the abolition of part of the oppressive structure and the consolidation of

64 The draft was published in the journal “Arquivo Judiciário” in 1946 (Arquivo Judiciário, *Projeto da Constituição*, volume LXXVII, 1946).

65 Dias (2010).

66 Bonavides/Andrade (2008) 376. These constituents were from political parties (Communist Party and *União Democrática Nacional*) opposed to the elected president.

67 Bonavides/Andrade (2008) 387.

a parliament invested with constituent powers. However, they also led to a general reaction of conservative liberals and military personnel against workers and communists, which involved not only immediate political persecution and repression, but also paved the way for maintaining or creating authoritarian interpretations and legal arrangements that profoundly marked the period after the transition.

We can indicate some representative aspects of both situations mentioned above, taking as a guiding point the debate over the constitution. The first issue worthy of discussion is the constitutional changes generated by the transitional period. Those changes began with the government's choice to carry out a limited constitutional reform that only enabled new elections, without including the creation of a new constitution. That choice brought the expansive dispute over the validity of the 1937 Constitution to the fore, which then persisted through the entire political transition, from the beginning of the democratization process to the installation of the Constituent Assembly.

However, despite the cries from critics of the *Estado Novo*, the 1937 Constitution was reaffirmed by the opposition in at least two moments. When the *Queremista* position was being debated, it was necessary for the opposition to validate Vargas's constitutional reform as a strategy for ensuring that elections would be held. And then, after the deposition of Vargas, when President José Linhares performed an extensive constitutional reform, he used the *leis constitucionais*—the same legal instrument that the UDN had previously criticized. Thus, the effort, headed by Linhares, to dismantle the oppressive structures of the *Estado Novo* nevertheless involved the affirmation of the legitimacy of the authoritarian constitution of that period. Therefore, there was no temporal synchronization between the political and constitutional break.

Ultimately, the most important innovation during this period was the enactment of a democratic constitution in 1946. The way in which the constituent assembly was convened is quite unusual, since it resulted neither from a revolution nor from a formal, traditional decree, but rather from an Electoral Court's decision recognizing the "unlimited constituent power" of the new parliament. This judicial ruling can be explained by its manifest political aim: to block a popular movement that believed it was more important to draft a constitution than to vote for a new political leader.

The second point worth noting is the construction of certain authoritarian legal content that became persisted, despite a democratic constitutional innovation. Such content produced effects beyond the transitional period, as illus-

trated by some key examples. Although President Linhares revoked central elements of the dictatorship, he left intact the national security criminal laws and the Political Police, an expression of clear continuity with the previous authoritarian regime.

Another case is more explicit in its ascriptive dimension: the legal competence granted to the newly elected president to exercise “all the powers of the ordinary legislature” until the new constitution has been promulgated. This provision allowed the former Minister of War, General Gaspar Dutra (who was elected president in 1945), to not only legally regulate the most recent period of transition, but also to anticipate the normative production of certain politically “sensitive” matters and “protect” them *from* and *against* the new constitutional text. That was the case with labor strikes, for example, which were recognized as a right by the 1946 Constitution,⁶⁸ but which continued to be interpreted in a restrictive manner based on *Decreto-Lei n.º. 9.070*, published before the new Constitution by President Dutra.⁶⁹

Therefore, although the constituent process of 1945 to 1946 was characterized, to some extent, as a break with the previous regime, inaugurating new democratic practices and establishing a new relationship with individual and social rights, many of authoritarian structures and semantics remained in place. However, we cannot exclude the democratic nature of the experience that started in 1946 and the importance of the new constitution for that historical context.

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68 Article 158 of the Constitution: “the right to strike is recognized by the constitution and its exercise shall be regulated by law”.

69 In the administrative sphere, the strike continued to be interpreted as a political crime and a disciplinary offence. Following this line, see the legal opinions of Silva (1952; 1954).

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Transition to democracy and the Brazilian presidential system post-1946: the relationship between institutional design and political instability

Claudia Paiva Carvalho

1. Introduction: transitioning to democracy and adapting the presidential system; 2. The dispute between the presidential and the parliamentary systems; 3. Political crisis, presidential system, and institutional reform; 4. Final remarks: presidential system in transition

1. Introduction: transitioning to democracy and adapting the presidential system

The Brazilian Constitution of 1946 restored representative democracy after eight years of dictatorship. During the “New State” regime (*Estado Novo*, 1937-1945), there were no elections, and Parliament was kept closed. President-dictator Getúlio Vargas concentrated legislative powers and appointed interveners to govern states. Restoring democracy required changes in the system of government. At the time, there was a consensus that presidential power should be contained in order to avoid the abuses and arbitrary measures practiced by the previous regime. But there was disagreement on how this should be done.

During the constituent process that took place from February to September 1946, some representatives supported the parliamentary campaign led by deputy Raul Pilla. Pilla was the main sponsor of parliamentary reform as a means to improve democracy in Brazil. But he did not succeed in approving the parliamentary system in the constitutional frame of 1946. The presidential system prevailed, although under a significantly different set of rules.

Most constituents believed that the presidential system better suited the Brazilian political tradition and would better serve the need for State intervention. As the State’s action spread to areas of economic policy and social assistance, the importance of a strong Executive branch became more prominent. At the same time, in a Cold War scenario, a strong State was also defended to face the so-called communist threat. The constitution framers understood that the presidential system would be better qualified to enable the State to perform such roles. Therefore, the transition to democracy in-

volved designing an Executive branch that would be both limited and powerful.

To prevent abuse, the Constitution would establish constitutional limits on presidential power, especially by reinforcing the mechanisms of Legislative control. The multi-party system and proportional representation should balance the president's power, since the government would depend on congressional support to conduct its agenda. The mediation of national parties and the functioning of the electoral system, where secrecy of the ballot was guaranteed, would also decrease the president's personal influence in the choice of congressmen and state governors. Finally, the president would be subject to congressional investigation and oversight and, ultimately, to impeachment in the case of serious misconduct.

Despite the adjustments, the presidential system was a key factor in the political instability of Brazilian democracy after 1946. Three major political crises took place in 1954, 1955, and 1961, all of them involving conflicts between the Executive and the Legislative, as well as attempts to remove presidents from power or to prevent them from taking office. The three political crises were solved through political interference of the Armed Forces, though the military did not remain in power, but returned the government to civilians. In 1964, however, one last crisis – also featured by strong disputes between president and Congress – would collapse democracy and install a military dictatorship that would last 21 years.

There seems to be no doubt that political crises challenged the presidential system. But one must ask whether the dysfunctions of the presidential system are to be blamed for the political instability. A growing number of congressmen thought so and endorsed consecutive attempts along the 1950s to amend the Constitution in order to adopt the parliamentary system. Nonetheless, all attempts failed up to President Jânio Quadros' resignation in August 1961, which was followed by an impasse created by the attempted military veto on the inauguration of Vice President João Goulart (Jango). As a compromise solution to ensure that João Goulart took office, but under limited powers, Congress approved a hasty implementation of a parliamentary system. The parliamentary experience was both unstable and ineffective. After successive cabinets fell from power, a plebiscite held in January 1963 approved the return of the presidential system by a large majority.

Given this scenario, the present research investigates how the presidential system responded to Brazil's transition into democracy post-1945. Based

on a document analysis methodology, the main purpose is to analyze how the debate on system of government became central to the constitutional and democratic order, as well as to explain the relations between the presidential system and the political crises of the period.

The text is divided in two parts. The first topic analyzes the presidential system in the Constitution of 1946 and the first attempt to adopt a parliamentary system, considering the political context, the legislative debates, and the expected or frustrated outcomes. The second part investigates the relationship between the political crises of 1954 and 1955 and the perspectives of changing the system of government, based on a diagnosis of presidentialism as a source of political instability.

2. The dispute between the presidential and the parliamentary systems

The debate about system of government is of central importance for Brazilian constitutionalism post-1946. Such centrality can be demonstrated by the consecutive attempts to adopt the parliamentary system. As mentioned earlier, the dispute over the political system that would better serve Brazilian democracy started in the Constituent of 1946. It was certainly a relevant topic for the transition into democracy and one that persisted on the agenda throughout the period, until the 1964 coup d'état.

On March 12 1946, during the constituent debates, the “Parliamentary Manifesto”, written by José Maria dos Santos and signed by more than 60 congressmen, was launched. According to the text, the “New State” dictatorship had not been “but the logical and necessary conclusion of the forty-eight years of personal government” that had prevailed over Brazil’s republican history. Only by abandoning the personification of power inherent to the presidential system would it be possible to build a truly democratic regime.

Deputy Raul Pilla proposed an amendment to the draft Constitution providing for the adoption of a parliamentary system. The justification stated that the presidential system did not ensure an adequate relationship between the executive and legislative branches: either one of the powers annulled the other or they lived in constant conflict. The lack of integration impaired the government’s ability to act efficiently and to conduct the public policies necessary to face national problems.

The presidential system also failed to guarantee mechanisms for holding the president accountable, argued Pilla. The fact that the government did not

depend on the confidence of the Legislative would favor the concentration of powers and the despotism of the president. In addition, impeachment would be an ineffective and useless mechanism to combat presidential abuses, as demonstrated by this instrument's historic lack of enforcement.

In the context of the Constituent Assembly, left-wing sectors also supported the parliamentary amendment based on their criticism of the authoritarian uses of presidential powers and their belief on the possibility of social change via the parliamentary system. Therefore, communist and socialist representatives stood up for a parliamentary system equipped with a strong Legislative branch as a means of democratic transformation of society.

The Constituent Assembly did not approve the parliamentary change. In practical terms, the presidential system's victory was largely due to the dominant presence of the governing party that wished to preserve the President's powers. But those in favor of maintaining a presidential system also needed to justify such choice. One of the main arguments referred to an alleged Brazilian culture and political tradition of praising authority and strong central power. In addition, the debates also highlighted the prospects for the presidential government under the new grounds set by the Constitution of 1946.

A series of mechanisms created to improve representative democracy would serve to limit the president's powers and control abuses. Proportional representation would strengthen nationally-based parties and guarantee a plural parliamentary composition as a counterweight to presidential action. The possibility of congressmen participating in the government and the Congress' prerogative to call for Ministers of State to provide clarifications would also improve the relationship between the powers and the control over the Executive's acts. The constituents described this model as an "eclectic" or "temperate" type of presidential system, including elements that were typical of the parliamentary system, as deputy Rafael Circunriá argued:

Eclectic presidentialism, with fair and convenient concessions to parliamentarism: attendance at the Chamber of Ministers of State; accountability for the acts the ministers subscribe to, with the President of the Republic; possibility of deputies and senators exercising the ministerial function without losing their mandate.¹

The 1946 Constitution came into force in September 1946. In 1948, the preface to the second edition of the "Parliamentary Manifesto" already indicated articulations within the Congress for a constitutional reform to aban-

1 Anais Constituinte (1946) 83.

don the presidential system. The movement was led by Raul Pilla who, at the end of 1949, had gathered enough signatures to submit the proposal for constitutional amendment n. 4, aimed at implementing a parliamentary system. The attempt to promote a constitutional change in such a short notice demonstrates how the institutional design adopted by the 1946 Constitution remained a conflictive aspect of the political transition. Over time, proposals for parliamentary amendments would be reinforced by successive political crises that challenged the presidential system.

During the constitutional amendment procedure, an important debate involved two congressmen: Raul Pilla and Afonso Arinos.² Raul Pilla was the proponent of the parliamentary amendment, and Afonso Arinos the rapporteur of the Special Commission constituted to evaluate the text. While Pilla was an enthusiastic supporter of the change in the system of government, Arinos strongly defended the maintenance of the presidential system at the time. The difference of opinions engendered a rich debate that became a mandatory reference for studies on system of government, as well as a central episode of the Brazilian constitutional experience after 1946.

Raul Pilla was a trained physician and had been involved in politics for many years. His party, the Liberating Party (*Partido Libertador*), had its support base rooted in the southern state of Rio Grande do Sul. Both Pilla and his party had the defense of the parliamentary system as their main political platform. Arinos, in his turn, belonged to the National Democratic Union (*União Democrática Nacional*), the main opposition party to Getúlio Vargas and to the political groups linked to his name. Arinos belonged to a traditional political family and was a jurist also dedicated to an academic career.

The two parties shared similar ideas about political, social, and economic policies. As a rule, both held more conservative positions, defending individual freedoms and opposing the agenda of strong State intervention. They also shared the criticism of what was identified as populist and demagogic politics, mainly related to the figure of Vargas. But when it came to the debate over systems of government, unlike the Liberating Party, the National Democratic Union did not establish a unique and binding position for many years, leaving it up to each member to vote for or against the parliamentary amendment. As rapporteur for the Special Commission created to analyze the proposal, Afonso Arinos was strongly against it.

A few years later, Arinos would change his position and support the adop-

2 Pilla's and Arinos' opinions are gathered in: Franco/Pilla (1958).

tion of the parliamentary system in Brazil. This change of mind, shared by several other jurists and politicians, will be analyzed later. But in 1949, in his opinion to the Special Commission, Arinos stated that the parliamentary system violated the independence between powers since it promoted “almost a complete merger of the executive and legislative branches.”³ Moreover, by giving primacy to the Legislative branch, the parliamentary system would hardly be compatible with the concept of the supremacy of the Constitution and with judicial review:

Presidentialism, the legal system par excellence, places the Constitution legally above the laws and it is up to a body of jurists to resolve conflicts between one and the other. Parliamentarism, a political regime par excellence, hardly accepts constitutional supremacy in the face of political power, and logically removes the question from the legal realm.⁴

Arinos considered that the parliamentary system prioritized political freedom and its defense by the Parliament, while the presidential system favored legal freedom and its defense by the Judiciary.⁵ And because the parliamentary system would repel Constitution as a supreme law, it would also be irreconcilable with federation, which depended on the superior norm of the Constitution to regulate the division of powers between the federal entities.

In response, Pilla argued that the parliamentary government was not based on the Parliament’s sovereignty, typical of conventional or assembly governments, but rather allowed for a better integration between political branches. Instead of subordination, the parliamentary system would favor a coordinated relationship between the Executive and the Legislative. The possibility of dissolving the Chamber would guarantee a balance of powers by preventing the Legislative branch from abusing its prerogative to overthrow governments over the loss of parliamentary support.⁶

Another aspect highlighted by Pilla was the presidential system’s inability to resolve conflicts between Executive and Legislative branches through the mechanisms provided by law.⁷ In a situation of escalating crisis, the system of checks and balances would fail, and the response would generally involve the use of extra-constitutional measures. As a result, the presidential system

3 Franco/Pilla (1958) 26.

4 Franco/Pilla (1958) 71.

5 Franco/Pilla (1958) 73.

6 Franco/Pilla (1958) 73.

7 Franco/Pilla (1958) 73.

would threaten democratic stability and would often lead to breaches of the constitutional regime.

The debate over the advantages and disadvantages of each system of government is not new in political science. Many considerations have already been made about each system's ability to guarantee stability of democratic regimes, to enhance democracy, and to strengthen the decision-making capacity of political powers.⁸ In the present research, our goal is not to consider a theoretical debate on whether or how institutional choices matter and which system works best.⁹ Rather, the purpose is to understand why it was an important debate in the context of Brazil's political transition post-1945 and how it impacted on constitutional theory and practice during that time.

Support for the parliamentary system significantly grew over time, including the conversion of former staunch supporters of the presidential system. Such discontent with the presidential system in Brazil during the 1950s is related to the fear of the authoritarian past, but also to the political crises and the opposition's political strategies. Therefore, it is important to understand what motivated players to change their positions over time. It is also relevant to note that, despite its growing popularity, all attempts to implement a parliamentary system were frustrated until its improvised adoption during the political crisis in 1961, which can hardly be considered a victory of parliamentary supporters.

In an analysis of the statements made in the Chamber of Deputies defending the parliamentary system between 1946 and 1961, Eunice Esteves identifies seven main arguments:¹⁰

- i) Balance of powers: cooperation between the Executive and the Legislative, avoiding the "dictatorship" of the presidential system;
- ii) Government responsibility: prime minister is approved by parliament and is kept accountable;
- iii) Building political leaders: the prominent role of parliament in the government contributes to the preparation of statesmen;
- iv) Strengthening of parties: cabinet system obliges parties to develop coherent and unified programs;
- v) Administrative stability: the fall of the cabinet does not stop the administrative machine, kept separate from the government;

8 Linz (1991).

9 Cintra (2004).

10 Esteves (1984).

vi) Smooth succession: cabinet changes do not generate crises, but occur under normal conditions and with national approval;

vii) Natural adaptation: through parliament, public opinion has greater influence over the government, which responds better to the nation's problems and needs.

Esteves also notes which arguments were used the most at each moment. In the debate over the first parliamentary amendment, in the context of Vargas' election and the first years of his government, arguments related to smooth succession and government accountability prevailed. The concern with presidential succession was connected to the conflicts and political instability surrounding Vargas' election in 1950. At the same time, concerns with the president's authoritarian background and reactions to corruption scandals contributed to criticisms regarding the lack of accountability in the presidential system.

It is worth noting that an attempt to begin impeachment proceedings against Vargas' Minister of Finance, Horácio Lafer, occurred in parallel with the debates on reforming the political system. The deputies' frustration with the lack of accountability of the president and his assistants strengthened the parliamentary discourse.

The debate over the first parliamentary amendment, from 1949, was interrupted in 1950 after Arinos' and Pilla's votes in the Special Commission. The procedure was only resumed in 1952, when a new Commission was formed and approved Pilla's vote in favor of the parliamentary system. At that time, dissatisfaction with the presidential system corresponded to dissatisfaction with Vargas' election and government. Getúlio Vargas had been elected in 1950 under strong protests that criticized his authoritarian past, but also feared his connections with the working class. For many opponents, Vargas' victory at the polls had only been possible thanks to the presidential system, which allowed for the popular choice of the president, and thus made room for the alleged pernicious influence of demagogic and populist practices.

During Vargas' administration, criticism of the presidential system was also encouraged by opposition sectors that sought to undermine presidential power. Opponents accused Vargas of disregarding the role of the legislative branch and of making direct appeals to the people as a source of legitimacy to government policies. They also criticized the excessive powers that the president held in his hands, both to control the legislative agenda by approving

measures of interest to the government, and to issue wide reaching decrees independently from Congress.¹¹

One of the leaders of the opposition to Vargas and well-known jurist, deputy Aliomar Baleeiro argued that the presidential experience changed his mind about the political system. He had defended the presidential system in the Constituent Assembly, but became a supporter of the parliamentary reform in Brazil. "I was a presidentialist and, unwillingly, insulting my legal education, I became a parliamentarian, due to the disenchantment of the regime in which we have lived until today."¹²

It becomes clear that criticism of the presidential system was mixed up with opposition to Vargas' administration. In other words, support for parliamentary system was in part a political strategy for those who had not accepted Vargas' return to power in the first place. Such political use of parliamentary discourse was not new. The defense of parliamentary system had long been identified as an expedient reaction to momentary crises or as an opposition attitude towards the government. That was also Afonso Arinos' understanding in 1949, as he claimed that parliamentary amendment was driven by the opposition's interest in approving an institutional change that would weaken the president's power.¹³

Nonetheless, despite the growing anti-presidential attitude among groups opposed to Vargas, the parliamentary amendment was rejected by the majority of congressmen in a vote that took place in June 1953. Even a party that supported the parliamentary system in its program voted against the amendment. The negative result can only be explained by taking into account the electoral ambitions of parties and politicians already thinking of candidacies for the 1955 presidential succession. Deputies officially justified their vote against the amendment on the grounds that it would be inconvenient or inopportune, due to the impact on institutional stability. But the prospect of coming to power certainly sparked interest in maintaining the presidential system.¹⁴

As Paixão e Barbosa pointed out in an analysis of the debate over the system of government in the 1950s:

11 D'Araújo (1992); Dulci (1986).

12 Diário da Câmara dos Deputados, 12 Jun. 1953, 5348-9.

13 Franco/Pilla (1958).

14 This is the case of the Social Progressist Party (*Partido Social Progressista*), which defended the parliamentary system in its political program, but voted against the amendment. The interest in maintaining the presidential system was related to the interest of its leader, Ademar de Barros, to run for president in the 1955 elections.

It is clear that many defenders of the parliamentary system were ideologically committed to their cause, but the promotion of an alternative system of government also followed the motivations of more specifically political-electoral and partisan nature.¹⁵

As noted, shaping the system of government had been a major concern in the transition to democracy. Shortly afterwards, ideas for changing the institutional mechanism emerged and led to an important constitutional debate. Not only that, support for the parliamentary system grew over the period in close connection with the political crises featured by conflicts between the powers.

3. Political crisis, presidential system, and institutional reform

After the first parliamentary amendment failed, it would not be long before the idea of changing the system of government was brought back into public and legislative debate. It reappeared shortly after the final crisis of Vargas' government, which ended in August 1954 with the president's suicide, in the context of strong pressures for his resignation and attempts to remove him from power, including threats of military intervention.

For some time, the government had been facing difficulties. The opposition and a significant part of the press accused Vargas of corruption and anti-democratic measures. The crisis escalated in early August, when one of Vargas' main political opponents, the politician and journalist Carlos Lacerda, was the target of an attack that resulted in the death of a member of his personal security, Air Force officer Major Rubens Vaz. The revelation that a member of Vargas' personal guard took part in the attack and the suspicions of the president's direct involvement exacerbated tensions between the Armed Forces and the president. Amid threats of military action and pressure for his removal and resignation, Vargas decided to take his own life. Such dramatic act put an end to his government, but not to his influence on national politics.

The tragic end of Vargas' presidency intensified the debates about the functioning of the institutions and the political system. According to Hermes Lima, an important jurist and former deputy member of the Socialist Party (*Partido Socialista Brasileiro*), the crisis demonstrated the failure of the presidential system:

15 Paixão/Barbosa (2013).

I believe that the tragic fall of President Vargas has challenged, once again, the viability of the Brazilian presidential regime. The presidential system organizes the Executive in such a rigidly one-person format that any structural change poses fatal dangers to its functioning.¹⁶

The author highlighted the main points of criticism of the presidential system: tendency towards a personal government, lack of collaboration between the executive and legislative branches, and the absence of effective controls over the president. The presidential system was also responsible for creating conflicts and crises without offering a way out. As a result, politicians would call upon the Armed Forces to intervene in political processes. “The Army was raised to the category of interpreter of the natural law of Brazilian presidential system,” said Lima.¹⁷

In January 1955, Afonso Arinos would write that, due to the expansion of State interference in the economy, “Brazilian presidential patriarchy” became stronger. However, although the president was strong in economic policies, he was weak in governance, which depended on the unstable support from Congress, caused by party fragmentation. The combination of “political strength” and “legislative weakness” of the president would define Vargas’ administration and lead to its final crisis.¹⁸

When Vargas’ government came to an end, another parliamentary amendment offered by deputy Raul Pilla in May 1954 was in progress. After the escalating conflicts that led to the government’s fall, the amendment was pushed forward under what seemed to be a strong consensus that the adoption of the parliamentary system would be the adequate response to the political and institutional crisis. Deputy Coelho de Souza summarized this shared belief: “Right after the 24th of August we heard in every corner that the adoption of Deputy Raul Pilla’s amendment, which, with a clear vision and eminent political clairvoyance, foresaw the whole crisis in which we now plunge, would be the solution.”¹⁹

The expectation of successfully approving the amendment did not come true. The rapporteur of the Special Commission had already given an opinion contrary to the amendment, which was voted and approved by the Commission in November 1954. The legislative debate was concentrated during the

16 Lima (1954) 53.

17 Lima (1954) 67.

18 Melo Franco (1955).

19 Diário do Congresso Nacional, 15 Dec. 1954, 8607.

months of December 1954, May and June 1955. However, support for the reform declined over time, and in September the amendment was rejected for lack of quorum.

Although the amendment did not get to be approved, the legislative debate reinforced the relationship between the political crisis of 1954 and the failures of the presidential system. By blaming the presidential system for the crisis, deputies dismissed Congress from responsibility and emphasized a moderating, patriotic, and unbiased intervention by the Armed Forces.

For instance, Deputy Coelho de Souza described the presidential system as a balancing game between the Executive branch and the Armed Forces. “For these forces, the Congress does not count – or it counts very secondarily,” he added. According to this view, the Legislative branch would not have played a relevant role in the final crisis that ended Vargas’ government. The Armed Forces, on the other hand, would have acted as saviors by solving the conflicts and restoring normality with no intention of taking power, but ensuring the prompt return to the civilian command.

The idea that the Armed Forces moderated political crises became well-known and quite influential in explaining Brazilian democracy from 1946 to 1964. That was actually an idea supported by many members of the political elites. For instance, in a conference before the General Staff of the Army, in 1949, Brazilian sociologist and politician Gilberto Freyre argued that the Armed Forces were designed and prepared to arbitrate major national conflicts.²⁰ An important jurist, Themístocles Cavalcanti, favored a similar approach. According to him, the role of the military structure in Brazilian politics would be more relevant the less consistent and developed was the social structure. The lack of political elites capable of leading the country with responsibility also left room for the military to act at certain times to “correct the anomalies found in the normal mechanism of the political system.”²¹

Some congressmen incorporated the same thought to explain the 1954 crisis. According to Deputy Castilho Cabral: “The Armed Forces had to intervene for the presidential balance to be reestablished in Brazil.” Deputy Luiz Garcia stated that it was not correct to say that the Armed Forces were called upon to intervene on political disputes; they only acted when compelled by the circumstances and because of the dysfunction of the presidential regime:

20 Freyre (1949).

21 Cavalcanti (1961).

But, Deputies, the Armed Forces were never called upon to solve certain crises in the country. They have come to act as an imperative of the moment. It is political circumstances – because of political crises – that have been determining their interference in the country's public life. The flaw is neither in the formation of the Armed Classes, nor in those who direct politics, but in the regime, which sometimes does not allow for a constitutional way out, a legal way out of a crisis.²²

This interpretation disregarded the decisive role Congress played in the destabilization process and in the final crisis of Vargas' government. It also simplified the relations between the Congress and president Vargas, as if they were based on a complete supremacy of the Executive, secured by the Armed Forces. It is important to understand why this image did not match reality.

Firstly, Congress was not a minor player in the Vargas administration. It is true that Vargas maintained dubious relations with parties and with Congress, and often sought to legitimize his policies through direct appeals to the people. But Vargas also faced limits imposed by the Congress and sought its collaboration to succeed in governing. As for the president's influence on the legislative agenda, the Constitution itself guaranteed a great amount of powers to the Chief of the Executive specifically to allow for his participation in the legislative process. As already mentioned, a strong Executive was the institutional design supporting an intervening State. Besides, considering the performance of other presidents in the same period, it cannot be argued that Vargas exerted a disproportional influence over Congress.

Even more striking is the role that the Congress and some parties played in the process of destabilizing the government. A few months before the final crisis, opposition attempted to impeach Vargas based on irregularities on government expenses and on alleged communist plans and connections. The impeachment failed, but anti-Vargas forces continued a campaign of strong attacks and defamation against the government and the president.

During the month of August, Vargas' opponents tried several strategies to remove him from office by extralegal means. They tried to force the president's resignation on the grounds that he had lost the authority and legitimacy to occupy the position. They also sought to justify a military intervention to remove Vargas and expressly called on the Armed Forces to take action, which included efforts to circumvent existing legalist resistance within the military. By August 12th, deputy Aliomar Baleeiro stated that the only reason why Vargas was still in power was because "people responsible for the Armed

22 *Diário do Congresso Nacional* (1955) 2771 (Speech of Dec. 13 1954).

Forces of the country feel a sort of embarrassment in offering a solution that violates the Constitution.” According to him, the country was under a severe political disturbance

because we fear touching the Constitution. I praise this concern for our supreme law. But we need to know that the country’s life cannot be damaged by the myth of a separation of powers or by theoretical principles that do not match our needs.²³

Many other deputies were engaged in convincing the military to remove Vargas and in offering legal arguments to justify disobeying the Constitution. Therefore, it is by no means reasonable to say that Congress or the parties had a minor part in the course of events.

Secondly, it is also not possible to understand that the Armed Forces intervened as simple arbitrators of the political crisis. The military acted as key stakeholders and as active participants in political processes throughout the period from 1946 to 1964. The fact that they did not officially hold power does not take away the constant influence that they maintained over politics. In the case of Vargas, who had been overthrown by the military in 1945 and who was elected in 1950 through military endorsement, relations with the Armed Forces were a central component of government stability.

The political crisis of 1954 may have represented a test of the presidential system’s functioning and its ability to resolve conflicts. However, there was a clear attempt to make institutional design responsible for the crisis in order to, at the same time, make institutions and agents who triggered the crisis unaccountable. The fact that the adoption of a parliamentary system did not move forward is symptomatic.

However, another political crisis would again challenge the presidential system and reinvigorate political and legislative movements in favor of changing the system of government. The political crisis’ critical point took place in November 1955, when two presidents were removed from office. Those events were a result of a series of conflicts that happened along the year and orbited around the October presidential elections.

Succession was largely pointed out as one of the serious flaws of the presidential system.²⁴ Raul Pilla highlighted the “notorious and well-proven fact that each presidential election generally corresponds to a serious crisis that

²³ Getúlio é um espectro que já não mais governa, “Tribuna da Imprensa”, Aug. 13 1954.

²⁴ Trigueiro (1976) 384.

endangers the democratic institutions themselves.” The coincidence between succession and crisis was a characteristic of the presidential system in Latin America:

The presidential system was called an *astronomical* political system, for strictly submitting political events to the calendar: with equal reason, in Latin America at least, it could be called *cataclysmic*, since each succession is characterized by deep agitations, if not by a coup d'état or a revolution.²⁵

After Vargas' suicide, Vice President Café Filho took over the government with a conciliation speech. However, the 1955 presidential campaign was troubled by attempts to change the electoral rules, to cancel the election itself, and to challenge the candidacy of Juscelino Kubitschek (JK) and his running mate João Goulart, both of them associated with the figure of Vargas and therefore strongly fought by his opponents.

Those who opposed the elections claimed the existence of fraud and corruption that supposedly tainted the results of the polls. They also challenged the JK-João Goulart candidacy specifically, mainly due to relations with the communist party, which had been declared illegal by the electoral justice. The most radical anti-Vargas sectors gave speeches in favor of military intervention and the establishment of an exception regime that should correct the flaws in the democratic process and prepare the country for true democracy.²⁶ The use of military force to solve the succession problem was defended by Alves Rodrigues, who argued: “This is not a coup – pure and simple – in the subversive sense, in the sense of ‘quarterly’.” According to him, “What everyone wants is that the law of force imposes the force of law.”²⁷

The announced victory of JK and Jango amplified the threats to prevent the elected candidates from taking office. In this context, in early November, President Café Filho took a temporary leave from office due to a health problem, and successor Carlos Luz took over. Under the suspicion that Carlos Luz was articulated with sectors favorable to a coup, the so-called preventive coup or countercoup was organized. A military movement led by General Henrique

25 Franco/Pilla (1958) 370.

26 See the newspaper articles published by Lacerda: Em cima da hora, “Tribuna da Imprensa”, 5 Jul. 1955; Tudo legal, “Tribuna da Imprensa”, 1 Aug. 1955; Antes ou depois, “Tribuna da Imprensa”, 11 Aug. 1955; Proposta concreta para resolver a crise, “Tribuna da Imprensa”; 18 Aug. 1955.

27 Alves Filho (1955) 11-13.

Teixeira Lott removed Carlos Luz from office. Troops and tanks cordoned off the area of the government palace, and the president and his close advisers took refuge in a warship with the initial intention of resisting.

The military movement publicly justified itself as a preventive action aiming to ensure respect for the popular vote and election results and to guarantee that the elected candidates took office. Carlos Luz' removal was endorsed by the Congress, which approved a declaration of inability against the president, later extended to president Café Filho when he tried to return to office. Café Filho appealed to the Federal Supreme Court to claim the right to end his term as president. Yet, one day after the appeal, the government declared a state of siege that prevented the Court from considering the case.

The 1955 crisis involved a dispute over the constitutional and legal order.²⁸ On the one hand, those who supported the removal of two presidents from office claimed the need to prevent a coup and guarantee the rules of the democratic game that demanded respect for the election results. On the other hand, those who had questioned the election results and called for military intervention would stand as guarantors of the legal order against the removal of presidents outside legal means.

Much like 1954, the political crisis in 1955 was not resolved by the means provided by the Constitution. Conflicts between the Legislative and Executive branches caused political and institutional instability. But the 1955 crisis also challenged an important aspect of the presidential system, which is the transition of power. The holding of presidential elections with increasing social participation and with instruments to guarantee the vote against coercion was something new and significant for Brazilian democracy. Certainly, the electoral processes were not free from fraud and corruption, but the attempts to invalidate the elections were related to another feature of the presidential system that bothered part of the political elites: the popular choice of the president.

It is also important to note that, despite the use of military force to remove the presidents from office, the solution to the crisis included the direct and relevant collaboration of the Legislative branch. Congress approved the declaration of inability of the two presidents, as well the state of siege requested by the government. The legislators that endorsed such drastic measures made great efforts to demonstrate that they were supported by law and by the Constitution. This institutional and legal endorsement is relevant to understand the crisis and its effects.

28 Carloni (2012).

Juscelino Kubitschek took office under the state of siege decreed and secured by military support centered on the figure of General Lott, who became an influential Minister of War. As a government that was born out of a political crisis, the idea of institutional reform was present from the start. In fact, the government discussed a broad constitutional reform that would promote a series of changes, including the electoral process, the relationship between powers, and legislative making process.²⁹ Changing the system of government was also among the topics of discussion.

A new parliamentary amendment was offered by Raul Pilla in April 1956 and was under Congress' analysis nearly through the entire Juscelino's administration. A significant number of parliamentarians signed the amendment, including the support from leaders of majority, minority, and opposition. However, the favorable trend towards the approval of the reform was reversed in a few days. The pivot of this setback was the Minister of War. In an interview on a national radio station, on April 18, general Teixeira Lott declared himself against the amendment. He said: "Personally, I am not in favor of parliamentarism. I think that, under the current conditions, Brazil would not support a change in the system of government."³⁰

Press channels and opposition accused Lott's statement as undue intrusion into legislative work and as a military pressure, if not a military veto, to the amendment. The general's statement against the change sent a clear message for the Congress' governing coalition to block approval of the amendment. Lott would later explain that the amendment could be used to weaken JK's government, as a tool for questioning presidential powers and pressing for new elections. In addition, although he denied it, General Lott had his own electoral ambitions, which were made clear when he decided to run for president in the 1960 elections. For someone with possible intentions to become president, it was convenient to maintain the presidential system.

As Cristiano Paixão and Leonardo Barbosa point out, this episode is little known, despite its relevance to understand an important character such as Lott.³¹ Books generally describe Lott as an army official strictly committed to the rule of law and detached from party disputes. His interference in the legislative debate on the parliamentary reform reveals a political move and a

29 Reforma Constitucional (1956), "Revista de Direito Administrativo", 46.

30 Lott confirma: vetou a emenda parlamentarista, "Tribuna da Imprensa", Apr. 18 1956.

31 Paixão/Barbosa (2013) 56.

calculated strategy that do not match the neutral and unbiased profile commonly attributed to him.

Despite the parliamentary amendment's new defeat, the negative evaluation of presidentialism was growing. An important figure would come to support the adoption of the parliamentary system: Afonso Arinos. As seen previously, Arinos had been a strong supporter of the presidential system in the early years of the 1946 regime. In 1957, Arinos declared his change of opinion based on what he understood as a failure of the presidential experience in Brazil.³² The diagnosis would be based on his own testimony:

I saw, from within, in one of its most critical moments, the process of profound maladjustment of the Brazilian presidential machine. Reflecting on it, in the light of the events that I experienced directly, or followed closely, I came to the conclusion that such maladjustment has an impact outside the strictly institutional field and affects the entire complex national reality, leaving its structure unstable and hampering its development.³³

According to Arinos, the failure of the Brazilian presidential system was due to the lack of development of three main pillars: the Constitution, the political parties, and the Supreme Court. Firstly, Brazilian constitutional culture was attached to abstract and unstable concepts and to practices of constantly changing Constitutions, with no commitment to any of them. Second, political parties were weak and unable to neutralize the predominant military influence in political processes. Finally, the Supreme Court had failed its mission to act as an arbiter of legality. Instead, the Tribunal would be defined by a combination of weakness, omission, and conformism.³⁴

Arinos' analysis demonstrates how political crises influenced the perception of the Brazilian presidential system as a regime that did not work and caused democratic instability. There is no doubt that the crises were a driving force behind the attempts to establish parliamentarism.³⁵ However, the fact that all the attempts up to 1961 failed casts light on the political, partisan, and electoral strategies that motivated supporting – and withdrawing support – for parliamentary amendments.³⁶ At the same time, dissatisfaction with the presidential system also reveals difficulties in dealing with typical elements

32 Franco (1957).

33 Franco (1958) 2.

34 Franco (1958) 5-6.

35 Esteves (1984).

36 Paixão/Barbosa (2013).

of democracy, such as popular participation in politics and the resolution of political and social conflicts.

Finally, Arinos suggests that the presidential system failed because the 1946 Constitution itself would have failed. The conclusion does not seem to do justice to the constitutional experience of 1946 – it would be reductionist to assume that the institutions and mechanisms designed by the Constitution simply did not work. As other studies have already shown, even with difficulties in institutionalizing itself, the party system after 1946 grew stronger over time, responding to changes and political disputes.³⁷ The Brazilian Congress also emerged as one of the strongest in Latin America in the post-war period. Both Congress and the parties played a decisive role in the context of political crises, including articulation with the military.

In this sense, what was considered a crisis in the presidential system can also be understood as part of an adjustment process. Relations between the Executive and the Legislative, for example, reflected the Congress's significant gain in autonomy and the president's challenge to balance popular legitimacy and the need for government coalition. At the same time, tensions between presidentialism and democracy would not be resolved by changing the system of government, which was made clear by the turbulent parliamentary experience of 1961-1963.

4. Final remarks: presidential system in transition

The post-1945 transition to democracy in Brazil was strongly linked to the debate over the system of government. The authoritarian experience of the "New State" (1937-1945), as well as the abuse of exceptional measures in the First Republic, were largely considered to be the result of the presidential system's excesses, that provided the president with almost uncontrollable powers. For some, democracy would require abandoning the presidential system. For others, it would be enough to adapt the presidential system with the necessary checks and balances in order to avoid abuse.

Presidentialism was preserved after all, but it was kept under attack throughout the democratic period of 1945-1964. The political crises that shook the regime reinforced criticism towards the presidential system and support for the parliamentary system as the most appropriate for maintaining democratic stability. In this context, frustrations regarding the political

³⁷ Souza (1990).

system's functioning were often interpreted as a continuation of the unsuccessful presidential experience in Brazil. In other words, according to this view, after 1945 the same "imperial" presidentialism with authoritarian tendencies and with no effective controls that shaped Brazilian history insofar predominated.

The present study demonstrates, however, that it is not possible to speak of a mere and pure continuity in the practice of the presidential system. The institutions operated under a different context, with new rules related to the electoral process, the party system, and political participation, as well as new ways of controlling and limiting the presidential power, mainly through the Legislative branch. The presidential system itself was in transition. This does not mean that the institutional model had no problems, difficulties, or contradictions. But the political and legal history of the relationship between the Executive and the Legislative is more complex than a diagnosis of a flawed institutional design.

Political crises were also indications of a presidential system in transition. On the one hand, they demonstrate the resistance to the democratic process and the difficulties in resolving conflicts between the powers within the legal rules and framework. They also prove the willingness to break the law based on a justification of necessity or on the idea that the Constitution could not be a suicide pact. The extralegal solutions to the crises were carried out through interventions by the Armed Forces, which proves the central role played by the military. At the same time, the episodes reveal the Congress' protagonist position in leading the crises and in legitimizing the measures adopted. As a consequence, it becomes clear that authoritarian threats cannot be understood solely as a concentration of powers in the hands of the Chief Executive. In fact, the Legislative branch also actively participated in the process of establishing and legitimizing the post-1964 dictatorship in Brazil.

As for the parliamentary system's defense, it can be seen that it was strongly connected to political and electoral strategies, especially from opposition parties. Although they also aimed at improving the institutional design adopted by the 1946 Constitution, parliamentary amendments were influenced by the electoral calendar and the political crises. When it was finally implemented in 1961, the parliamentary system was an improvised response to a new political crisis used as an expedient to reduce the powers of President João Goulart, as he took office after the resignation of Jânio Quadros.

Finally, the analysis of the relationship between the government system

and political instability in the context of the transition to democracy in Brazil after 1945 sheds light on reflections of the present time. The scenario of political instability in Latin America and the constant episodes of presidential removal have been the subject of several important studies.³⁸ Investigating how conflicts between powers were resolved in the past and how institutional mechanisms worked in response to crises helps to better understand this scenario and further developments. After all, institutions do matter, but they interact with certain contexts, disputes, and strategies that are peculiar in times of political crisis and transition.

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38 See, e.g., Valenzuela (2004); Pérez-Liñán (2007); Hochstetler (2007).

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The physical body through the juridical lens:
an issue of law of innovation and of innovation in law (XIX-XX cent.)

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1. Coordinates and spaces; 1.1. Languages and contents; 1.2. The “body” as a “juridical place” in trans-formation; 1.3. Where is the body? Natural law and general principles of law; 2. Some examples between the nineteenth and twentieth centuries in Italian legal experience; 2.1. Active and passive body in crimes “against morality”; 2.1.2. Abduction and “forced body”; 2.1.3. Public scandal and private offences; 2.2. Represented and imagined body; 2.3. “Collective body”: health care and protection; 3. An in-progress conclusion: cues for further analysis

1. Coordinates and spaces

1.1. *Languages and contents*

Taking “innovation” and “transition” as coordinates, I am ready to place myself in a hyperbolic space, where to transfer themes that are, in some extent, “familiar” to the legal historian, but need to be re-shaped into new descriptive and interpretative geometries.

I will therefore use these given coordinates in a descriptive sense, but also as hermeneutic categories, and then my first concern will be to provide clarifications on the meaning of these two words / realities / concepts, in as far as they are addressed here.

These are outwardly monolithic terms, from a general semantic profile, which find a seemingly unproblematic translation within legal frame, where they appear to be external categories. However, “innovation” and “transition” present themselves, at a closer look, with multiple and problematic levels of depth and facets, and seem to be able to connect with each other and tune in to the legal sphere, revealing unprecedented tracks and paths of study and analysis.

Reflecting on the concept of “transition”,¹ it appears immediately (and not exclusively) to be placed within a temporal-semantic field, and seems to place

1 Precious ideas and references in Meccarelli (2018) in particular 19-21. On transition, I also refer to the hints and suggestions offered in Cornelißen/Lacché/Scuccimarra/Stråth (2018).

itself in dialogue with that of “historical contingency”; it is also compatible – indeed, necessarily connected, in my opinion – with that of “evolution” in its most recent and prudent re-interpretations, which, in fact, combine the idea of a process, free from finalisms, with that of transformation by way of adaptation and exaptation.

In particular, “transition” identifies a process that takes place over time, with respect to which the *dies a quo* and the *dies ad quem* are relevant. It is a process that goes from a “before” to an “after”, drawing a time frame and tracing perspectives that the historian identifies and delineates by making reconstructive choices, on the basis of moments and phenomena that are themselves transitory (I can imagine, in legal history, laws expressly ruling a transitional period, bodies or procedures introduced to regulate the transition from one regime to another, from one system of law to another, etc.), and which at the same time suggest the transition as a heuristic key. We could say that “transition”, as an instrument of explanation and scientific investigation, has an ontological status (it is outlined in the “external” data) and at the same time epistemological (as a conceptual instrument that performs, in fact, a heuristic action).

In short: “transition” is not only what in the context declares itself as such, but also what the historian identifies as such in the context, taking as its reference a “before” and an “after”, which are relevant in the light of the observed space-time reality and from its protagonists’ point of view. This, obviously on the basis of the assumption that law is context-sensitive and that a legal historian is above all an “observer” of the context and its main players.²

2 In particular, those who study legal history “ocupa la posición dada por la confluencia entre dos puntos de vista que conllevan estrategias cognitivas y discursivas diferentes. Un punto de vista posterior respecto de lo acontecido, que va del presente al pasado (miramos desde después) y tiende a construir genealogías, privilegiando por tanto la diacronía (del pasado al presente). Un punto de vista externo, que va de fuera hacia dentro (miramos desde fuera) y tiende a construir ‘mundos’, espacios de sentido, marcos de significado, privilegiando por tanto la sincronía (el pasado o el presente). [...] Pero el historiador es la suma de ambos: el sujeto que, a efectos cognitivos, adopta un punto de vista posterior y externo respecto de lo acontecido; una abstracción, si se quiere, que usamos para designar el punto donde confluyen ambas perspectivas y examinar las condiciones epistemológicas que determinan a quien ocupa esta posición”. Garriga (2020) 8-9. I may add, on this subject, the reflections of Halpérin (2017). Considerations on these issues, also with regard to the latest paths of legal historiography, are in Hespanha (2019): “[t]he boundary between law and other normative discourses and practices became totally porous and context dependent” 16.

As for the issues outlined here, “transitional” is the same time-span considered, from a general history profile and with particular regard to the socio-cultural context of the historical phase that goes from the second half of the nineteenth century, particularly from its last two decades, to the inter-war period. A fifty-year timeframe, that in Europe marks the long moment of transition throughout modernity and to modernity.

And modernity is a key concept ³ for us, beyond conventional periodization and historiographical debates on it.

Reading through the self-narration of '800/'900 actors, “modernity” is period in which, for the first time, innovation, the other coordinate here taken as our reference, becomes a distinctive sign, the one that marks the abrupt acceleration and trans-formation that we could say global, not only European, as much as the affirmation of a new anthropology, which is rooted in the hard sciences (there are many studies that highlight the link between new anthropology and theories of physics - relativity and quantum - with the decomposition and complexification of individual identity).⁴ It is a period in which machine starts replacing men, men are mechanized by their artificial extensions and mechanicism invades thought, linked to the faith in progress.⁵

“Modernity”, in the perception of those times, lies exactly in the clear dividing line between known past and the tension towards the new, a future

3 For reflection on the concept of modernity, pregnant with meanings, I refer to Rosa (2015) 23-24, and his stressing on “speed” and especially “acceleration”; with reference to this last crucial idea, he points out that, since XVIII century a “processo accelerato di trasformazione della società”, in a wide cultural sense, can be detected, that is a “trasformazione dei modelli di rapporto sociale, delle forme della prassi e della sostanza della conoscenza (rilevante per la prassi)”. That is, there are acceleration processes within society and other processes that are accelerations of the society itself. For Rosa, 28, who takes as reference measures of changement “family” and “work”, as “istituzioni che organizzano i processi di produzione e riproduzione”, affected by technological acceleration, “classical modernity” is the period that goes from 1850 to 1970.

4 The same “distruzione della nozione di tempo nella fisica fondamentale» is the «realizzazione dell’ubiquità dell’impermanenza”: Rovelli (2017) 87; there are other “scientific traumas” that modernity contemplates, from non-Euclidean geometry to Darwinism. For a broad picture, Geymonat (1971) remains essential. For interesting hints on the relationship between “machine theory” and anthropology, technique, technology and identity of human beings in modern age, I refer to the essays in Russo (2007).

5 But the acceleration of modernity brings the perception of insecurity and fear with it: on these boundaries see Scuccimarra (2019) 21 and ff.

that is still not well identified, but certain and better. And innovation is a typical phenomenon of modernity, highlighted by economic,⁶ social and cultural history, which in scientific, technical and technological development has found its most immediate and typical expression.⁷

As a matter of fact, going back to language, and looking at the lemma “innovation” in the linguistic use and lexicography of the ‘800-’900, we identify clues on the significant historical path of the term,⁸ which put a more abstract semantic-conceptual field, beside innovation meant in the traditional field of science and technology. Indeed, it is a path that refers also to innovation as change, transformation and evolution, defined in opposition to the idea of “conservation” and “tradition”: the term “innovation” gains the wider meaning, witnessed by the texts, of “introduction of new ideas, or systems in the political, legal, religious, artistic, scientific, economic or technical sphere”.⁹

If the growing diffusion of the use of the term is immediately associated

6 It is known that from Joseph Schumpeter onwards, or since the beginning of the twentieth century, innovation is a crucial element in the micro- and macroeconomic reflection.

7 I think of the beautiful encyclopedic item edited in 1989 by Luigi Luca Cavalli Sforza, anthropologist and geneticist, and recently re-edited with a final essay by Telmo Pievani, where innovation is an implicit element of cultural evolution: Cavalli Sforza (2019) and, on these issues, Fusar Poli (2020). On the nexus between culture and law in its different perspectives (law as culture, law in culture, culture in law etc.) there are numerous insights in scientific literature: I mention Cotterrell (2004) 3, as a clearly explanatory text concerning this complex subject matter, in its various forms and declinations, among which the “comparative” one, as well as the perspective of a “*law’s domination of culture*”, draw a specific attention of the legal historian.

8 It is rather interesting to investigate the term “innovation” from a lexicographical profile (rooted in Italian linguistic tradition). “Innovating”, referring to multiple semantic fields, ranging from abstract to technical, takes on an increasingly broad and dynamic shared meaning, that of “transforming by introducing new systems or methods”, while the noun “innovation” becomes synonymous with change and evolution. In the most recent and accurate lexicography, to innovate means “to change, modify, vary, change by adopting or introducing new elements or methods; make something new; make new, modernize, modernize” and again, “profoundly transform a political, juridical, economic, religious, cultural situation; introduce new regulations, new institutions; reform”. The quotes are taken from Cardinali (1846) 76; Tommaseo/Bellini (1861) 1548-1549 but see also the precious edition (from XVII to XX cent.) of the *Vocabolario* of the Accademia della Crusca, now also available online at <http://www.lessicografia.it/ricerca.jsp>.

9 The definition is translated from Battaglia (1995) 43-45.

with a growing concrete relevance of the “innovative phenomenon”¹⁰ in the economic and scientific-technological field, only in very recent times innovation seems to have gained its significance for legal studies, especially in reaction and response to the impact of technical and scientific innovation on the sphere of law. However, if the non-rhapsodic and accepted use of the *lemma* in the legal field dates back to very recent times and typically concerns the area of “*Research and Development*”, this model has historical roots right at the end of the nineteenth century, and reconnects to industrial property and patent law,¹¹ historically representing the effective legal content of innovation.

Precisely this specific area of law offers an example of the relevance of innovation not only as a phenomenal datum that precedes law and which is conformed by law, but also as a process that concerns the law itself, internal to it and expressive of transformations that invest the norm, legal science, interpretation, discursive models, etc.

Innovation therefore becomes a versatile phenomenal and conceptual/instrumental tank (as a heuristic *medium*), concrete and abstract at the same time, which, in my view, implies the idea of a process – a tension *in novum* that is neither necessarily aware nor intentional – without value connotation as such, that implies a substantial course of time in order to be observed as significant, or impacting on context and not merely ephemeral. Therefore it is an ontologically historical phenomenon, which incorporates the transition, the passage from/to, and its – only apparent – negation, i.e. permanence. Transition and permanence: almost two tracks that implicate each other, which justify each other.

From these introductory lines, a wide range of intersectional questions and topics emerges: I will try to address some of them, within the given guide-coordinates.

10 Looking at the growing and varied literature on the subject, mainly traceable through the last thirty years, and centered on the economic relevance of scientific-technological development, I mention, as significant also of an (albeit heterogeneous) autonomous area of scientific interest, Fagerberg et al. (eds.) (2005), particularly at 349-379, where the multiplicity of innovative models and their dynamics throughout history is highlighted.

11 Fusar Poli (2012): as for “research and development”, with reference to the emerging of a tight connection between research, inventions and production, also from a labour law point of view, see 117-129 and 226 and ff.; see also Fusar Poli (2015) on “scientific property” and the impact of hard sciences on innovation, in connection with the worldwide need of legal protection for scientist work.

1.2. *The “body” as a “juridical place” in transformation*

Given my premises, I will take into consideration “innovation” as a process of change towards new internal structures in legal knowledge (methodological, interpretation, linguistic, even epistemological innovation), focusing on a specific investigation area, that, according to me, intensely reflects the transitional phase of modernization, challenging legal actors and their instruments. My aim is testing the coherence, or better, the sincronicity between endo-legal innovation in a moment of transition and their context, especially through the mediation of the jurisprudential output of the Italian courts, that translate the dynamic process of change and transformation of reality into static juridical shapes or, viceversa, adapt legal innovations to a slowly-reacting reality.

Within this frame, the topic of my analysis is the “body”, real and symbolic center of change and also a “legal place”,¹² at the same time material and immaterial, a subject and an object, self-perceived by the subject of law and extra-perceived (or recognized) by lawyers, legal scholarship, judges, legislator. The vastness of this topic is immediately clear, and leads to potentially unlimited thematic gradations and perspectives, referable to the entire spectrum of the juridical, from the remote past to futuristic scenarios, from the positive datum to speculation, from norms to their interpretation.

I therefore consider it useful to propose only some reflections – which may appear rhapsodic, but are rather meant to be evocative – around themes of extra-, trans- and endo-juridical innovation that contemplate the body as an

¹² Among the Italian jurists who have dealt with the theme of the relationship between body and law, Stefano Rodotà stands out with his numerous and intense studies, also developing the theme of new technologies impacting on body perception and legal relevance: I will just mention Rodotà (1994) and the *Trattato di biodiritto* directed by him together with Paolo Zatti, with particular reference to its second volume of Canestrari et al. (eds.) (2011), that collects interesting contributions where the attention to historical profiles is not lacking. Also, on the relationship between body, individual and person, I can mention Baud (2003). As for Italian legal history literature, the body issue seems to be mainly an implicit cultural background or a non-exclusive nor direct subject of analysis, especially in criminal law frame: many fruitful cues, especially about ‘*right on one’s own body*’ can be gathered from Testuzza (2013) and Testuzza (2016) but given that an exhaustive picture of papers and book thematically involving ‘body’ can not be outlined, specific references will be given time to time. Lastly, I have found illuminating Agamben (2014), where ‘body’, ‘property’ and ‘use’ are put in relationship through dense pages that suggest fascinating perspectives for historical investigation.

object of law in two main senses: (1) in its immediate physical dimension – the body as a non-available good and mainly, for the considered period, the body as an active or passive subject of crime, in the kaleidoscope of criminological, anthropological and sociological theories developed since the second half of the nineteenth century; (2) from the (mediate) profile of its representation, both (i) concrete, as an image - we can think of visual art, photography, cinema, therefore the rights and obligations arising from the new techniques of reproduction and diffusion of the image, and from the new needs of exploitation, but also of protection of the image – both (ii) as a vehicle/symbol of individual rights with collective relief (for example the body as object of care, with the first hints of “right to health” through the theme of drug law).

It is a body in transformation, which means that it goes through a phase of transition towards a new definition, also juridical (from a double profile: descriptive and prescriptive), to which the innovation on a broadly understood side contributes substantially. In all cases, these are perceptions and representations – immediate and mediate – of the body (and the “mind”, located in the brain, is a part of it)¹³ that also change, owing to new sciences and techniques, more and more refined, exactly in the considered decades, thus imposing a challenging dialogue between legal interpretation and different scientific knowledges, with their methods and technical languages. In this way, that is, by facing new problematic issues, for which the traditionally applied models, the known tools, the usual strategies and argumentative techniques are inadequate, incomplete or forced, the juridical discourse (and the physiognomy of the jurist) is innovated from the depths.

1.3. *Where is the body? Natural law and general principles of law*

In order to present a last introductory note, I will leave the ground to the distinguished Italian philosopher and jurist Giorgio Del Vecchio (1879-1970), in the form of a long quotation from a text I have repeatedly encountered, in recent times, following different study paths; a text that reflects “transition” in the sense of which I intend to speak, also addressing issues that touch the theme of “body” and its presence/absence in Italian legal system.

The avant-garde gaze of Del Vecchio,¹⁴ while analysing the possibility of

¹³ The inclusion is clear if only we think of criminal positivism theories and the model of anthropological determinism from which it draws inspiration: see Musumeci (2015).

¹⁴ Del Vecchio has a deep influence also on great Latin American jurists and philosophers including Brazilian ones, such as Miguel Reale. On the connections between Del

innovating the legal system through its principles, when lacking norms, is also focused on the “body” and on the new shades of the relationship between freedom and law when connected to the body, in the light of social and cultural changes, as well as economic ones, that affect the very start of the twentieth century.

In the lecture on the “general principles of law”, the opening address read for the course of Philosophy of Law in the Royal University of Rome, on December 13rd 1920, while stressing on freedom as “*expression of the absolute value of the human personality*”, he makes examples of situations in which “*it’s perfectly admitted that effective limitations to personal arbitrium occur, not expressed in law, and yet legally valid, because grounded on those general principles to which the law itself refers*”. Among the mentioned examples, Del Vecchio points out the “right over one’s own body”:

The notion of the right on one’s own body, for example, is completely obscure in our legislation, this right is recognized and protected only indirectly, by means of the general public order guarantees, of the criminal laws concerning ‘crimes against the person’, and by the civil law only as far as it imposes compensation for damages as a consequence of any culpable act. The inadequacy of such a generic and indirect recognition, in a scientific perspective and considering the needs of definition of concrete cases, is made clear by the fact that many still deny the existence of a right on their own body, and that among them who admit it, there are vivid disagreements about the nature and consequences of the recognition of this right.¹⁵

These words exactly evoke a moment of transition in Italian scholarship, but also in the Supreme and minor courts, leaving behind consolidated positions, and moving towards new ones in absence of express legal provisions, notably in the field of civil law.¹⁶

Vecchio and Latin-American thought, see the notes of Rivera Llano (2017) e Leucadito (2017).

15 For the text of the lecture, here translated into an English version, see Del Vecchio (1921), but also its reproduction in *Rivista Italiana per le Scienze Giuridiche*, VIII (2017) 15-63 (43 in particular), preceded by the interesting notations by Bruno Romano (3-14). On the disruptive (for Italian legal scholarship of the time) thought of Del Vecchio, see also Sciumè (2002) 220 and ff.

16 The acts of disposition on parts of the body are the first normative expression of rights on the body, which finds a normative discipline starting from art. 5 of the Italian Civil Code dated 1942, which translates into law previous jurisprudential and doctrinal orientations. Note that, originally, an art. 6 entitled “Rights to one’s own body”, has been drafted,

Not surprisingly, Del Vecchio writes about the “body” and its legal re-definition, through the mirror of “general principles of law” of the Italian legal system, that are a conservative and innovative instrument (handled by judges, really a key factor for us) at the same time, therefore able to ride the transition. And exactly on case law and on Italian law courts interpretative paths we are now turning our glance, to observe the “law in action” through its actors, and to detect (or not) the sincronicity between change in reality and innovation in the juridical (not only normative) dimension.

Our attention will be focused on criminal law, a crucial field, where the body seems to be impacted from multiple sides, as a material and physical entity (the “crimes against the person” mentioned by Del Vecchio, give it significance), but also in the light of its “social perception” and public representation.

2. Some examples between the nineteenth and twentieth centuries in Italian legal experience

2.1. *Active and passive body in crimes “against morality”*

2.1.1. *Abduction and “forced body”*

Given the premises above, our field of investigation and analysis is identified by the decisions of the Court of Cassazione of the Kingdom of Italy, between “Zanardelli Code” (1889) and “Rocco Code” (1930),¹⁷ concerning crimes that imply the “social representation” or projection of the body. The two codes are reference points identifying a specific legal transition, that goes from a “lib-

providing that the only two limits for acts of disposition of the body when physically damaging, are law and moral; indeed, in Pandolfelli/Scarpello/Stella Richter/Dallari (1939) 58, we find that “L’art. 6 del progetto non s’ispira al rigore di quei principi, per i quali dovrebbero ritenersi prive di effetto tutte le disposizioni che toccano l’integrità del proprio corpo, in base a quelle preoccupazioni aprioristiche per le quali si afferma che il corpo non può essere oggetto di alcun diritto di cui la persona è titolare, essendo esso stesso un elemento essenziale della personalità. Il progetto muove, invece, dalla considerazione che esistono, anche nel campo del diritto privato, numerosi contratti in cui la persona dispone del proprio corpo più o meno direttamente o indirettamente (contratto di baliatico, di locazione d’opere, contratti di circo, ecc.). si è pertanto ritenuta adeguata una norma che dichiari tali disposizioni permesse quando non siano contrarie alla legge o alla morale”.

¹⁷ On Zanardelli and Rocco Codes, see the essays and the sources collected in Vinciguerra (1999) and Vinciguerra (2010). On the court of Cassazione, my main references are Abbamonte (2003), Meccarelli (2005), Mastroberti (2014).

eral” criminal code to the “fascist era” code, stimulating a closer look at the balance between tradition (as justice protects the given system) and innovation of interpretative solutions, especially when dealing with extra-judicial data and phenomena deeply rooted into the cultural and social background.

It is a topic I have recently investigated, through an extensive and intensive exam of the case law, especially devoting my attention on cases where criminal offences acted against persons and violating bodies are punished for their intrinsic and mediate *vulnus* to society and its widely shared values. We are talking about crimes originally (by 1889 Code) considered “against good customs and the order of families”, and that Italian Criminal Code of 1930, according to a different systematic choice, has splitted into the category of “crimes against public morality” and “crimes against the family”.¹⁸ The law provisions concerning these criminal offences, that have a predominantly sexual connotation, reflect a precise vision of “person” in society (with its internal order and given rules), a vision that, first of all, is shared by the legislator, and also solicits law-apppliers and law-interpreters to a complex transduction from a system of values to a system of rules and *vice versa*.

A logical operation that reveals – precisely through the legal discourse developed in the judgments – how much and through which argumentative paths this social vision finds concrete affirmation in the frame of justice.

Looking closely at the sources regarding the types of crime considered here, we can observe how the new sciences, firstly social and medical ones, have, on the one hand, impacted on the tools of knowledge and decision-making process of the judge, necessarily also conditioning the language, more and more accurate and “technical”;¹⁹ on the other hand, they have fueled her-

18 As for legal doctrine on the specific crimes, see Calogero (1890), Precone (1892), Mortara (1890-1899), Tuoizzi (1902), Manzini (1934), Grispigni (1939).

19 With regard to the connections between law and new sciences, especially from the criminological and medico-legal profiles (particularly connected to the development of the “Positive School” and to the “experimental” method), I mention Speciale (2012), Musumeci (2015) and with reference to the Positive School, in particular on the topics hereof, Musumeci (2012), Colao (2012), Miletta (2012). The new relevance assumed by the criminological and, more generally, psycho-anthropological studies, variously absorbed by a large part of the legal doctrine, is also evident in the argumentation of the decisions taken by the courts. Especially from the 10s of the ‘900, the relevance of the subjective state of the offender, or the “criminal” or emotional nature of the accused, seems to become crucial and is outlined by means of technical (psychiatric, physiological, biological) languages borrowed by social and medical sciences.

menetual slow changes affecting the balancing of principles, interests and rights. And the balance seems to be also weighting tradition (what needs to be kept effective) and innovation (what needs a new shape, content or solution) in a permanent dialogue between these two (apparent) opposites.

If it is true that judges tend to be attentive to the respect of the literal data and of the legislator's *voluntas*, thus confirming their role as guardians of values, both in full liberal age and in the years of the fascist regime, it is equally true that the law-maker's choices, particularly those concerning the considered crimes, leave ample margins, stimulating a more intense interpretative effort, for which also the axiological choices assume importance. In fact, through the "body" – which physically undergoes the criminal action – also enters the "moral"²⁰ and, by this way, the passive subject of the crime, typically female and of minor age, often does not coincide with the subject properly offended and does not hold the primarily injured legal asset.

From a certain point of view, the body that undergoes the violent or perverse action of the offender is a sort of *medium*, an instrument through which rights belonging to a sort of collective domain are injured: criminal behavior passes through the individual physical body, but the good actually injured is another, it's immaterial and it's held by the social community.

During the considered years, in the judge's weighting, "sexual freedom"²¹ and the concept of autonomy and self-determination of human beings over their own bodies is very far from making its appearance; the very first "rudimentary" ideas of integrity and inviolability of the physical body do not significantly enter into a relationship of comparison with the need to repress the unlawful conduct that puts the social canons and order (as it is positivized into the legal frame) at risk. And the body is the indirect protagonist, also through the words of judicial decisions: it is the image and the instrument of those canons and of the moral qualities in which they are concretized.

In this regard, from the point of view of the historical investigation, the case of the "*ratto*"²² (that is the case of abduction with sexual aims) appears

20 On the liberal period morality, see also Rizzo (2004).

21 As Testuzza (2013) 282 clarifies, sexuality is the first manifestation of corporeality to become the object of specific consideration by the jurist, typically in connection with the context of marriage where sexuality should "functionally" be expressed, very far from ideas of bodily integrity or freedom.

22 Arts. 340 e 341 of Zanardelli Code and 522-524 in Rocco Code. For an interesting analysis concerning this crime and the short-distance dialogue between Cassazione and lower courts on different interpretations, see Cazzetta (1999) 361 and ff.

to be particularly significant of a transition, which leads to identifying in the subject directly offended (physically forced, suffering physical or moral violence), and no longer in the family – violated in its unity personified by the father-symbol – the actual (as the moral and social) victim of the crime.

The conduct of those who, with violence, threat or deceit (but also with consent of the minor-age victim) subtracts or holds with them a person, both to force her to contract marriage in case of a woman, or for the purpose of lust, presents a dense and articulated case study. The violent or “consensual” abduction (punished by both the Codes) is typically against the female minor, but places the theme of the violation of the *patria potestas* in primary evidence, prevailing with respect to the right of freedom of the subject to which the corporal abductious conduct is immediately directed. The victim of the crime is, in fact, the family²³ – even, more widely, the social order, as evidenced by the fact that a ‘reparative marriage’ extinguishes the crime – not the person who is violated.

In the 1920s the interpretation begins to consolidate, and the “ratto” appears as an offense that primarily affects “the right to individual freedom of the person abducted” and only in consequence that of the family,²⁴ from that descending the extension of the protection of the effective passive subject (even if minor and orphan without tutors, or in case of consent of the parental authority) through the argumentation of some innovative decisions.

A decision given in 1926 on the subject of consensual “ratto”, through a

23 In this sense, as for case law from the most relevant specialized law reviews, which are my main source of decisions, I can mention Cass. Pen., 19 December 1890, Ric. Mirabella, Pres. De Cesare, in *Monitore dei Tribunali*, 32 (1891) 89, significant of the preminent family honour. In XX cent. a new interpretation is making its way: see, for instance Cass. Pen., 23 March 1914, Ric. Cavallone, Pres. Blancuzzi, in *Giustizia Penale*, 19 (1914) 723-725, where, in a case of consensual “ratto” the judge highlight an harm, both of the order of the families (and the legal objectivity is represented by the lesion of the rights of the *patria potestas*), and of certain rights of the raped, who is the “true passive subject of the crime”, therefore entitled to complaint “even without the assistance of those who integrate its legal capacity” (in the same sense Cass. Pen., 17 July 1903, Ric. Lo Giudice, Pres. Petrella, in *Monitore dei Tribunali*, 45 (1904) 258. The relevance of social and family values lies also in the provision that exclude the punishment (Zanardelli Code: art. 352) or criminal relevance of the conduct of the offender (Rocco Code: art. 544), in case of subsequent marriage with his victim.

24 See, for example, Cass. Pen., 25 January 1922, Ric. Tucci, Pres. Nonis, in *Giustizia Penale*, 27 (1922) 927-930.

synthetic reconstruction of the jurisprudence and case law developed and with an argumentation focused on identifying the injured right, rejecting legalistic formalism, states that: “while not disputing that the objectivity of the consensual crime is based on the violation of family rights, it simultaneously admits a direct injury also to the rights of the minor, who is the passive subject of the offence; and therefore she too is materially and morally affected and offended by the crime itself, also for the possible injury of her personal freedom”.²⁵

Almost unexpectedly, considering the patriarchal ideology of the period, but at the same time predictably, in the light of the slow path that the case law has traced in the previous decades, even under the validity of the Italian Criminal Code of 1930, which places the crime of “ratto” partially among the crimes “against the family” – and which also assigns a fundamental social role to the family cell, according to fascist organicist view of social collectivity – the interpretation of the judge is oriented towards recognizing the very personal rights of the subject primarily offended. We are on the threshold of the recognition of fundamental rights and this gradual process flows like a karst river even in times that would seem to follow a contrary direction.

We can think we are talking about innovations that gradually stabilize and consolidate,²⁶ despite of the historical period and of the formal legal choices.

2.1.2. *Public scandal and private offences*

In some situations, the judge’s interpretation seems strongly stereotyped and appears to be taking an inverse direction with respect to the idea of (even slow) emancipation we could expect, taking into consideration the cultural and social climate. Attitudes and postures that are deeply rooted in tradition could be hard to remove, or could even find new vitality, if not new political-ideological nourishment. Resistances and viscosity, despite of modernization (we could even think of different speeds within the texture of reality), are mirrored or even fostered by judicial decisions

25 Cass. Pen. 15 March 1926, Ric. Carandola, Pres. Dobelli, in *Giustizia Penale*, 31 (1926) 598-599.

26 We can underline the emergence of a “strutturale ambiguità della leva giudiziaria: ora docile strumento repressivo, ora potente macchina di costruzione del consenso; spesso asservita al regime ma anche dotata di insospettabili logiche proprie, non del tutto addomesticabili»: justice appears to fulfill a «funzione *conformativa e performativa*: da un lato rifrange le dinamiche sociali, dall’altro apre un canale di elezione per intervenire». Miletta (2015) 684-685.

In this regard, it seems to me particularly significant of the connection between the body, the sphere of what we now define as “sexual freedom”, and public morality, the relevance of the “scandal”, that is the disturbance to the common moral sense, which can be determined by the perception (with the eyes or through the narration) of a part of the body or of sexually connoted behaviors. As well as a large number of decisions in which the element of the “scandal”, the “commotion of public opinion”, is a constitutive element of the crime, we can also count many cases in which it plays the role of a decisive circumstance for the purposes of the trial. If adultery, or incest, are punished only in the event of a public scandal, there is also the “indecent exposure” offence, a sort of residual case, for which the impact of the conduct on an indistinct “public” assumes decisive importance.²⁷

In every situation, the objectivity of the “scandal” turns out in different and mutable interpretative shades, clearly representing the difficulties in giving substance to that “common moral sense” whose injury is relevant for legal purposes. The qualification of the scandal that emerges from motivations is mainly the result of this argument: the scandal causes an “injury to the rights of society”²⁸ and therefore the behavior, which would otherwise fall within the sphere of private actions, becomes harmful to a collective right, hence deserving to be repressed. Public relevance, visibility and the effect of social disturbance are a constant in the logical arguments of the decisions in the considered decades, but ‘scandal’ is a word that through legal interpretation is filled with meaning, varying as the value system (and social context) changes.

The trial itself, in case of crimes against morality, causes scandal and “offense propagation”: everything refers to the public relevance of the crimes considered and the offense inflicted by them. The fact that the element of public impact is decisive, also from an argumentative point of view, can be seen from many profiles, including the procedural one: prosecution *ex officio* rather than lawsuit (and the remissibility of it) provided for by the legislator is a normative index, from an argumentative profile, of a greater impact of the crime on collective morality. The aim is “not to attract the great light of justice

²⁷ In the twentieth century, also in connection with the spread of the press, a rather articulated case study emerges (sometimes colorful), which focuses on sexuality and the female body exposed in images, described in literary works, depicted in works of art.

²⁸ C. App. Milano, 1 December 1896, App. Altigieri, Pres. Geloso Peralta, in *Monitore dei Tribunali*, 38 (1897) 535-536.

[...] over the travails of intimate life”, if not strictly necessary in relation to the gravity of the offence injuring the collective morality.²⁹

The approach to body, sexuality and moral issues seem to lie on a continuous path, from liberal to fascist period. We can figure out a line,³⁰ from liberal individualism to fascist collectivism, traceable on the basis of a persisting tension to social control through cultural and ideological strategies of communication as well. A common paternalistic model encouraged or impelled by the State as a compacting and strengthening (exploitable) value is carried on, notwithstanding a different collective sentiment.

This is an asynchronicity reflected by case law: a sort of conservative resistance to innovation and change (according to the institutional and political foreground³¹ and rejecting the social and cultural background), with a few sparks of exception. Sparks that shed light on different future scenarios.

2.2. *Represented and imagined body*

Trying to widen the gaze towards a concept of “mediated” body, but this time in an effective and technical sense, that is in connection with the wide spreading images by means of new instruments and methods of reproduction and communication boosted by technological innovation, emerges the possibility of investigating the links between law and body from a perspective that is undoubtedly unknown to the jurist until the first half of the nineteenth century.

Between the end of the nineteenth century and the first decades of the twentieth century, there is a remarkable development of legal initiatives aimed at regulating rights on “intellectual works” (copyright and patent law are involved) both in the domestic and international legal framework.³² These

29 This is stated in Cass. Pen., 17 July 1922, Pres. Nonis, in *Giustizia Penale*, 27 (1922) 1015-1017. See also Rizzo (2003).

30 See Cazzetta (1999), especially from p. 185, where, among others, the feminine consent issue lifts the veil over the deceptive and rhetorical ‘secularization’ of criminal law in the liberal age; in this way a continuity, from liberal period and the fascist one loses its hyperbolic guise.

31 It is well known the distrust of the regime for the judiciary, or rather, for those individual personalities who, from within, threaten the image of granitic compactness and common adhesion to the imposed values: see, among others, Abbamonte (2011) 902 and Meniconi (2015).

32 As for intellectual property, see Fusar Poli (2014).

“new rights” of the authors and inventors may conflict with or impact on other emerging rights: those “of personality” whose conceptual shaping is in progress by European (German and French in particular) legal scholarship. We can appreciate that the “right on one’s own image”, begins to be taken into serious consideration at the start of XX cent. by civil law and commercial law scholars; then, it’s also faced and reflected in the case law, revealing a growing friction surface between law principles.³³

Also in this case, a further reference to Del Vecchio’s lecture can lead us to the heart of the matter.

Among the examples of possible recourse to the general principles of law, in order to fill regulatory gaps and balance intersubjective conflicts between their respective freedoms, Del Vecchio mentions the “right to image”:

No provision of law in our system prohibits, for example, a painter or a photographer from portraying the image of anyone, and also from disclosing it; nor could such a prohibition derive from other legal provisions by analogy. If the aforementioned criterion were true, for which in all cases not covered by law the legal solution would consist in excluding any limitation, the said activity should therefore be judged included without limit in the sphere of individual law. But the more general and true principle, which embraces, not only negatively, the essence of the human personality, that principle which is implicit in our legal system, requires a deeper and, we would like to say, more substantial examination of the abovementioned relationship. The artist’s will to portray and disseminate the image of others has to be balanced with the will of whom the disclosure of his/her appearance may not like.

The conflict finds a solution, according to Del Vecchio, “going back to the general principle of respect for the human personality, and placing in relation with it that particular expression of the personality which consists in one

33 For a careful examination of the European doctrine on the subject, I refer to Piola Caselli (1904), reported in comment to a decision of the Court of Appeal of Turin of 3 March 1903: in relation to a controversy dealing with the photographic reproduction of a female body, he addresses the issue of the conflict between copyright and “right on one’s own image” (as for Piola Caselli himself, he seems not to consider the specific right as falling within the scope of the “rights of personality”). I also refer, as a doctrinal point of reference, to Kohler (1903), as well as, also for evidences of the recurrence in Italian case law, Ricca Barberis (1903); Ferrara (1903) (who goes back to the theme in 1942, with a valuable and organic essay); Dusi (1906) and, for the first avant-garde hints of attention, Amar (1872) 365 ff. Legal scholarship at the beginning of the twentieth century swings between imagine as a substantial part of the body, and imagine as an autonomous juridical *quid*, and also shifts from the existence of an absolute right to a complete denial of it.

own's physiognomy". Hence the juridical figure of the "right over one's own image", "presupposes a foundation of reason in our law, beyond the express terms of the law".³⁴

If legal scholarship reflecting on principles of civil law shows interest and wide opening to these atypical matters, as well as a fruitful flexibility, also through the reception of European theories and models, the same compliance with the frantic changes of reality cannot be detected passing to the side of criminal law.

The "body image" issues addressed by case law often mix up civil and criminal matters and reveal interesting examples of "resistance" that confirm the remarks of the previous paragraph, involving crimes against "public morality" focused on sexuality and on the female body displayed in images or represented (or described or suggested) in intellectual works. Here it is, precisely, the image of the body that assumes direct relevance and there is a close relationship between the concerns of the judges, even more rigorous in outlining the contours of the cases, and the changed cultural climate that is the "official" backdrop to the judgments considered.

See for instance the "indecent exposure" crimes: they become more and more frequently detected in cases of representation of the body, in connection with a certain "morality" taken as a reference. If the international case of the *Entartete Kunst* shows us in a spectacularly evident way this connection in its most "pathological" form, Cassazione decisions are not less significant when recognizing the body as vehicle of moral principles, thus revealing, through argumentation, the changing of the reference value system especially during fascist period.³⁵ The connection body-image-morality is in any case clear and again seems to disconnect the legal and judiciary frame from the effective social one, according to an "imposed morality".

³⁴ The translated sentences are taken from *Rivista Italiana per le Scienze Giuridiche*, 8 (2017) 42-43.

³⁵ The Cassazione is called to express itself on the subject of "indecent exposure" in relation to literary works and figurative art more and more frequently between the years '20 and '30 of XX cent.: "art must tend to purify the environment, it must soften, not dirty, the costume" (Cass. Pen., 7 June 1926, Riccardo Mariani and Mattavelli, Pres. Bianchi, in *Giustizia Penale*, 31 (1926) 478- 482; in the same sense Cass. Pen., 13 May 1931, President Carrara, in *Giustizia Penale*, 37 (1932) 239-241 and Cass. Pen., 30 aprile 1934, Ric. Donivi, Pres. Saltelli, in *Giustizia Penale*, 39 (1934) 1132-1334).

2.3. “Collective body”: health care and protection

Lastly, in order to conclude the series of examples, it is worth mentioning the subject of the body as a vehicle/symbol of individual rights with a collective projection: health as a pattern of relations, that implies a connection between individual bodies and the “social body” in its collective sense.

In this field, the theme of drug regulation and its “patentability” is a significant example in our perspective, both in the sense that it involves the external datum of innovation – in a period in which scientific and industrial development undergoes a phase of profound transformation, in which interests of the chemical industry, relaunched by the war events, are particularly pressing – and also from an internal perspective, with regard to the emergence of new interests worthy of legal protection and with reference to the balancing of these interests with those individual, or in any case particular, to the exploitation of the product of intellectual work.³⁶

Starting from the first attention of the jurists, the issue arouses strong contrasts and even ideological conflicts, in particular revealing the close connection between the level of economic development and the provision of patent protection. This last relationship becomes tangible when the patent model is exported, being the object of a regulatory “transplant” outside the European borders (see the law of the Latin American colonies, but also the Far East ones), and the exclusion of the patenting of drugs becomes a reason of differentiation from the law of the “mother country”. And here there is a transitional theme that has also a spatial dimension, inherent in the transplant.³⁷

But going back to the specific Italian experience, we notice that, in the most significant moments of the parliamentary debate related to the Piedmontese draft law concerning the rights on industrial inventions and discoveries³⁸ (finally entered into force in 1855 and then extended to Lombardy and all Italian provinces), a substantial modification of the original draft involves the exclusion of patentability for “inventions or discoveries concerning phar-

³⁶ Fusar Poli (2013) 159-160, 202, 218.

³⁷ On the theme, Augusti (2016) offers a clear analysis of literature, and suggest a stimulating exploitation of the heuristic category in historical approach.

³⁸ It is the Law 12 March 1855, n. 782, also known as Law 30 October 1859, n. 3731, that is the provision that extends to the first of the territories acquired to the future Kingdom of Italy, the Piedmont patent law.

maceutical preparations or medicaments of any kind”.³⁹ But the normative exclusion is weakened by jurisprudence and case law: the exceptional nature of the exclusion, with respect to the “natural” right deriving from the invention, does not allow an extensive interpretation of the law, and the patentability at least of the ‘procedure to obtain drugs’ is gradually admitted.⁴⁰ A surreptitious change, we may say.

The main problem of the drug issue is closely linked to the new industrial economy and new research structures, which also require attention to the needs of economic incentive for research and discovery/invention actors and activities. At the base of the prohibition, still, there is a highly idealistic vision of medical research, while, in reality, biochemical research is part of the production cycle. In a few words: on one side, we have the scientist, being an employee of the investing company, hence a cost for it; on the other side, there’s a rudimental “right to health”, guaranteed also through the wide accessibility of pharmaceutical drugs, a right that seem to overbalance industrial needs.

Patentability being excluded, also the path of “scientific property” is residually followed.⁴¹ In the draft agreement drawn up by Francesco Ruffini in 1923 for the League of Nations, aimed at ensuring protection and remuneration for scientific activity, we find an extension of the possibility of protecting drugs (the “medicaments”), implicitly circumventing the ban on patenting in various European countries, including Italy. The “scientific property” fails its aim, wrecked in international contrapositions, and slowly disappear from international tables, but leaves important traces: Italian legislator, while dealing with the reform of industrial property law enacted in 1934, revitalizes the issue and, substantially accepting the requests made by the pharmaceutical associations, deletes the old (and badly tolerated) exclusion of patentability.⁴² The law innovation is merely ephemeral, because it never becomes effective,

39 Embracing the positions of the prevailing French doctrine: see in particular Renouard (1865) 308 ff.

40 As for the history of drug patentability, see in particular Mazzolà (1951) and Rontondi (1952), as well as Barone (1978), this last one commenting the decision of the Constitutional Court mentioned afore in text.

41 Fusar Poli (2015).

42 I’m referring to the Royal Decree 13 September 1934, n. 1602 which, however unimplemented, marks a fundamental moment in the history of the legal discipline. Commenting on the exclusion of drugs from patentability, the prohibition is linked to «errors of appreciation or prejudices» (Labocchetta (1931) 19).

and a subsequent decree in 1939 restores again the *status quo ante*, also triggering questions of constitutional legitimacy.

It is an ambiguous and complex story that does not end up with the crystallization of the principles (including that of health) in the republican constitutional chart: the prohibition on patenting falls only with the D.P.R. June 22, 1979, n. 338, implementing the well-known pronouncement of the Italian Constitutional Court n. 20, dated 20 March 1978, whose motivation is particularly attentive to the historical steps.⁴³ In particular, the Court detects an inner conflict between the Government draft law⁴⁴ and the parliamentary Commission one, concerning the *ratio* of the disputed law provision welcomed by the Piedmontese legislator and then by the Italian one.

The main reasons of the (“outdated” according to the Court) legal provision were originally based on the opportunity of “prevent charlatans, apothecaries and ‘secretists’ from taking advantage of patent rights to sell products that are not useful for health”; on the concern about an increase of the price of drugs caused by the patent; on the idea that the discoverer - inventor - philanthropist, who dispenses to all men the fruit of his research, is not entitled to any form of economic remuneration, except for prizes in case of “reported benefits”. Unconvincing reasons, as can be seen, that have clashed head-on with the principles of the Italian constitutional chart, in particular that of equality (art. 3) and also with the Republic’s duty to “promote scientific and technical research”.

Is this case a case of “positive” innovation carried out through case law? Can we consider the long period of the exclusion of patentability, eluded by courts’ decisions, a transitional one, contrary to the real and prevailing attitude, and caused by the accidental prevailing of a minor voice in the legislative debate, as sources seem to demonstrate? The “pharma” issue should need an even more thorough examination.

3. An in-progress conclusion: cues for further analysis

I can now try to shortly highlight those that seem to me to be some of the significant points revealed by the themes and examples I have chosen within the perspective of “innovation and transition in law”.

43 See the precious comment on the case, by Pardolesi (1978).

44 The main author of the Government draft, Antonio Scialoja, opposes the prohibition, but the orientation prevailing in Parliament results in the exclusion of patentability: see Fusar Poli (2012) 44.

I could not say that the following considerations are shaped as a real conclusion; I would rather say that they represent the partial results of an investigation that lends itself to be integrated and expanded. An exploitation of the same perspective could be imagined, outspreading the studied examples (I think in particular of the theme of body in relation to “collective health”, to the “state of exception” and the emergency legislation), or even deeply exploring the multiple facets of the two coordinates taken into consideration.

On this last point, I find stimulating, for the heuristic potential it offers, the hypothesis of deepening the spaces of overlap between “transition” and “innovation”, bringing them into an interdisciplinary context that seems necessary to me to fully hold this view. I tried to highlight some aspect of this intersectional complexity in my analysis and the first insight reveals challenging answers to my opening questions.

For instance, through the cases discussed as examples, we see that innovation appears, both from an “external”, scientific-technological profile, and from an “endo-legal” approach, the last one revealing an often unpredictable process of gradual, non-traumatic change, which may concern language, normative content, legal models or institutions, argumentation, *etc.*. Exploring this second, “internal” key, it is not worth asking which, between innovation or transition, is the logic or chronological *prius*, but rather highlighting that innovation consists in a (sometimes really slow and imperceptible) transition, as a dynamic process that is based on (and conceptually implies) tradition and continuity and tends to permanence.

It can be said that in this process, law-appliers and law-interpreters (mainly jurisprudence and case law) played – plays? – a fundamental role, from two main sides: *(i)* by means of argumentation and by affirming principles of law that impacts on law interpretation and, *(ii)* giving inputs on the lawmaker itself. It is above all by looking at case law playing the role of mediator between positive law and reality, that we can grasp how ‘external’ innovation and changes can be translated into the shapes of law and, at the same time, how the juridical dimension itself experiences changes in a sort of adaptation process that is permanent transition.

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From telegraph to telephone: an exemplary transitional space in the legal discipline of technical innovations (1877-1903)

Francesca Martello

1. The hint of transition in the legal world: the telephone, an exemplary case with uncertain contours; 2. The intuitive similarity between telegraph and telephone: considering analogy, fragmentation and incompatibility; 3. The precarious balance between academic and jurisprudential solutions and legislative attempts; 4. Tradition, fixed points and identity of each transitional space

1. The hint of transition in the legal world: the telephone, an exemplary case with uncertain contours

On the theme of the interweaving of law and technical innovation, there are numerous spaces of transition that usually emerge, chronologically speaking, between the significant diffusion of invention and the promulgation of an *ad hoc* legislative discipline capable of regulating, if not all of them, at least the most relevant and new legal profiles opened up by the novelty introduced. It becomes interesting therefore to analyze what happens in this framework and which contingent legal strategies are adopted to face new forms of relationships generated by the apparatus responsible. This investigation is not intended to be a mere survey of provisional solutions, but an attempt to reconstruct the most salient features of an exemplary transient period which, at least in an inductive way, allow us to grasp and define the contours of transience as an autonomous object of study.

Beside the awareness of progress,¹ there emerges explicitly from most of the essays and monographs on technical innovations, the perception of the transitory nature of the legal situation at that time. More voices manifest the realization that, in the face of a “sun of progress”² that is seen to constantly “change and

1 For the different elaborations on the concept of “progress” see Testoni (1976); Sasso (1980); Sasso (1984); Papa (1985). The latter’s conception is used by Giuseppe Speciale to distinguish between an Enlightenment conception, where progress is not a necessary character of human history but depends on man’s ability, and a historical conception according to which progress is a necessary and absolute character of human evolution. Speciale (2001). For sources see Miceli (1911).

2 Cogliolo (1917).

evolve”³ into an “unceasing movement that transforms, and transforming everything improves (...), wraps around everything, penetrates everything”,⁴ “the science of law and law itself are not stationary but should be the constant mirror of the moral and economic conditions of a people”.⁵ So the flow of progress reverberates in the progress of law. However, this passage is never linear and immediate: one perceives the surprise in the words of Camerano who idealizes photography as a wind that “penetrates suddenly, knowing no obstacles, not stopping in front of barriers”.⁶ At the same time, they are openings determined by sociological development which, as the “basis of inorganic, organic and social evolution”⁷ is ineluctable, even if in the period between the nineteenth and twentieth centuries it experienced a singular peak marked by “cluster innovations”.⁸ Then, most of the innovations, at the dawn of their introduction, followed an “uncertain and changing technical trend” without developing “except rather poorly”.⁹ This was true for the telegraph and the telephone,¹⁰ but also for “the appearance of railway tracks, and cars that were greeted with hostility”.¹¹ In practice, it opens up, “transition periods”¹² in which “science, and, even more so, positive law do not reflect very faithfully the needs of society (...), nor are they in perfect harmony with them”.¹³ The work of the legislator is, therefore, figurative as a path in constant perfectibility in which each step “highlights previously unknown or unsanctioned rules of law or promulgates new rules (...) replacing the force of the law with the arbitrariness of legislation”.¹⁴

3 Cogliolo (1891).

4 Chironi (1882).

5 Giampietro (1918).

6 Camerano (1902).

7 Chironi (1886).

8 Ciriaco (2000).

9 Nitti (1897).

10 Nitti (1897).

11 This discourse cannot be generalized to all technical innovations: “(...) dovunque i palloni, gli aeroplani e i dirigibili sono stati accolti sempre festosamente, anzi con entusiasmo, mentre la comparsa delle strade ferrate, dei telegrafi, dei telefoni e degli automobili fu in altri tempi accolta ostilmente”. Meili (1910).

12 Giampietro (1918).

13 Giampietro (1918).

14 Norsa (1883). Of the same tenor Foligno: “Sennonché, mentre quando la nuova invenzione è all’inizio, bastano generalmente o si fanno bastare le norme giuridiche esistenti [...], più tardi, quando questa è perfezionata e specialmente messa alla portata di tutti, si sente la necessità di nuove apposite regole che ne determinino il funzionamento che

The collection of characteristics incidentally attributed by 19th and 20th century jurists to transitional phenomenon, outlines some essential traits suitable for a first focus on this abstract object of study namely its *unpredictability* is one with its *inevitability*, which align it very closely to another theme of becoming, namely, the crisis;¹⁵ the *uncertainty and instability* that characterize its evolutionary process but also a certain *circumscription*, to use mathematical jargon, of its boundaries and finally, the *disconnection* between transitional solutions and the needs of reality. Essential characteristics, fleetingly perceptible but nevertheless grasped by jurists in every breach in the legal system opened by technical innovations.

For a more in-depth analysis of these aspects and their peculiarities, the choice, for various reasons, falls on the transitional space generated by the diffusion of the telephone. The advent of telephone communication is, first of all, an exemplary case, deeply representative of the sudden legal vacuum that a novelty can generate. Several contributions to legal doctrine¹⁶ introduce the issues related to telephony starting precisely from the “problems and complaints”¹⁷ raised by an unregulated use of the device, with reference to the first services for public use, the installation of telegraph poles and cables on private property, public safety and episodes of interference between several telephone lines and between the latter and telegraph lines. However, the first responses to these events were isolated, contingent and above all inconclusive, denoting the confusion and difficulty in identifying a single and coherent legal framework. Cesare Norsa’s¹⁸ words make us fully understand

limitino i rapporti pubblici e privati da essa nascenti, che ne stabiliscano particolarmente le funzioni”. Foligno (1912-1916). Of the same tenor also Rivalta when reviewing Rava: “Mentre però l’invenzione di così utile strumento per le comunicazioni faceva dunque immensi progressi, non progrediva del pari il lavoro del legislatore” Rivalta (1900).

15 See Canullo (2017).

16 Norsa (1883); Cavalieri/Persico (1908); Rava (1900).

17 Norsa (1883).

18 Cesare Norsa, was a lawyer expert in international law, representative of the Milanese Lawyers’ Association, as well as a member of various associations that led him to have numerous contacts with foreign law and legal literature. In particular, he was a correspondent member of the Royal Lombard Institute of Science and Letters, a correspondent member of the Veneto University, the Academy of Legislation in Madrid, the Society of Comparative Legislation in Paris, the Institute of International Law in Brussels and, finally, of the Associations for the Reform and Codification of the Law of the People of London. Tacchi (2002); Liva (1991). Cf. also the subheading on the front cover Norsa (1883).

that originally the matter was affected by such serious “legal weakness”¹⁹ that the relative law could be considered “absolutely inconsistent”.²⁰

This specific problem goes hand in hand with a very particular circumstance: the telephone, unlike other inventions such as electricity or the car, was part of an innovative juridical path partly already opened by the telegraph,²¹ another fairly new and apparently similar instrument to the telephone. This marked the open transition from telephone communication with legislative and interpretative strategies based on the comparison/conflict with a pre-existing regulatory framework, even if it was lacklustre in itself.

To all this is added the *transversality* of the numerous critical issues generated by the telephone: the simple establishment of simultaneous communication at a distance had enormous repercussions in all legal branches, both in substantive and procedural law. In order to have a sufficiently precise picture of the many legal issues arising from the telephone, it is useful to consult the index of one of the thematic monographs elaborated on the subject, written with the precise aim²² of enclosing in a single place all the legal problems relating to a specific invention.²³ Taking as reference the work of the lawyers Cavalieri and Persico²⁴ for its analyticity and practicality, among the various problems are: the nature of the contracts stipulated by telephone, whether between those absent or those present, the discipline of the electric-telephone conduits relative to the easements of support, the type of management with which to provide the service, if in a state monopoly, concessionaire or private, the judicial authority responsible for telephone disputes, the identification of crimes perpetrated by telephone, the violation

19 Norsa (1883).

20 Norsa (1883).

21 A juridical theoretical space configured in particular from Serafini (1862).

22 Regarding the telephone, the most important in ascending chronological order are: Norsa (1883); Rava (1900); Forti (1902); Di Marzo (1903); Brunelli/Longo (1906); Cavalieri/Persico (1908).

23 This is a new form of legal monograph, no longer focused on this or that legal institution, but dedicated to a single technical innovation that would deal with all the legislative material, doctrinal problems and sometimes the jurisprudential pronouncements related to it, across the legal system. Among the first Serafini (1862). There are several examples in Italian legal literature: Benvenuti (1884); Pipia (1900). German legal literature: Bar (1892); Meili (1908). In Spanish legal literature: Ortuño (1920); Garcia Rodrigo (1927).

24 Cavalieri/Persico (1908).

of the secrecy of telephone correspondence and insult and defamation committed by telephone.

The delimitation is an ontological and intuitive connotation typical of every transition: as far as technical innovations are concerned, the point of origin is identifiable when “law”, including legislation, legal theory and jurisprudence, takes an interest in the issues and new legal relationships generated by novelty. There is nothing like a great invention, “it brings with it the creation of new social relationships” and, given that “every social relationship in civilian populations must be governed by a legal precept”,²⁵ the arrival of an innovation identifies the initial moment of a legal transition in its first impact on the legal system. On the other hand, recognizing the conclusion of a transitional space of innovation is more complex. In the light of the premises made up to now, this should take place with the return to the ordinary situation prior to the transition. This occurs when the legal landscape is reunited with the new economic, social, technical and factual reality generated by the invention, in other words, with the full and complete adaptation of “law” to the new situation, hence its consequent loss of the very character of novelty, at least on the legal level.

The complexity of recognizing the inventor of the telephone,²⁶ corresponds to the difficulty of precisely tracing the initial moment of the transition period, begun by this new form of communication in Italy. Although it is easy to identify it from a factual point of view in the first telephone line installed in Milan on 30 December 1877, from a legal point of view one can only rely on²⁷ the most important legal journals and monographs to realize that telephony had begun to capture the world of law with the first Italian judgments – few in truth – and the first works of legal doctrine on the subject in the early 1880s, as confirmed by the legal encyclopaedia entry dedicated to the telephone: “In Italy only in 1880 was there the need to regulate the relationships arising from the telephone business”.²⁸

Before this moment there is a trace of the theme only in a ‘Study on the Telephone’ competition announced by the Royal Academy,²⁹ in public opin-

25 Foligno (1912-1916).

26 Cavaliere/Persico (1908). See too: Foligno (1912-1916).

27 Among others: Arca (1900); Armissoglio (1889); Bianchi (1888); Bianchi (1892); Cammeo (1887); Farlatti (1902); Galassi (1905); Nitti (1897); Pipia (1900).

28 Foligno (1912-1916).

29 We refer to the competition published in 1878 by the Regio Istituto Lombardo, Class of Mathematical and Natural Sciences, on the subject “Study on the telephone”, the

ion³⁰ and in weak attempts to legislate. In fact, on November 27, 1880 the Minister of Public Works Baccarini in concert with the Ministers of the Interior (Agostino Depretis) and of Justice (Tommaso Villa) presented to the Chamber of Deputies a bill on the telegraph service that should have been extended also to the telephone, given the few rules contained therein. In addition to the insufficiency and superficiality of this attempt at extension, the draft was presented two years later, on April 25, 1882, by the member of Parliament Parenzo, but never approved.³¹

Ideally the starting point of this legal transition could be said to be in October 1882 with the publication in *Il Giornale delle leggi*,³² of an article by Francesco Carlo Gabba,³³ which seems to be the first academic publication on the telephone, since “no one else bothered”.³⁴ Proof of this is, first of all, the periodical *Monitore dei Tribunali* which, contrary to its usual policies,³⁵ republished the well-known article only nine days later,³⁶ for its originality and correctness. The novelty of the article can also be seen from the answers of the jurists³⁷ recalled to the debate³⁸ by the conclusions formulated by Gabba: the

prize of the Cagnola Foundation. Norsa gives us an account of it, which also specifies that there was only one participant. Norsa (1883).

30 They are quoted by Norsa (1883).

31 Foligno (1912-1916).

32 Gabba (1882a).

33 On Gabba see Beneduce (1998).

34 Beneduce (1998) 515.

35 The editorial staff of the *Monitore* (made up of the compilers Dr. Giovanni Porro, owner and manager and the lawyer Amilcare Della Carlina) wanted to specify that in the past it had hardly ever given space to articles already published in other magazines and that this exception was justified by the novelty and correctness of the ideas reported by Gabba. Beneduce (1998) 513.

36 Gabba (1882b).

37 Not only Ercole Vidari, but also the members of the editorial staff of *Giornale delle Leggi* (Avv. Bernardo Cassini, Editor-in-Chief, Avv. Gaetano Queirolo, Vice-Director) and of *Il Monitore dei Tribunali* who expressly supported Gabba's thesis. See the following note.

38 The reconstruction of the debate launched by Gabba's article from the pages of *Giornale delle Leggi* and *Il Monitore dei Tribunali* is not part of the theme of this essay. However, it deserves a mention: in response to Gabba's thesis on the nature of the telephone contract between those present, Ercole Vidari had an article published in the same magazine *Giornale delle Leggi*, in which, countering his colleague with interesting arguments, he came to the opposite conclusion, namely the nature of the telephone con-

management of the *Giornale delle Leggi* in the persons of the lawyers Cassini and Queirolo, wanted to underline the “*brand new and very interesting*”³⁹ character of the subject. Ercole Vidari⁴⁰ made it clear, in a note to his reply article,⁴¹ that although “very important, mind you, from a theoretical point of view: however, as far as practice is concerned, the telephone has so far only served to put in communication bosses and salespeople, factories and branches or warehouses, etc. Concluding contracts is not yet needed”.⁴²

Yet shortly afterwards, Gabba and Vidari’s academic articles proved to be of great use for later literature on the telephone, also providing the two main starting points from which to elaborate a correct theory, especially from a methodological point of view, guided by analogy. In fact, it is curious that the very first voices of debate that were added to Gabba and Vidari, with a few exceptions such as Bolaffio and Norsa, tried to range themselves on one side or the other, essentially reiterating the arguments of the two reference authors. There was Majorana, who in his monograph,⁴³ as noted by his reviewers,⁴⁴ “diligently examines and takes sides in favor of Vidari’s opinion”;⁴⁵ but also Ottolenghi⁴⁶ and Gatto, whose opinion was assimilated to that of Majorana.⁴⁷

tract between those absent. The reply to Vidari did not take long to arrive both from the editorial staff of *Il Monitore dei Tribunali* (Editor of *Il Monitore dei Tribunali*, *Ancora sul punto se il contratto stipulato per telefono sia a considerarsi far assenti o fra presenti*, *Il Monitore dei Tribunali*, Anno XXIII, n. 43, 28 ottobre 1882, 1017-1018) which, albeit implicitly, from the editorial staff of *Il Giornale delle Leggi*, which repropounded the article signed by the Editor-in-Chief of *Il Giornale delle Leggi* (editorial staff of *Il Giornale delle Leggi*, *Ancora sul punto se il contratto stipulato per telefono sia a considerarsi fra assenti o fra presenti*, *Giornale delle Leggi*, Anno 13, n. 45, 9 novembre 1882, 553-554, both in support of Gabba’s thesis. The really interesting point is the “personification” of the directions of the two periodicals in the expression of their opinion.

39 Editorial staff of *Il Giornale delle Leggi* 553.

40 On Vidari see Monti (2011).

41 Vidari (1882).

42 Vidari (1882) 529.

43 Reviews refers to: Majorana (1883). However Majorana printed a new edition of his book in 1912: Majorana (1912).

44 Anonymous (1884); Delogu (1884); Anonymous (1883).

45 Anonymous (1883) 150.

46 Ottolenghi (1883).

47 Anonymous (1884).

2. The intuitive similarity between telegraph and telephone: considering analogy, fragmentation and incompatibility

Within this framework of transition, thus begun, acute jurisprudence interpretation⁴⁸ identified an initial period characterized by the “application to telephone communications of the rules and laws governing telegraphic communications”.⁴⁹ As anticipated, the legislator – the proposer, first of all, had recourse to the extension of the telegraph regulations to the telephone.⁵⁰ But the appreciation of the analogy was also the first methodological option although not necessarily decisive, for the legal theory. Gabba and Vidari themselves, although they agreed on the need to “study the facts in their intimate essence”⁵¹ because “rights have a close connection with our physical way of being”,⁵² compare the two innovations several times, placing the contract concluded by telephone, first in the category of contracts between those present, then in the category of contracts between those absent. On the one hand, Gabba highlighted the differences in the functioning between the two devices, and in particular the absence of interpositions between the telephone subscribers. This inevitably cancels the gap between the proposal and the acceptance, eliminating the distances at least in time. For his part, Vidari used the same argument against his colleague, arguing that if “two people (...) communicated with each other directly by means of a telegraph”, there would be a simultaneity comparable to a moment of silence in telephone communication and therefore, it could be said that this constituted a telegraphic contract between them.⁵³ Hence the senselessness in Vidari’s thought of establishing the

48 Foligno (1912-1916) 595.

49 Foligno (1912-1916) 596.

50 See footnote 32.

51 Gabba (1882b).

52 Vidari (1882).

53 As anticipated in this heated debate, the direction of *Il Monitore dei Tribunali* (The Monitor of the Courts) was also included, which, in issue 40, Year 1882, published a commentary in support of Gabba’s positions and deeply critical of Vidari’s reasoning. It is not known what actually motivated the Editor to intervene directly and actively in the debate, it is enough to know that the Directorate itself asserts that their intention was “non lasciare senza un cenno questo lavoro dell’egregio prof. Vidari [in quanto] dal canto suo tiene, in specie nel campo del diritto commerciale, un posto troppo alto, perché le sue obiezioni se tali possono dirsi, ci sembrassero da trascurare”. See also *Giornale delle Leggi*, 13/40 353-354.

diversity of legal framework, regardless of the concrete manifestations of the two instruments.

In essence, a period of transition opened up during which the legal issues related to the telephone were continuously tested in the light of the strategies of the *analogia legis*⁵⁴ and the general principles⁵⁵ or *analogia iuris*,⁵⁶ fitting into that late nineteenth-century trend of recovery and rethinking of these interpretative canons prepared by the legislator. Mechanisms that went from being mere exegetical references, appropriate for the convergence between the will of the legislator and the activity of the interpreter, to becoming a ploy for allowing legal theory and jurisprudence to “complete the law to /reveal what is latent in it, or rather what is potentially hidden in it”.⁵⁷

In the light of this, the intuitive similarity between the telephone and the telegraph led to the conception that the former was nothing more than a different form of communication at a distance, belonging to the same genre as the latter and therefore to be “considered as such”.⁵⁸ Even a current of thought⁵⁹ based on an unspecified “scientific point of view”, annulled any differentiation, believing that telephony was nothing more than a branch of the telegraphic phenomenon.

Among these analog applications, the one relating to the management of telephone communications as a government monopoly, pending its own specific bill, stands out for its importance. The law on public works of 20 March 1865, had subjected the telegraph service to a public monopoly, although this was not absolute, since no sanctions had been provided for acts of private competition. On the contrary, “in the process of experimentation and pend-

54 Benoit (2005); Guastini (1976); Naletto (1991); Palchy (1974); Petronio (2010).

55 See Sciumé (2013).

56 On the origin of the distinction between analogy legis and analogy iuris: Errera (2010); Pene Vidari (1977).

57 This refers to Mortara’s words: “Non importa se, chiamato a determinare la norma regolatrice di un particolare rapporto, il giudice ne dichiarerà una effettivamente diversa da quella che il legislatore aveva per esso destinata”. Mortara (1905). See Meccarelli (2005).

58 Parere della R. Avvocatura erariale (1884).

59 This is the point of view of Marchiori: “La telefonia non potrebbe considerarsi altrimenti che come un ramo della telegrafia, sia dal punto di vista scientifico, che da quello dell’applicazione”. Atti del parlamento italiano. Camera dei deputati (1890).

ing a legislative provision”⁶⁰ in other words, “precariously”,⁶¹ telephone communications had been regulated by Royal Decree no. 1335 of 1 April 1888 (amended by Royal Decree no. 2110 of 21 February 1884), which allowed private telephony operations under a three-year, renewable, not necessarily exclusive, concession from the Ministry of Public Works, against payment of a fee.

However,⁶² a number of contributions of an academic⁶³ and other nature reflected on the appropriateness of this differentiation. Among others, Francesco Nitti, in an objective evaluation of the theme,⁶⁴ wrote that “the affinities between one and the other are so great, their origin and purpose are so identical, that it is a serious mistake to consider them differently”.⁶⁵ In fact, the common features of the two services, such as the establishment of remote communication, the operation through electricity, the need for a network of cables to be installed in urban areas, entailed the same needs and functional repercussions. As for the post office and the telegraph, *the general utility* of the telephone could not be seriously challenged: it responded, like other forms of communication, to the “need for universality of citizens”⁶⁶ understood not as generality but as the “whole State”.⁶⁷ Hence the need to prevent an industrial exercise harmful to consumers.⁶⁸ On the one hand, the private exercise of telephony did not guarantee a regular, continuous and uniform service, especially in those places where entrepreneurs could make less profit. On the other hand, in the most profitable areas, a sole telephone company, as an *arbitra assoluta*⁶⁹, would have raised tariffs dramatically in order to obtain maximum profits, which, against the plurality of private industries,

60 Foligno (1912-1916).

61 Norsa (1883).

62 Norsa (1883); Arca (1900); Basile (1900); Rava (1900); Brunelli (1908). It should be noted that despite the law of 1892, the issue continued to be the subject of lively debate even afterwards, concerning the differentiation between the management regime of urban and interurban lines and the phenomenon of municipalisation.

63 Nitti (1890-1891).

64 It is Nitti himself who makes it clear that his is an objective doctrinal evaluation, unrelated to any political connotation. Nitti (1890-1891).

65 Nitti (1890-1891) 113.

66 Norsa (1883).

67 Norsa (1883).

68 Nitti (1890-1891).

69 Nitti (1890-1891).

would have created inconvenience and damage to the urban context.⁷⁰ In support of these prospects, the jurists Arca,⁷¹ Nitti⁷² and Norsa⁷³ pointed to the experience gained with the telegraph in other countries because “given the essential affinities (...) it is logical that one now encounters the same difficulties encountered and overcome by the other”.⁷⁴ Particular emphasis is given to the case of England where the State, noticing the considerable telegraphic development and the problems generated by private management, was forced to redeem the communication systems for “hundreds of millions of pounds”.⁷⁵

Attention was also extended to the development of the new communication tool: the increased connection and speed given by the telephone, heralded in the early 1890s its future extension even to the detriment of the telegraph itself. Therefore, in keeping with these intentions, it was necessary to evaluate which management system would most favour the progress of telegraphic communication in order to apply it, by similarity, also to the telephone, at least while waiting for legislation specifically dedicated to it. In this light, it appeared that only the state authority could satisfy the direct communication needs of “every corner of Italy”, as it was able to compensate for any losses with the development of technology and the economic progress of the country.

Naturally, alongside these arguments, others were proposed in support of the public monopoly, at times linked to public safety which was threatened by the intertwining of several electric cables, at others to the economic loss to the State from the prevalence of the telephone over the telegraph and, again, to the need for telephone and telegraph networks to be connected to each other. However, we will skip a deep analysis of these aspects so as not to distract attention from the issue that is of interest here, i.e. the profiles of analogy between the two instruments of communication, grasped by legal science and

70 Norsa recalls in particular an episode that occurred in Milan in December 1882: “per la neve caduta in qualche giorno del mese di dicembre 1882, i fili telefonici si ruppero improvvisamente, e ne nacquero pericoli gravi di disgrazie per le persone percorrenti lungo le vie della nostra città. Inoltre se come avvenuto per Milano viene accordata a più di un concessionario la facoltà di stabilire ed esercitare il telefono in una medesima città molti inconvenienti sorgono dall’esercizio simultaneo” Norsa (1883).

71 Arca (1900).

72 Nitti (1890-1891).

73 Norsa (1883).

74 Nitti (1890-1891).

75 Nitti (1890-1891). On this interesting point see also: E.d.V (1898).

based on the hypothesis of *an initial and transitory* extension of the existing rules to the new apparatus. The “close analogy with the telegraph service”⁷⁶ was also used in other issues such as the legal qualification of telephone operators as clerical and non-workers and the public authorization for the attachment of telephone wires.⁷⁷

Extensive interpretation, both in the form of the *analogia legis* and in the form of the *analogia iuris*, presupposes that there is already a rule or principle regulating the analogous or similar case in the legal system. However, the framework of the dialectic between telegraph-telephone was also enriched by issues with respect to which the analogical perspective remained at a design stage without rising to the legislative level: this is the case of the installation of apparatus, supports and telephone wires in defiance of the absoluteness of private property. While in other countries – Norsa gives the example of Louisiana and Belgium⁷⁸ – the law had already imposed on the owners the obligation to tolerate the affixing of telegraph wires, in Italy, according to the jurist, there had been a general acquiescence towards telegraph systems (“a test of tolerance” or “a willing obedience to the orders of the Public Authority” or yet again “having reflected little or not at all on the severity of the burden imposed”),⁷⁹ almost a “universal consensus of the population”,⁸⁰ which had prevented the Italian legislator from introducing a specific provision to this effect. With the advent of the telephone, episodes of opposition became so frequent⁸¹ that the parliamentary committee was induced to extend public servitude to the telephone as well, inserted for the first time, but only for the telegraph, in the bill of 27 November 1880, Art.4.⁸² This particular episode opens the way to a more careful reflection on the features characterized by

76 Cavalieri/Persico (1908).

77 However, here the analogy was admitted only in the Italian areas to which the Piemontese law on telegraphs of 23 June 1853 regulating the matter had been extended. For the other areas, since the analogy could not operate in the absence of a law on the similar case of the telegraph, one had to refer to Artt. 1 and 8 of the law on public works. Parere della R. Avvocatura erariale (1884).

78 Norsa (1883).

79 Norsa (1883) 98-99.

80 Norsa (1883) 98-99.

81 Report of the Ministry of Public Works accompanying the bill of 27 November 1880, no. 138 and the Report of the Parliamentary Commission of the same bill produced on 25 April 1882 no. 138 cited by Norsa (1883).

82 The bill was never enacted. Foligno (1912-1916).

the use of the analogical strategy applied to the telephone issue: in any case, it was a question of punctuality of application forced to confront two aspects.

The first one is the *fragmentation* of the legal rules on the telegraph and their consequent insufficiency for a phenomenon as extensive as the telephone. The Italian telegraphic legislation of the late nineteenth century, which at least initially could have filled some urgent and specific gaps, was scarce and poor, and was not able to extend to all the problems generated by the telephone. Leaving aside the two international conventions of Paris in 1865 and Petersburg in 1876, the measures adopted on telegraphic matters by the pre-unification states – in particular the Piedmont law no.1563 of 1853 –, although incomplete “as they were sure to be in the early days”,⁸³ were never extended to the whole Kingdom,⁸⁴ with the exception of those relating to the special economic relations underlying the provision of the service. Even in 1883, the need for a unitary law regulating all the new legal relations generated by the telegraph, both private and public, was only satisfied with “here and there imperfect regulations, or very succinct articles of law”, “isolated seeds of legislation”.⁸⁵ So the legal vacuum was left to be filled by a customary right based on the public utility of the service, public common sense and the prudence of the Administration. This was the result not only of frequent governmental instability, which had in fact halted several bills,⁸⁶ but also of a well-considered choice, in imitation of other European States which wanted to wait in order to gather as much data as possible from experience, before providing a stable legal framework for the new instrument, as they were not able to foresee the future evolution of communication techniques.⁸⁷ Therefore, the state-of-the-art Italian legislation on telegraphic matters, lacking a

83 Norsa (1883).

84 Sabato (1912-1916).

85 Norsa (1883).

86 One thinks of the bill presented by the Minister of the Interior on 22 June 1878, which was intended to “provvedere alla guarentigia, alla libertà e al segreto nella corrispondenza telegrafica privata”, whose legislative process was interrupted by the dissolution of the House in 1880. One thinks again of the already mentioned project of 27 November 1880, no. 138 presented by the Minister of Public Works, in agreement with the Minister of the Interior and Justice, which was also not properly complete and in any case stopped by the dissolution of the Chamber. Foligno (1912-1916).

87 Report of the Ministry of Public Works accompanying the bill of 27 November 1880, no. 138 and the Report of the Parliamentary Commission of the same bill produced on 25 April 1882 no. 138 cited by Norsa (1883).

general and organic framework able to satisfy all needs and including only “partial, grainy, insufficient rules”,⁸⁸ was not suitable to lending itself to general analogue extensions, either interpretively or a fortiori, with an explicit legislative extension. On this last point, therefore, the legal theory recognized the fruitlessness of referring to foreign examples, such as that of England and Belgium, where, at least initially, the analogical extension was – or had already been involuntarily⁸⁹ – prescribed by law.

Alongside the fragmentation, there was also the *incompatibility*, in some ways, between the legal framework of the telegraph and the specific peculiarities of the telephone and the relative legal issues. Vidari, Gabba, Norsa were in fact well aware of the profound differences between the two instruments and of the forcing that took place in aligning them.⁹⁰ There are several aspects that confirm this profile. The functional connection established by the law on public works of 1865 between the transmission of telegraphic dispatches and railway law was considered an example. In order to guarantee the safety and regularity of the railways, the concessionaire was obliged to install offices and telegraph apparatus with which the State could interfere at any time for the transmission of its official dispatches. According to Norsa, these provisions could not “logically extend, in their entirety to phones, as their application to them is neither necessary nor obvious”.⁹¹ More fitting is the factual circumstance that telegraph personnel could and had to, according to the International Telegraphic Convention of 21 July 1868, halt dispatches that were dangerous for public safety. On the contrary, direct communication between telephones prevented any extensive application of this regulation, requiring instead other measures of prevention and protection. Along the same lines were also envisaged provisions made to deal with hypothetical criminal offences. Most of these measures were, still at the planning stage and related to the illegitimate actions of the employee who took possession, opened, revealed, suppressed or altered the contents of a telegram, or had maliciously delayed its transmission or delivery. At most, as Norsa observed, since these are criminal provisions, therefore insubstantial in their extensive⁹² interpre-

88 Norsa (1883).

89 In the English case, the telegraph legislation: Norsa (1883).

90 Gabba (1882a); Vidari (1882).

91 Norsa (1883).

92 “(...) poiché delle leggi penali non è lecito fare una interpretazione estensiva”. Norsa (1883) 107.

tation, the hypotheses regarding the criminal activity of the suppression of a telegram or the arbitrary alteration of a machine in order to seize the communication could be legally extended to the telephone. In addition, in telephone communication, there are factual peculiarities unknown to the telegraph, such as the already mentioned absence of a temporal distance in the meeting between proposal and acceptance and the need for tariffs that are adequate both to the development of the new apparatus and to limiting its prevarication over the telegraph, to the detriment of state finances.⁹³

In the light of this picture, the concluding proposals made by the first legal literature dedicated to the telephone are well understood. Norsa, more than anybody else, explicitly favours an investigation of all the regulations concerning telegraphic matters in order to proceed “with a subtle eye” to examine “to what extent they coincide and where instead modified or appropriate new provisions are needed”.⁹⁴ In fact, it was his opinion that the “sensitive and important points of contact” should induce the legislator to issue a “cumulative law” containing “common general principles” alongside “provisions, rules and determinations appropriate for both systems”.⁹⁵

Gabba and Vidari, even though they settled for opposite positions, ignored the legal panorama offered by poor telegraphic legislation, in the deep conviction that the new phenomena of the telephone should be analyzed and disciplined “for what they really are, without trying to adapt them to their own opinions”. However, it was precisely on the different conception of the functioning of the telephone and the different interpretation of the concept of *presence* that the contrast between their opinions was based. Finally, Nitti who, enriching his legal reasoning with a series of confutations of all the options against the public monopoly, seen by some as dangerous collectivism, closed his article hoping that these unfounded “concerns” would not further slow down the parliamentary work because “acknowledging the principle of the exercise of the state, assuming that between the government monopoly and the company monopoly, that of the state is preferable (...) it seems to me little prudent to indefinitely postpone the resolution of such an important issue”.⁹⁶

93 On this point see also De Viti De Marco (1890).

94 Norsa (1883).

95 Norsa (1883).

96 Nitti (1890-1891).

3. The precarious balance between academic and jurisprudential solutions and legislative attempts

After the pioneering voices and the consequent contributions alternately deployed towards one or other theory, the increasing diffusion of the telephone, together with the profiles of fragmentation and incompatibility with the telegraph, made the empty legal spaces “in their essence and structure”⁹⁷ more and more evident. Hence both for the completely unregulated new and remaining issues, there was no other option but to urgently ask the legislator for a unitary framework, dedicated mainly, if not exclusively, to the telephone.⁹⁸ In this area, the process of conciliation of the legal system with reality gave way to a second type of approach, characterized by a substantial balance established between the thrusts of the legal theory towards an original *ad hoc* law, meagre jurisprudence and, in addition, background parliamentary work that tried to satisfy legislative expectations.

The literature of this period has authoritative voices and covers various legal issues, the most important of which relate to the conclusion of the contract by telephone and the management of the telephone service. On contractual matters, Bolaffio⁹⁹ and Bianchi’s¹⁰⁰ points of view are valuable as they finally express neutrality and detachment regarding the first trilateral debate (Gabbani-Monitore dei Tribunali). Bolaffio, dealing with contractual perfection in relation to Art. 36 of the new Code of Commerce,¹⁰¹ applied his deductions to the telephone, recalling in several points of his discourse the relevant profiles of difference from the telegraph. Moving away from the excessive academicism with which, in his opinion, the issue had been addressed, the future successor of Vivante, proposed focusing on the most convenient solution in terms of legal practice: it was true, as claimed by Gabba, that the telephone, unlike telegraphic communication, allowed the simultaneity of statements, but this did not help to identify the moment of perfection and therefore, the

97 Giannini (1908).

98 For a reconstruction of the numerous bills elaborated on questions of the telephone from the Baccarini project to the first Italian law exclusively dedicated to the telephone (law of 12 April 1892.95) see Foligno (1912-1916); Giannini (1908).

99 On Leone Bolaffio see Cicconetti (1969).

100 On Ferdinando Saverio Bianchi see Mosca (1968).

101 Bolaffio, in particular, after summing up the trilateral debate, states that he has reflected “a lungo sulle ragioni addotte da quelli che ci precedettero nella trattazione dell’argomento”. Bolaffio (1882).

applicable law, the legal customs, the competent court, even in case of transmission errors. What is most interesting, is the hope, in the conclusion of the article, that his work “if good, even if only partially, will be useful (...). If bad (...) not to worry, time is there to administer quick and relentless justice”. Bianchi,¹⁰² having, like his colleague “proceeded with an elimination work” of the various theses, presented an original reconstruction, introducing the new category of “*contratti conclusi per relazione immediate*”, that is “such that there exists simultaneity between the declaration of one and the perception or knowledge of it by the other”.¹⁰³ As clearly pointed out by the lawyer Camillo Cavagnari¹⁰⁴ a reviewer from the *Monitore dei Tribunali*, the difficulty of moving away from pre-existing concepts and the pretension of proposing an innovative solution, led Bianchi to conclude “*for convenience of language*”¹⁰⁵ that the contract by telephone was in any case to be considered equivalent to that stipulated between absent persons.

On the subject of telephone service management, De Viti De Marco,¹⁰⁶ although an economist, fed the legal debate in the pages of the *Giornale degli economisti* by arguing for the opportunity of a pluralistic management of telephony, unless one wanted to give in to those trends of collectivization that would increase the costs borne by the State and at the same time decrease the quality of those complex services, in need of numerous operators and expensive means, such as those related to communication.

For its part, *the case law on telephony*, at least until the first decade of the twentieth century is very limited¹⁰⁷ and has few pronouncements mostly related to the tariff regime and the “affixing of telephone lines and devices”. With respect to this last issue, the judges, in the absence of a complete law on the matter, strove to grant protection by recognizing judicial actions to owners harassed by the passage of wires.¹⁰⁸

On the other hand, *the intense parliamentary work* only led to the drafting of several bills, none of which was approved until 1892. They range from the first Baccarini project of 2 March 1882, to a list that includes, among the

102 Bianchi (1888).

103 Relevant sentences of Bianchi’s work reported by Cavagnari (1888).

104 Cavagnari (1888).

105 Cavagnari (1888).

106 De Viti De Marco (1890), also quoted by Arca (1900).

107 Consiglio di Stato, IV Sezione (1899); Corte di Cassazione di Roma a Sezioni Unite (1901).

108 Corte di Appello di Genova (1904).

most important and above all ambitious, the Lacava and Saracco projects. None of these was ever approved either for lack of funds or because of the numerous government crises.¹⁰⁹ However, it should be pointed out that, at this early stage, there were some very timely interventions specifically dedicated to the telephone, mostly marked by *necessity* and *temporariness*. In particular, there were “some regulations [adopted] with individual ministerial decrees”¹¹⁰ such as, for example, Decree No. 1335 of 1 April 1883 on the approval of specifications for telephone operating concessions for public and private use, later amended by Decree No. 2110 of 21 February 1884.

Among the three forces, the opinions of consultative bodies interposed as a useful pivot for achieving a summary and temporary stability. Among these, the opinion of the *Avvocatura Erariale* was very direct and limited itself to stating that “where the Sardinian law of 1853 does not prevail (...) Articles 1 and 8 of the law on public works relating to the attributions of the Ministry of Public Law apply”.¹¹¹

More precisely, on the other hand, the Council of State which, when questioned by Minister Baccarini himself on the subject of a public telephone service, specified that it would be up to the State, throughout the Kingdom, to have the monopoly of telegraphs and, consequently, also that of telephones “which are nothing more than the application of the same principle for the use of correspondence and for the transmission of thoughts and words”.¹¹² The Supreme Council focused its line of argument on the regulatory foundations provided by the laws of March 20, 1865 – which among the public works, also included “maintenance and operation of telegraphs” –, August 18, 1870 and by the Piedmontese law of 1853, which although not extended to all provinces, was considered sufficient for an analogical extension to the telephone.

Finally, on April 30, 1891, Minister Branca presented a project relating only to the management of the telephone service, “rather than [to] the development of telephony”¹¹³ and privatisation. In fact, the project aimed at recognizing the telephone service more as a private industry than as a need marked

109 Foligno (1912-1916).

110 Foligno (1912-1916) 599.

111 *Parre della R. Avvocatura erariale* (1884).

112 The ruling of the judgment is reported by Foligno (1912-1916).

113 Cavalieri/Persico (1908).

by “necessity and universality”.¹¹⁴ However, “the very provisions of the project and certain sentences of the report betrayed a different concept”,¹¹⁵ which finally led to a state monopoly and telephone operation through strictly regulated concessions, to be entrusted only to private industry for a well-defined period – initially 25 years. The approval of this project with the promulgation of Law No. 184 of 7 April 1892, apparently put an end to the uncertainty, at least with regard to the regulation contained therein. The legislation regulated the public and private use of telephone lines only by means of a government concession; it admitted the existence of peculiar support easements for the electrical wires of the telephone, dwelling also on the tariffs and the possibility of lodging administrative appeals against the decisions of the Prefect on the matter.¹¹⁶ Certainly, the law of 1892 and the relative regulation of 1894, did not dampen the academic ferment: the legislative framework, far from being complete, left *blank spaces but also a stratification of regulations*, not easily referable to order. For this reason years followed, about a decade or so, in which legal theory and jurisprudence strove to widen the legislative mesh, this time not in relation to a previous regulation and not with an analogical method.

The jurists continued to oppose each other, even on previously unthought of aspects that experience had produced. Among these was the interesting question of *ingiuria telefonica* which, while for some¹¹⁷ seemed certainly subsumed in Article 395 of the Zanardelli Code, for others needed a particular hermeneutical effort: the element of “presence”, understood as “real and effective”.¹¹⁸ In addition to being essential for the configuration of the case referred to in the second paragraph of the above mentioned provision, it contributed to justifying the increase in the penalty prescribed therein, the offence expressed as a person denotes, in fact, a more serious *animus iniuriandi*.¹¹⁹

When this and similar cases arose, it was fundamental to identify the place of jurisdiction which the jurists¹²⁰ tended to identify as where the recipient’s

114 Norsa (1883).

115 Foligno (1912-1916).

116 For the text of the law: Cavalieri/Persico (1908).

117 Galassi (1905).

118 Cavalieri/Persico (1908).

119 Cavalieri/Persico (1908).

120 Facchinetti (1902). It should be noted that Facchinetti was King’s Deputy Prosecutor at the Court of Florence when he published this article.

telephone was located, as the place where the insult, the defamation, the acceptance came to the knowledge, to the ear of the other party. In order not to consider the procedural aspects connected with the telephone evidence.¹²¹

Moreover, only in the early twentieth century, was the telephone issue beginning to come to terms with the new phenomenon of *municipalisation*, that is, the trend, which spread in several Western countries to “exalt and expand the city’s function”¹²² in order to consider economic, legal and social problems in relation to the municipal context. From this point of view, we can understand the writings of Arca,¹²³ Bresadola¹²⁴ and Basile,¹²⁵ who expressed themselves favourably towards the “decentralising”¹²⁶ policies that “do not already have as their aim a decrease in the social activity of the state, but only a more harmonious direction of it”.¹²⁷ Among the protagonists of this debate, Luigi Rava¹²⁸ stands out, in particular, with a monograph,¹²⁹ included in the *Primo trattato completo di diritto amministrativo* by Orlando, in which he proposed a more structured solution – dependent on the urban or interurban nature of the telephone lines – but, in any case, still regressive as regards the previous legislative settlement relating to telephone management.

In the field of jurisprudence, the pronouncements on telephony were enriched in number and themes, contributing to completing the jagged legislative panorama with rigorous definitions, compositions of apparent regulatory antinomies and resolutions of further issues arising from the use of telephone systems. The Council of State outlined the field of application of telephony, understanding “telephone communication”¹³⁰ as “not a conversation in the

121 Cavaliere/Persico (1908).

122 Bliss et al. (eds) (1908).

123 Arca (1900).

124 Bresadola (1901).

125 Basile (1900).

126 Arca (1900).

127 Arca (1900).

128 On Luigi Rava see Meniconi (2016); D’Agostini (2013).

129 Rava (1901).

130 “Per ‘conversazione telefonica’ si intende non una conversazione nel significato comune della parola, ma ogni comunicazione per mezzo del telefono, e quindi anche quella che ha per oggetto la trasmissione del contenuto di un telegramma”. Consiglio di Stato (1905). But also “La comunicazione telefonica si deve intendere stabilita quando sia in condizione di agibilità e si possa senz’altro parlare: il semplice filo non dà comunicazione telefonica”. Pretura di Orvieto (1907).

common meaning of the word, but any communication by telephone, and therefore also that which has the object of transmitting the content of a telegram". Jurisprudence also reconstructed the juridical nature of the peculiar supporting easement introduced by the law of April 7, 1892: neither predial servitude nor right of use in the restricted meaning of the Civil Code,¹³¹ but "a public servitude governed by special law".¹³² In numerous rulings the judges reconciled the recent legislation on telephone matters with the previous law, such as the railway,¹³³ commercial¹³⁴ and labour law.¹³⁵ The judges' attention was focused on new cases, the result of the experience and development of telephony: ranging from the limits of the responsibility of telephone companies towards subscribers in case of interruption of service, especially if due to force majeure¹³⁶, to the conditions for establishing a plurality of concessions,¹³⁷ and the problem of the competition between telephone lines and power lines.¹³⁸

The knowledge of this legal doctrine and jurisprudence is crucial for confirming the characteristics of the transition. Not only do they show that after 1892 the legal system was far from conforming to the needs of the real, but they also show that the transition periods are not immune to new vicissitudes that complicate the transition process, leading to the rethinking of statutes until then considered undisputable. In the literature reported, the problem of telephone offences had not appeared before the widespread and informal use of this instrument; likewise the profiles of the state management of the service seemed incontrovertible until they were confronted with municipalisation. This is to say that the transition is not a linear, but a bumpy one, made up of only apparent slowdowns, complications and stability, susceptible to

131 Tribunale Civile di Roma (1906).

132 Corte di Cassazione di Palermo (1907).

133 Tribunale di Firenze (1906).

134 "L'esercizio telefonico può essere assunto anche da società cooperative senza venir meno al principio di mutualità". Corte di Appello di Milano (1906).

135 "La legge sul lavoro delle donne e dei fanciulli è applicabile anche alle telefoniste", Cassazione di Roma (1905) in footnote. But also in Pretura di Treviso (1905).

136 Corte di Cassazione di Torino (1903). But also Pretura di Torino (1902); Tribunale Civile di Firenze (1906). But contrary: "Non sono dovuti danni per la caduta dei pali se l'Amministrazione non mancò di diligenza in vigilando". Tribunale di Venezia 17 dicembre 1904 e Corte di Appello di Venezia, 26 ottobre 1905, in Cavalieri/Persico (1908).

137 Corte di Appello di Roma (1901) e Consiglio di Stato (1900). But also the Court of Cassation of Rome 18 December 1902, Cavalieri/Persico (1908).

138 Corte di Appello di Lucca (1903).

the external influences of other transitional spaces. In fact, the words of Rava's reviewer are extremely apt: "only it was a difficult thing to resolve every question in such a mutable and continually progressing matter. Who in fact could have taken into account all the transformations and all the improvements that telephony is capable of"¹³⁹ and, one adds, society?

It can be understood, therefore, how the latest trend of this ideal transitional path, as also identified by the legal theory, is afferent to the "Italian legislative movement"¹⁴⁰ that "at this point could not stop"¹⁴¹ because the problems previously linked to fragmentation had now turned into a *lacunosity* directly proportional to the incessant spread of the new machinery.¹⁴² We can mention some new bills such as the one by Nasi of 1889 for the construction of new urban lines and that of Di San Giuliano, to prescribe the direct state assumption of almost all the existing telephone lines, reducing the concession to a mere possibility the project by Pascolato aimed at the reorganization of all services.¹⁴³ Despite the ease with which they fell through, these projects highlight the continuous and urgent need both to fill the gaps – newly emerging and formed around the law of 1892 – and to give "better organization"¹⁴⁴ as well as to encourage the development of an increasingly complex and structured communication network. In an attempt to satisfy these intentions, no better instrument than a single text could be envisaged. In particular, the proposal put forward by the Honorable Galimberti on June 14, 1902 was successful. It suggested authorizing the Royal Government to collect and reorganize in a single text the provisions of the above mentioned law as well as the previous ones and was approved by the Chamber of Deputies with Law no. 32 of February 15, 1903. The Government implemented the delegation with the decree of 3 May 1903 no.196, considered by the scholars "the most important telephone law".¹⁴⁵

The use of a single text does not represent the culmination of the continu-

139 Rivalta (1900).

140 Foligno (1912-1916).

141 Foligno (1912-1916).

142 The numbers reported by Rava are very interesting: in 1899, seven years after the 1892 law was passed, there were only two dealer companies (La "Generale" and "L'Alta Italia") with 11 and 9 networks respectively. In not even a decade the networks had practically doubled. Rava (1900). Dati confermati da Foligno (1912-1916).

143 Foligno (1912-1916).

144 Foligno (1912-1916).

145 Foligno (1912-1916).

ous legislative movement regarding the telephone. Suffice it to say that it did not cover all the legal issues related to the telephone and that, moreover, it was the subject of numerous subsequent amendments – such as, among others, Law No. 506 of 15 July 1907, which made the trend towards the exercise of the State prevail in a definitive manner. Its survey reconnaissance nature, inferred from the provision of delegation – “The government is authorized to coordinate and collect in a single text (...)”¹⁴⁶ – made this single text only a fixed point, ordered, systematic, but never definitive. On closer inspection, the legislative movement on the subject of the telephone, together with the related debates on theory and case law continued to follow the factual development of the new means of communication through the intensification of long-distance lines; the telephone connections between Italy and abroad, hence the first international telephone conventions;¹⁴⁷ transoceanic communications – with all that derived from them in terms of underwater lines;¹⁴⁸ the adaptation of the telephone to wartime – “Modern warfare is essentially scientific and electricity is one of the most effective collaborators”.¹⁴⁹ In short, a continuous work of additions, modifications and reinterpretations that goes beyond the periodization on which this contribution is based. For this reason it is difficult, if not impossible, to recognize a moment of perfect reunification between the juridical order and telephony: the continuous development of the latter and the contexts of its use prevented the former from taking definitive positions.

In spite of this, the adoption of the single text by decree of 3 May 1903 no.196, represents, a good point to place, if not the conclusion, at least a pause in the transitional path initiated by the telephone as not only was it considered the most important and basic legislation on the telephone but “although modified by successive laws, it is still [in 1912] in force and constantly applied”.¹⁵⁰ In the light of the above premises, the identification of this as a stage, if not conclusive, then at least the *arrival* of the transition is something to be contextualized both positively and negatively. On the *positive side*, the choice to affix this term is justified by the particular nature and function of a single text: it is in

146 Legislatura XXI- 2° Sessione, Discussioni, Tornata del 31 gennaio 1903, Atti Parlamentari della Camera dei Deputati 5081.

147 Orlando (1914).

148 From the affirmations of Cavalieri and Persico we can guess that in 1908 transoceanic communications were still a mere hypothesis. Cavalieri/Persico (1908).

149 Anonymous (1916) 31.

150 Foligno (1912-1916).

fact a legal instrument of its own for defining, coordinating and systematizing a subject that is considered to be, at least at that moment, summarily complete. In reality, and on the *negative side*, the legislator of 1903 did not foresee either how much more the need for a telephone network extended to the whole Nation and beyond would grow, nor the relative and continuous insufficiency of financing, nor the dissatisfaction of the employees of the concessionary Companies regarding their juridical and economic status, nor, finally, the First World War and the consequent strategic value of the telephone.

4. Tradition, fixed points and identity of each transitional space

The analysis of the case of the telephone, allows us to detect the most salient aspects of the phenomenon of legal transition falling within technical development. The first juridical interests in the new instruments generated, or rather, noted, a situation which Norsa accurately defined as “weakness” or “legal inconsistency”.¹⁵¹ Therefore, it was not so much a matter of gaps or voids, but rather of an insufficient and unsuitable juridical structure, detached from factual reality, and yet fundamental in elaborating the first answers to the new questions. This initial basic toolbox originated from pre-existing law for several reasons. First of all, because of the urgency with which solutions were needed, especially in jurisdictions where recourse was made to legislation that was already well established, such as that on the telegraph or the aqueduct, in relation to their “affinity of form and substance”¹⁵² with electrical and telephone pipelines. This impelling need for answers sometimes went beyond the scope of the debate of 1882 on the value of concluding contracts by telephone. To this is added, in contrast to the trend, a *prudent predisposition*: as Norsa and Foligno pointed out, and as can be seen from the parliamentary debates on the various bills presented on telephone issues, there is every intention to wait and accumulate as much experience as possible, at least until the definitive settlement of the telephone system. In fact, among jurists, the new telephone models such as the Reis or the lanyard¹⁵³ model are a warning, since they could change the way in which the word is transmitted and therefore distort any new law drawn up on previous and outdated models. However, what drives most towards the recovery of the previous right are

151 Foligno (1912-1916).

152 Corte di Appello di Roma (1898).

153 Norsa (1883).

what Carnelutti, in an article dedicated to electricity, calls “the eyeglasses of theories, formulas and tradition” that “often have so much influence on us that we isolate ourselves completely”.¹⁵⁴ The same risk is clearly felt by Gabba and Vidari with regard to telephone matters: for the former it is necessary to “study the facts in their intimate essence”¹⁵⁵ because, using the words of the latter “rights have a close connection with our physical way of being”.¹⁵⁶ And yet, as we have seen, they both tried to relate the telephone to the legislation already elaborated for the telegraph.

The works of reform and refinement that took place after the single text of 1903, connected with municipalisation, transoceanic lines¹⁵⁷ and the war, partly question the possibility of placing the concept of legal transition in the world of technical progress. In fact, we could not speak of transition if, after the advent of an innovation, the reunification between the juridical world and the real world seems to be an asymptotic graph, insusceptible to reunification. Indeed, if we accept the thesis that considered the telephone as a mere branch of the telegraph and the telegraph, in its turn, as a form of communication at a distance comparable to postal correspondence, it is no longer even possible to identify exactly the initial moment of transition. Therefore, in that straight but jagged line of the progress of law in relation to technology, it is essential to consider *fixed points* which, although not definitive, delimit a transitional space as an object of analysis. These fixed points, as can be seen from the single text of 1903, do not participate in the unstable, uncertain and temporary nature of the law, but are originally designed to last and be preserved. This differs from the first regulations on telephone issues that were laid down “provisionally” for some “particular points”¹⁵⁸ or from the analogical applications related to the telegraph, which although intuitively correct, remained a mere “adjunct”.¹⁵⁹ It should be noted, however, that on the subject of progress there seem to be some examples of definitive elaborations reached following heated theoretical debates and jurisprudential disputes, as in the case of the legal nature of electricity, still today explicitly qualified as a movable asset by Art. 814 of the Civil Code.

154 Carnelutti (1913).

155 Gabba (1882b).

156 Vidari (1882).

157 Cavalieri/Persico (1908).

158 Foligno (1912-1916).

159 Foligno (1912-1916).

It follows that reflection on the transitions brought about by technical progress can only be generalised within certain limits because every process of change has its own particular characteristics. These give it *identity* and also influence its course. In the case of the telephone, the transition period opened by its diffusion favoured another phenomenon of (re)transitional openness that has probably never been completely defined: through a *reverse flow* compared to the one previously described, the legal framework promulgated on the telephone was, curiously, extended by law or by extensive interpretation, to some controversial issues inherent in the telegraph, which became rarer and more exceptional, dragging them into a “journey backwards”.¹⁶⁰ This is the case of the State’s responsibility for the damage caused to users on the occasion of the service which, although it had been excluded by the telegraph regulations, was reintroduced, after a long debate, in the 1903 single text on the telephone and expressly extended ex Art. 32 to the telegraph service.¹⁶¹ Also as regards government concessions for telephone operation, where the report on the Pascolano bill suggested “extending also to telegraphy the faculty that the government has to give telephone concessions for private use”,¹⁶² and on the matter of the servitude of telegraphic lines.¹⁶³ In practice, the legislative elaborations on the telephone became a real “opportunity to fill the gap and for the regulations on this matter [the telegraph] to acquire the authority and effectiveness that so far it had not had”.¹⁶⁴ This peculiar change of direction of analogical strategies, determined both by the undoubted and unchanged similarity between telephone and telegraph, and by the irresolution of fragmentation in telegraphic legislation, seems to contradict one of the main characteristics that, intuitively, are attributed to transitional phenomena. It is not only a question of paths made up of attempted legislative interventions, unstable doctrinal proposals and contingent jurisprudential decisions, drawn unidirectionally from an initial legal situation to a final one, which tend to be static until the next period of change. Sometimes the opening of transitional spaces represents an opportunity, an ideal opportunity to review the entire legal system with new eyes, attentive to weaknesses

160 Giannini (1908).

161 Giannini (1908) XI.

162 Atti Parlamentari Senato, Legislazione XXI, 1° sessione 1900, Disegni di legge e relazionali n. 24, 74, nota 6, 2. Cit. also in Cavalieri/Persico (1908).

163 Cavalieri/Persico (1908) 136.

164 Cavalieri/Persico (1908).

and shortcomings, envisaging new and stronger tools for its innovation and progress.

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In the middle of nowhere.
The never-ending transition of Italian private companies
(*società a responsabilità limitata* - SRL)

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1. Introduction; 2. Streamlines in reforms of Business Law from 1942 to 2004. The birth and growth of SRL; 3. The long-lasting season of the amendments to the s.r.l. rules (2008-2019); 3.1. The confirmation period (2008-2012); 3.2. The counter-reformation (2012-ongoing?); 3.2.1. The Innovative Start-ups; 3.2.2. Innovative SMEs; 3.2.3. The general extension of specific rules; 3.2.4. The final step: delegated management again; 4. Some possible final remarks

1. Introduction

Business Law is one of the fields in legal studies where innovations are usually most frequent and important. Actually, we can assume that Business Law has two basic purposes. On the one hand, it aims at regulating business activities; this means that business regulations are continuously chasing reality, trying to provide legal responses to the innovative situations developed in economic practice, but, at the same time, being aware of the fact that reality is always moving farther away, gaining a lead, like in Zeno's paradox of Achilles and the tortoise. On the other hand, particularly under the most proactive and wise legislatures, Business Law is responsible for promoting new entrepreneurial attitudes and tools, serving as a vehicle of innovation for society as a whole.

This means that Business Law, as regards the specific case, has either a rearguard (response) or a forefront (impulse) approach to the actual business environment. Such a situation is not necessarily dependant on the specific system of rules laid down in a given order: in the same legal environment – which can be either a national or a supranational one – the two attitudes might coexist. In the same legal environment, the rearguard attitude can be present with reference to some situations, while a forefront promotion approach is adopted for others .

In both cases, the need or aim to regulate the innovation gives rise to tran-

sitional phenomena. They nevertheless differ: very often, the rearguard attitude is not fully adequate to provide an answer to the question “where are we going to?”, while the forefront one naturally should be forged having a rather clear idea of the final target of the process. This clear idea is not always present, as we are going to see, and this creates somewhat of a short-circuit in legislative interventions, with schizophrenic sudden changes with little or no clear ultimate purpose.

In this chapter, I deal with a specific example from Italian Business Law, i.e. the case of the Italian private company, the *società a responsabilità limitata*. In fact, its course has been meaningfully marked by several conflicting legislative interventions during the last decade. This superabundance of interventions has contributed to changing the very basic profiles of this company form, whose nature and position in the system of Italian Company Law is currently a matter of harsh debate among legal scholars.

2. Streamlines in reforms of Business Law from 1942 to 2004. The birth and growth of SRL

From 1865 until 1942, the realm of Italian Business Law had as its primary legislative source a specific Commercial Code. The first Commercial Code of unified Italy was issued in 1865, and replaced just seventeen years later by the *Codice di commercio* issued in 1882. The remaining part of Private Law had the Italian Civil Code issued in 1865¹ as its main source.

The separation between the Civil and the Commercial Code is naturally relevant in order to understand the attitude of the Italian lawmaker regarding the relationship between Civil and Business Law. Business Law was intended to be a realm separated from general Private Law because of the economic nature of business.² It is not by chance that the application of the *Codice di commercio* was intended to occur with reference to all the acts of business (*atti di commercio*), and to contracts where even just one of the parties was a businessman (*commerciante*). In this system, where a single type of contract could have rules in both the Civil and Commercial Code, the provisions laid down in the Commercial Code prevailed over the possibly conflicting rules present in the Civil Code. The system was thus designed in order to expand the application of Commercial rules over the “common” civil ones, and this

1 Galgano (2010) 221 ff.; Spada (2009) 15 ff.

2 Spada (2009) 18-19.

expansion followed the commercial nature of the acts carried out by a subject.³

The unification of the Civil and Commercial Codes in 1942 solved the possible conflicts of rules, de facto sanctioning the priority of Commercial rules over general private ones. Even if one might be tempted to think that the repeal of the Commercial Code and the inclusion of the commercial subject in the Fifth Book of the 1942 Civil Code was to be intended as a “defeat” for Commercial Law, which was “losing” its proper Code, the correct reading of the unification is another. From a functional point of view, there has been a substantial transfusion of many of the solutions present in the late Commercial Code into the new Civil Code: many commentators and scholars have spoken of the “commercialisation of Private Law”.⁴ A corollary to this movement towards commercialisation was the identification of a new cornerstone of the application of commercial law: the passage from the *act* of commerce, to the *person* in charge of commerce, i.e. the entrepreneur (*imprenditore*). It has been clearly pointed out that, from a practical point of view, there were not huge differences between the old *commerciante* (businessman) and the new *imprenditore*.⁵ In any case, the fact that from 1942 on, the entire Commercial Law system has as its pivot not an act, but a person (either natural or legal, as in companies) clearly contributed to an increased certainty regarding the area of application of Commercial Law in the entire Italian legal system. A legal system that became much more thoroughly “commercialised” because of the adoption of commercial principles in the new Private Law regulation set down in the Civil Code issued in 1942.⁶

In the area of Company Law, the Civil Code issued in 1942 marked the creation of a “new” company form, the *società a responsabilità limitata* (hereinafter just *s.r.l.*), that was meant to signal the need for a specific legal tool for the development of small enterprises. By means of the *s.r.l.* the lawmaker was

3 Spada (2009) 25 ff. For a more comprehensive panorama, see also: Buonocore (2006) 15 ss, spec. 22 ff.; Libertini (2006), Delle Monache (2012), and the debate between Libertini (2015), Montalenti (2015), and Maugeri (2015). A new and recent debate on the so-called “*ricommercializzazione*” of Italian Business Law is also interesting: Angelici (2019), Portale (2019), Spada (2019), Libertini (2019), and the German-related remarks by Kindler (2019).

4 Buonocore (2006) 22 ff.

5 Spada (2009) 27-28.

6 For a comprehensive analysis of this transition from the Commercial Codes of the 19th century, to the new Civil Code, see Teti (2018).

granting the members of this company the benefit of limited liability, without imposing on them the stricter legal obligations taken from the rules set down for the (bigger) *Società anonima*, whose name was changed in 1942, becoming *Società per azioni* (s.p.a., Joint stock company).⁷

This general panorama was not affected by major legal amendments until 2003/04. In 2003, a general reform of company law was passed,⁸ with the purpose of modernising the Italian company environment. This reform did not modify any of the general Business Law principles, but designed a new allocation of competences for the company forms known by Italian Law. Indeed, the 2003/04 reform on the one hand, contributed to reinforcing the role of the s.p.a. as the reference model of the firm for bigger businesses. On the other hand, conversely, it enhanced the freedom for the members of an s.r.l., so that they were enabled to create a “custom tailored” company, with the specific features the members desired, and no strict legal ties.⁹

This attitude was clearly aligned with the 1942 scheme: s.p.a. for bigger enterprises; s.r.l. for smaller ones. Nevertheless, the reform in 2003/04 was not constrained just to that. It also recognised the momentous social role of the s.r.l. in the Italian economy, taking note that the s.r.l. was – and is – at large the most common company form in Italy, due to the overwhelming predominance of SMEs over bigger businesses in the economic life of the country.¹⁰ In so doing, this normative technique aimed at expanding the possibilities for a broader customisation of the company, leaving limited room for mandatory

7 A very valuable reconstruction of the legal precursors of the model abroad, and of the projects for the new code can be found in Rivolta (1982) 26 ff. The most complete work on the s.r.l. is certainly Zanarone (2010), where there are also historical and systematic remarks on p. 3 ff.

8 Legislative Decree January 17th, 2003, no. 5, amending the Civil Code with reference to the companies and cooperative societies, entered into force on January 1st, 2004 (hence the reference, in the text to the 2003/4 reform).

9 See the *Relazione* to the Legislative Decree 6/2003, which in the part devoted to the s.r.l. states: “Essa si caratterizza invece come una società personale la quale perciò, pur godendo del beneficio della responsabilità limitata (che del resto, dopo la generale ammissibilità della società unipersonale a responsabilità limitata, non può più ritenersi necessariamente presupporre una rigida struttura organizzativa di tipo corporativo), può essere sottratta alle rigidità di disciplina richieste per la società per azioni”. The *Relazione* is available in *Rivista delle società*, 2003, p. 112 ff. (the part cited is on p. 147).

10 According to data retrievable from database AIDA, there are currently more than 1.24 million active s.r.l.s in Italy; just for a quick comparison, the figure for s.p.a.s is 27,048.

legal provisions. The fundamental idea was to remove from the s.r.l. the tag of “s.p.a.’s younger (and smaller) sister”, which was very common until 2003, and was due to the massive cross-referencing in the realm of private companies of rules primarily laid down for joint stock companies.¹¹ The s.r.l. system that the 2003 reform designed was less influenced by the rules established for the *Società per azioni*, and originated a genuinely autonomous company form, with very few formal links with joint stock companies.

Moreover, the new s.r.l. also had a promotional function. Although a company, and due to this needing a starting share capital in order that its members could benefit from limited liability, according to the general doctrine/theory of legal persons in Italian Law, the minimum amount of money needed for the constitution was – and is – much lower than the minimum capital – or legal capital – required for establishing a *Società per azioni*.¹² With a view to this circumstance, the s.r.l. was intended to be the most likely candidate for being the “natural” entry-level company form, for entrepreneurs aiming at developing a business benefiting from limited liability. Of course, they had the opportunity to run their business either as sole entrepreneurs, or by means of a partnership; these solutions, nevertheless, had both pros and cons, the cons being the unlimited liability for the entity’s obligations, and the pros being the extreme flexibility that is the hallmark of partnerships and sole enterprises.

Until 2003/04, the members’ choice between adopting a partnership or an s.r.l. as a business model had to take into consideration that getting the benefit of limited liability could mean giving up designing the company in full accordance with their entrepreneurial ideas. Conversely, the unlimited liability characteristic of partnerships was the price to pay for full customisation. The reform in 2003/04 removed this obstacle, by expanding the room for members’ autonomy also in the s.r.l.¹³

11 See, for instance, the former (before 2003) Arts. 2486 and 2487 Civil Code, cross referencing for the application in the s.r.l. most of the rules laid down for the s.p.a.

12 Starting from the year 2003/04, EUR 10,000 instead of EUR 120,000 (but only 50,000, since 2014: see *infra*). Furthermore, besides the rules on minimum capital, the norms applicable to contributions allowed members, in most cases, to pay-in only one fourth of the subscribed contribution as of a company’s constitution. This means that, when establishing an s.r.l. with two or more members, whose contributions are cash, the amount of contributions to be immediately paid-in did not exceed 2,500 EUR. This entire issue has been revolutionised by the reforms in 2012/13 that we are going to analyse in the forthcoming paragraphs.

13 For instance, in the field of company governance, allowing the use of the models

From a systematic point of view, the new role for the s.r.l. was to be the link between the partnerships, and the s.p.a. There is, however, one more issue to deal with in order to make the panorama as clear as possible. When we mention members' enhanced autonomy in the s.r.l., we must not imply that such autonomy is necessarily intended to create a company that could be seen as "a partnership with members having limited liability".¹⁴ This situation covers just a portion of the entire range. On the opposite side, in fact, we must consider that the members could use their autonomy also in order to recreate an s.r.l. with features very similar to those present in the s.p.a., but with much lower capital requirements. A bird's eye view of the s.r.l., therefore, would not reveal a monolithic organisational form; it would rather show a flexible tool, where the hallmark was, typically, its own intrinsic flexibility.¹⁵ As such flexibility was intended to be used by the company's members, this led to considering the s.r.l. as the company form where the importance of the members as a person – in juxtaposition with the members' contributions as the key organisational feature – was more developed and crucial.¹⁶

This being said, understanding the key features of the s.r.l. when compared with the s.p.a. is nevertheless not immediate. Their ultimate purposes are intended to be different, and this is mirrored in the lower amount of capital required for establishing an s.r.l.; however, nothing prevents the members of the s.r.l. from deciding to raise the company's share capital not just higher than the minimum capital required for the establishment of an s.p.a., but even much higher. A lower minimum capital requirement for the s.r.l. than for the s.p.a. is thus directly linked with the ultimate purpose of the former, i.e. to serve as the vehicle for the acquisition of limited liability (also) for running small and medium sized enterprises. However, this has almost nothing to do with the key differences between the models, which is itself a paramount issue in a system based on the principle of typicality like that of Italy.¹⁷

The hallmarks of an s.r.l., when compared with an s.p.a., were traditionally intended to be two, present since 1942, plus one, in some ways reinforced in 2003/04:

established for partnerships (see: Art. 2475 Civil Code), or as far as contributions are concerned, with the possibility of work or service contributions, under certain conditions (Art. 2465 Civil Code).

14 See again the *Relazione* mentioned above, footnote 9.

15 Zanarone (2003) 84-90.

16 *Relazione*, footnote 9, 148.

17 Cf. Art. 2249 Civil Code.

a. In the s.r.l., the membership interests representing the participation of each member in the company (*quote*) cannot be, properly speaking, stocks (*azioni*), which are the hallmark of the s.p.a.;¹⁸

b. In the s.r.l., the membership interests owned by the members cannot be publicly traded, for instance in a primary or a secondary exchange market;¹⁹

c. In the s.r.l., one or more members are entitled to be in charge of the management of the company, along and together with the directors, while in the s.p.a. the company's management can only be enacted by the directors, with no competence regarding this for the shareholders.²⁰

While features a. and b. have been present in the rules of the s.r.l. since 1942, principle c. has been strongly affirmed in particular by the 2003/04 reform.

Points a. and b. have some common background. When we consider that membership interests cannot be stocks, this means that the company's capital can be divided not into a pre-arranged number of shares, each one with the same par value, and incorporating the same rights and duties – at least where the shares belong to the same class or category – but only in the number of the company's members. In a share-based system, each shareholder can own a certain amount of stocks, or shares; in a non share-based system, like the s.r.l., each member owns just one membership interest, whose actual value normally depends on the member's contribution. This means that, while all the stocks of an s.p.a. (or, more correctly, all the stocks belonging to the same class, in an s.p.a.) are necessarily equal in rights and “weight”, the membership interests of an s.r.l. are normally different. The prohibition to create stocks in the s.r.l. is to be read not just in a formal way – it is not possible to call “stock” a membership interest – but not even substantially – it is not possible to create “classes” of membership interests having necessarily the same par value and incorporating the same rights and duties.

This, naturally, has a direct influence on the (legally mandatory) prohibition to trade publicly an s.r.l.'s membership interests. The public trading, in particular when it comes to stock exchanges, requires the exchanged goods to be fungible; if they are not, the market is not in the condition to form the price for the good. Naturally, as membership interests cannot be incorporated in

18 Art. 2468, paragraph 1, Civil Code.

19 Art. 2468, paragraph 1, Civil Code.

20 Art. 2479, paragraph 1, Civil Code (and Art. 2380bis Civil Code for s.p.a.). For the deviations from this principle in the s.r.l. see below, paragraph 3.2.4.

shares, they cannot be considered fungible, and therefore cannot be traded on a market. Furthermore, the very nature of the s.r.l., with the central position of the member as a person, makes this company form an organisation where the fiduciary relations among the members are of the utmost importance. The consequence of this is that the number of members is usually rather low. This prevents membership interests from being listed in a public market system, with no guarantee on the personal peculiarities of the buyer, nor on his/her reliability towards the remaining members. Also for these reasons, the s.r.l. – along with its equivalent “sisters” in Europe and elsewhere –²¹ is usually classified as a private company.

The private character of this company form is relevant also when it comes to point c. In fact, if we consider a company with few members, we naturally understand that the separation between the ownership (members) and the control (directors) is far less pronounced than in public companies. Empirically speaking, also in those cases where directors are not members themselves,²² it is fairly usual for members to carry out management activities as well. The rules laid down in the s.r.l. establish a legal framework for such a situation, also by extending directors’ liability to the acting members, in the case where their behaviour prejudices the company.²³

The situation after the Company Law reform in 2003/04 was that in spite of belonging to the same family (the “companies”), s.r.l. and s.p.a. had different purposes and thus different key features. However, everything was about to change, from 2010 on.

3. The long-lasting season of the amendments to the s.r.l. rules (2008-2019)

3.1. *The confirmation period (2008-2012)*

The regulatory situation of the s.r.l. was not fated to find peace after the 2003/04 reform. In spite of having clear goals and ultimate aims for Italian private companies, from the very early years after the reform the Italian lawmaker found topics whose amendment could somehow reinforce the under-

21 This with meaningful exceptions in the Netherlands (where the local *BV* is at large modelled after the *NV*; references in Wooldridge (2009) 369), and (now for) Belgium, where with the 2019 Reform, the private character of the “old” *SPRL* was de facto denied. References in Bartolacelli (2019) 199 ff.

22 The default rule laid down in Art. 2475, paragraph 1, Civil Code, is that members only are entitled to be directors, if the articles do not state otherwise.

23 Art. 2476 Civil Code.

lying idea of the s.r.l. as an entry-level model, making its establishment and management easier.

The first relevant operation in the field dates back to 2008;²⁴ it basically deals with the repeal of the obligation for the s.r.l. to keep a specific book where the name of company members had to be recorded (*libro soci*): every transmission of membership interests was effective against the company from the moment of the deposit of the deed in the public Register (*Registro delle imprese*).²⁵ Naturally, this amendment implies the company directors have fewer duties to fulfil; namely, they were delivered from the keeping of the internal register. Without taking any position regarding the actual effectiveness of the new norm, we can nevertheless assume that the policy behind its introduction is, again, to broaden the differences between the s.r.l. and s.p.a., where the book is still present and mandatorily required.²⁶

Actually, with reference to the transfer of s.r.l membership interests, a further innovative legislative measure had been taken a few months before the repeal of the *libro soci*. Again in June 2008, a governmental decree laid down a “deregulating provision” regarding the requirements for the deed of transfer of an s.r.l.’s membership interest. The new rule made the intervention of a public notary in the transfer of the membership interest no longer necessary. It is now sufficient to undersign the deed of transfer by means of an electronic signature, with the eventual deposit to the *Registro delle imprese* to be performed by an enabled intermediary – which basically means a certified professional accountant.²⁷ This amendment makes the transfer of membership interests easier, and cheaper, considering the averagely high notary fees in Italy.

The role of the public notary in the Law regulating the s.r.l. is one of the key issues also for the second amendment that belongs to the “confirmation” trend, whose systematic impact has been far stronger than the repeal of the members’ record book.

Starting from 2012, but still ongoing in 2013, the rules regarding the minimum capital requirement for establishing an s.r.l. were changed radically. The minimum capital currently required for the constitution of a *società a*

24 Governmental Decree November 29th, 2008, no. 185, converted into Law no. 2, January 28th, 2009.

25 Art. 2470, paragraph 1, Civil Code.

26 Art. 2421.

27 Governmental Decree June 25th, 2008, no. 112, converted into Law, no. 133, Art. 36, paragraph 1bis, August 6th, 2008.

responsabilità limitata according to the regulation passed in 2012 (just) for a new company sub-version – the simplified s.r.l. – and in 2013 for every s.r.l., was reduced from EUR 10,000 to EUR 1.²⁸ Of course, this trend once again facilitates the establishment of a new s.r.l.; the underlying reasons for a further measure are multi-faceted.

On the one hand, if we consider the time of this amendment, it is clear that it came in the long wave of the global economic crisis that started in 2008. As one of the major effects of this crisis was the impossibility of maintaining the previous levels of employability, one of the solutions was to promote self-employment, by turning a former employee into an entrepreneur. In order to make this scheme more realistic, the establishment of a new company needed to be cheaper. This is why the lawmaker decided to modify the minimum capital requirement, taking it to almost zero: as (starting) capital is perceived as a cost, slashing this “cost” was to be seen in a certain sense as a “gift” to promote entrepreneurship.

This attitude alone does not have a direct impact on the above-mentioned issue of the intervention of public notaries in the process of the establishment of a company under Italian Law. As a general rule, in fact, whenever a company is established in Italy, regardless of its form – i.e.: the rule is the same for an s.p.a., s.r.l., and *Società in accomandita per azioni*,²⁹ – a public notary must draw up the deed of incorporation.³⁰ Even without taking position on the enhanced reliability of the deeds for third parties triggered by a system where a public servant certifies the deed, this naturally involves an additional cost for the company. Besides the capital and administrative costs to be paid to the public administration for stamps, taxes and filing activities, establishing a new company also requires paying the public notary’s fee for the drawing up of the deed. According to data provided by the EU Commission, the cost is not exactly negligible.³¹

28 The whole, complex history of this legal amendment can be read in Bartolacelli (2016) 665-673.

29 A sort of limited partnership by shares, which is however a company under the Italian company law system.

30 The due legal form (cf. Directive (EU) 2017/1132 of 14 June 2017, relating to certain aspects of company law, Art. 10) for the establishment is, for all these company forms, the *atto pubblico*, i.e. a deed drawn up by the notary : cf. Art. 2328, paragraph 2, Civil Code for s.p.a., cross-referenced in Art. 2454 Civil code for s.a.p.a., and Art.2463, paragraph 2, Civil Code for s.r.l.

31 An interesting comparative overview of the notarial fees throughout Europe is available in the “Commission Staff Working Document - Impact Assessment”, Accom-

The meaningful reduction of the capital requirement, therefore means that the cost of establishing a new s.r.l. has been lowered, but not as yet zeroed. Precisely because of that, an additional legislative intervention³² in early 2012 provided for a low-cost establishment of a new s.r.l., when the founding members were – originally³³ – people under 35 years-old. This special regime of establishment gave rise to a new “sub-version” of the s.r.l., named after the *Società a responsabilità limitata semplificata* – a simplified s.r.l., or s.r.l.s. – where the deed of incorporation is to be drawn up “in accordance” with extremely basic model articles prepared by the Ministries of Justice and Economic Development. In this case, too, the deed must be formally drawn up by a public notary;³⁴ however, as notaries *must* use the model articles, and they only have to assess the identity of the founding members and the lawfulness of the social object clause, they are not entitled to ask for a fee for this activity. In other words, when an s.r.l.s. is established, no fee is to be paid to the public notary for the deed of incorporation, and the starting capital can even be set at just EUR 1. The “price” for this facilitation in establishing the company is the fact that the s.r.l. will be necessarily governed by means of articles that are too basic to be effective and useful to the actual activity of the company.³⁵

The situation created by the establishment of the s.r.l.s. and the reduction of minimum capital requirements for the ordinary s.r.l. is, in my opinion, the highest point achieved by s.r.l. regulation with a view to the simplification of the model, when compared to the s.p.a. The autonomous nature of the s.r.l. is at this point even made extreme: the “price” for the limited liability, i.e.: the capital the members have to invest in the company in order to benefit from

panying the document “Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies” SUP, SWD(2014) 124 final, of April 4th, 2014, p. 45.

32 Actually, the legislative innovation here discussed came before the reduction of minimum capital for the ordinary s.r.l. As I am trying to explain in the text, and with a procedure that has been used very often in recent years, the simplified s.r.l. served as a sort of laboratory, or a *ballon d'essai*, for innovative solutions to eventually export to ordinary company forms.

33 While the current version of Art. 2463*bis*, amended in 2013, no longer requires a specific age, simply excluding legal persons from the use of an s.r.l.s.

34 But not in the – revolutionary – first version of the Act, where there was the possibility of establishing the company by means of a non-notarial deed. This rule was immediately repealed as of the conversion of the Decree into Act. See again Bartolacelli (2016) 699.

35 For a critical assessment, see Bartolacelli (2016) 669 ff., 689 ff.

a limitation in their liability for the obligations born by the company, tends now to zero. This naturally is a great help in the establishment of new companies, but, intuitively, gives almost no consideration to the protection of third parties, in particular the company's creditors.

On the other hand, the "one-euro company" should be considered in a certain sense as a label fraud: if it is true that one euro is *legally* sufficient for establishing a company, it must nevertheless be remembered that the single euro of capital is manifestly insufficient for the s.r.l. to rent an office, or purchase the furniture, or hire personnel. As it is reasonable that the company will have to perform at least some of these activities, and that at least in its start-up phase there will be no company fund to cover that, the necessary money is to be found elsewhere. This means that the money will be provided either by the members themselves, or by a financing third party, usually a bank, that will do it against a guarantee. However, the new-born company has no asset suitable to serve as a guarantee; such an asset has to be searched for in the members' personal patrimony. At the end of the day, the hyper-autonomy of the "new" s.r.l. is resolved by taking the key issue of financing the company outside Company Law, and within the scope of the application of general Private Law. The new paradox is that we are now facing the privatisation of financing, i.e. a core issue of Company Law.

Besides this, there is another profile where the new s.r.l.s. in particular betray the very nature of the s.r.l., and this concerns the members' autonomy in designing their own company. When we consider a company that, in order to be delivered from the obligation of paying the notarial fees, accepts to be regulated according to model articles arranged in advance by a public administration which the members are not entitled to amend, we are not looking at a company where the members' will is central.³⁶ For all of these reasons, the

³⁶ Even if the aura of myth surrounding the members' full autonomy in designing the company present in the s.r.l. should perhaps be removed. In fact, if it is true that this is one of the hallmarks of this company model, and that most of the rules laid down with reference to of the s.r.l. are not mandatory but simply establish a default framework where the members' will does not decide otherwise, it must be remembered that such freedom is very costly. The act of designing the company, by means of the drawing up of elaborate articles, is subject to the considerable cost of the fees to be paid to an expert consultant. Should the company decide otherwise, committing the drawing up to a cheaper and less skilled consultant, higher costs could eventually arise, due to the uncertainty in the decisions after the legal proceedings needed to solve the internal conflicts deriving from the poor articles. Freedom to design the articles, therefore, is certainly a wonderful gift, but

panorama here described does not help to define the s.r.l. as a virtuous form of company, as it seems to have lost, in many cases, most of its virtues.³⁷

3.2. *The counter-reformation (2012-ongoing?)*

3.2.1. *The Innovative Start-ups*

Later in the same year, 2012 which saw the creation of the s.r.l.s., a new Governmental Decree created a further regime, not limited to, but in particular addressed to the s.r.l.: the Innovative Start-ups.

Again, the purpose of this legislative intervention is to be a means for the promotion of new businesses in the form of a company; in this case, however, the goal is more targeted than in s.r.l.s., or in a low-capital ordinary

a gift that in most cases needs money to work properly – and perhaps too much money for a small company at the dawn of its business. For more comprehensive remarks, see Di Cataldo (2011) 297-316.

37 In the words of an important scholar, “Un tipo senza qualità”: Cagnasso (2013).

Even if we argue that, from 2012/13 on, there has been a sort of Counter-Reformation in the field of the s.r.l., with a general trend that has led to the *società a responsabilità limitata* closely resembling a *società per azioni*, also in the following years there have been occasional regulatory amendments intended to further facilitate the establishment of an s.r.l.

Such facilitations usually reduced the legal obligations an s.r.l. should perform. In the wake of this, there is the repeal of the obligation to appoint company auditors when the s.r.l.'s share capital exceeded the minimum required for an s.p.a. (Art. 2477, paragraph 2, Civil Code, eventually repealed in 2014). This amendment was to some extent required by the already mentioned reduction of s.p.a.'s minimum capital from EUR 120,000 to 50,000. If the original rule were maintained, every s.r.l. with a share capital between EUR 50,000 and 120,000 would have suddenly had to appoint at least one auditor, and evidently the lawmaker deemed such a consequence less desirable than reducing in a substantive way the obligation for s.r.l. to have auditors.

A second facilitation, coming from the European Union Law, dates back to August 2015. The Legislative Decree 139/2015, in fact, implementing in Italy the Directive 2013/34/EU, introduced into the Civil Code the new Art. 2435*ter*, on balance sheets facilitations for Micro-Enterprises. Actually, the rule is not addressed explicitly to the s.r.l., as the requirements for benefitting from the facilitation are based on the assets resulting in the Balance Sheet (under EUR 175,000), net turnover (under EUR 350,000), number of employees (5), and not the company form used. This means, on the one hand, that the facilitation is applicable not only to the s.r.l., but also to other company (and partnership, and cooperative society) forms, if they meet the requirements; and, on the other hand, that reasonably it will not be applicable to every s.r.l., as the bigger ones among them will not meet the prescribed requirements.

s.r.l., as the new company must be somehow “innovative”.³⁸ The primary aim of the operation seemed to be, therefore, the promotion of a new culture of innovation in Italian enterprises. In retrospect, on the contrary, it seems to be looked at as a new *ballon d’essai* to test on a limited scale solution to be eventually extended to a broader range of subjects.

A detailed description of the features of the Italian Innovative Start-ups is not important for the purposes of this chapter. What I must highlight is the specific regulatory regime temporarily (for a duration of up to five years) applicable to the companies that have been recognised as Innovative Start-ups. First, the promotional rules for the Innovative Start-ups are not limited to the s.r.l.; according to the Act, any unlisted company, or even a cooperative society, is entitled to be an Innovative Start-up, and therefore only partnerships are excluded from the scope of application.³⁹ Naturally, the company must be a start-up, i.e. it needs to have been recently established; specifically, the company must have been constituted up to four years before the application in order to be granted the benefits linked to the status of Innovative Start-up.⁴⁰

As we are looking at cases of newly established companies, the entire background of the amendments to the rules for the s.r.l. discussed so far is useful for understanding that most of the new companies that apply to be registered as Innovative Start-ups will be in the form of the “entry level”, and less expensive, model of company: the s.r.l. Also for this reason, the norm in the Act that provides for the “exceptions to general Company Law rules”⁴¹ focuses primarily on the s.r.l., with very few provisions applicable also to other company forms and cooperative societies.

Almost all the derogations to general s.r.l. rules considered by the norm are, both in empirical and systematic terms, colossal. I am discussing here only those that are more closely related to the trend – or counter-trend – I am trying to describe in this apparently never-ending transition in s.r.l. rules.

According to the already-mentioned Governmental Decree, the s.r.l.s reg-

38 The notion of “innovation” applicable to this company sub-version is rather broad. It can either be in the way the business is carried out e.g.: an innovative production chain for a “traditional” final product), or in the actual output of the business (an innovative product, regardless of the innovations in its production chain), or, naturally, in both of them. Cf. Benazzo (2014), p. 113 ff.

39 Art. 25, paragraph 2, Governmental Decree October 18th, 2012, no. 179, Converted into Law no. 221, December 17th, 2012, – hereinafter “Start-up Decree”.

40 Art. 25, paragraph 3, Start-up Decree.

41 Art. 26, Start-up Decree.

istered as Innovative Start-ups are entitled to have in their articles provisions regarding their own membership interests, allowing that such *quote* (stakes in the company) can be categorized. The *quote* that belong to each category must have the same rights, even departing from the rule set down by Art. 2468, paragraphs 2 and 3, Italian Civil Code.⁴² In the special categories (or classes) of membership interests just mentioned there is also the possibility of affecting the members' voting rights, even having classes of membership interests completely deprived of the right to vote, or with a limited voting right.⁴³

Besides that, the membership interests of Innovative Start-ups can be publicly bid for on the market,⁴⁴ even using specific online services the Governmental Decree establishes for this purpose, via an equity crowdfunding operation.⁴⁵ The Decree explicitly states that this possibility is a derogation to the provision laid down in Art. 2468, paragraph 1, Italian Civil Code.⁴⁶

If we consider that the rules mentioned deal with two of the three topics that can be considered the “inner sanctum” of the s.r.l. as a company form as distinct from the s.p.a., their relevance is naturally extremely meaningful.

The fact that the membership interests can be grouped into homogeneous classes, and that the membership interests belonging to each class have the same rights and duties, makes such membership interests substantially very similar to the stocks of a public company. It is true that the rule does not explicitly require that the membership interests grouped in classes must all have the same par value, as happens for the s.p.a. stocks; their similarity with the stocks is, however, very strong.

In the same vein, when the Act we are describing amends the Financial Markets Code by introducing the rules for a new primary online market for the allocation of the membership interests issued by the Innovative Start-ups, this clearly clashes with the general theory of the s.r.l., and its very nature as a private company.⁴⁷

42 Art. 26, paragraph 2, Start-up Decree.

43 Art. 26, paragraph 3, Start-up Decree.

44 Art. 26, paragraph 5, Start-up Decree.

45 Art. 30, Start-up Decree.

46 Besides those just mentioned, the Decree on Innovative Start-ups sets down many additional derogations to general rules applicable to the s.r.l., for instance in the area of financial assistance, delayed terms for capital reduction in case of severe losses, issue of hybrid financial instruments, and so on. The exceptions I have described more closely, however, are of the utmost importance from the systematic point of view.

47 As is explicitly recognised by the Decree itself, in Art. 26, when it states the departure from the rules laid down in Art. 2468, paragraph 1, Civil Code.

In different terms, then, we can say that the exceptions to the general rules applicable to the s.r.l. introduced by the Act on Innovative Start-ups substantially take the s.r.l. back to a model similar to that of the s.p.a.. They impact on two areas of the rules of the s.r.l. that had not been brought closer to the s.p.a. even in the period 1942-2003, when the s.r.l. was known as the “s.p.a.’s younger sister”. As none of the amendments referred to are obligations for the company members, but just possibilities, they are free either to use, or not, the s.r.l. Innovative Start-Up is much more similar to an s.p.a. than an s.r.l. before the reform of 2003/04.

Indeed, one could object that these amendments are not to be intended as general, as they are applicable only to an extremely limited number of s.r.l.s, i.e. those established fairly recently, that have some kind of an innovative vocation or hallmark. This was true for a little over two years.⁴⁸

3.2.2. *Innovative SMEs*

In fact, in January 2015, the Italian lawmaker, again by means of a Governmental Decree, decided to extend a relevant part of the exceptions the Innovative Start-ups were granted of to every s.r.l. with innovative character classified as an SME, with no need at all for the company to be in its start-up phase.⁴⁹ The applicable definition of an SME was the notion laid down by the European Commission in its Recommendation 361/2003.⁵⁰

The extension of the provision to the Innovative SMEs actually made sense. The underlying idea was that they would serve as a sort of “landing field” for the Innovative Start-Ups at the end of the start-up period. During such time, the Innovative Start-Ups benefit from several advantages, under Company, Labour and Tax Law; furthermore, they are allowed to draw up their articles adding provisions that are not consistent with the general s.r.l.

⁴⁸ But, also during that time, with the need to recognise that, after the end of the Start-up period, the provisions in the articles would nevertheless stay valid even if the company was not to be considered an Innovative Start-up any longer.

⁴⁹ Governmental Decree January 24th, 2015, no. 3, converted into Law no. 33, Art. 4, March 24th, 2015.

⁵⁰ Commission Recommendation of 6th May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC), Annex, art. 2, paragraph 1: “1. The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million”.

rules laid down in the Civil Code. With a view to a continuative promotion of the innovation, not only in the start-up phase, the regulatory intervention extended to the Innovative SMEs the application of many articles of the Decree on Innovative Start-ups.⁵¹ This means, in particular, that the same exceptions to general rules we observed for the Innovative Start-ups are also possible for the Innovative SMEs. Nevertheless, there is a fundamental issue to underline: while the exceptions in the Innovative Start-ups were thought to last for a time-limited period of up to five years, in the case of the Innovative SMEs this advantage is potentially everlasting. If the SME can show that its innovative nature persists – and this is to be declared on a yearly basis by the company directors⁵² – then the company continues to benefit from the promotional rules just mentioned. In particular, for the purposes of this chapter, the Innovative SMEs, which naturally can be s.r.l., are also entitled to create categories or classes of their own membership interests, incorporating different rights for each other, and with the possibility of accessing a primary market for the selling of such *quote*, by means of equity crowdfunding.

If even just these observations show the extreme relevance of the new rules for the Innovative SMEs, and the huge fallout for the general system caused by companies taking advantage of time-unlimited derogations from basic general rules and principles, we must nevertheless add that the Decree on Innovative SMEs went far further. In fact, besides the already mentioned extension, it also brought in additional amendments to the rules for Innovative Start-ups.

These amendments are once again hugely relevant also from a theoretical and systematic perspective. They deal with the establishment of an innovative company, and with the trading (and not just the initial placing) of its shares or membership interests. To put it more simply, a new framework applicable to virtually every innovative company was created despite there not being a legal definition of innovation in this case.

As for the company's constitution, as an alternative to the "classic" notarial deed of incorporation, the Decree allows Innovative Start-ups to be established by using an online form with a digital signature and online model articles prepared by the Ministry of Economic Development. The same possibility is also granted for every amendment to the original articles.⁵³

51 Art. 4, paragraph 9, Decree 3/2015.

52 Art. 4, paragraph 6, Decree 3/2015.

53 Art. 4, paragraph 10*bis*, Decree 3/2015.

The model articles developed for the case discussed here are fortunately much more detailed, and in general better, than those prepared for the simplified s.r.l.⁵⁴

The second deviation is even more ground-breaking from the systematic point of view. It is now possible not only to place newly-issued membership interests by means of equity crowdfunding on a public market, but also to trade them through enabled intermediaries, which operate in the online market reserved for Innovative Start-ups and SMEs.⁵⁵ In this case, not only is the ordinary notarial intervention not required but neither is the written form of the membership interest transfer. We should nevertheless remember that it had been possible to avoid notarial intervention since the Governmental Decree 112/2008, that enabled professional accountants to perform such activities.⁵⁶ In this system, which is a voluntary alternative to the usual one, the enabled intermediaries are entitled to hold the membership interests in their own name, but on behalf of the members, and to keep records of all the transactions related to the membership interests. The members are simply given certificates, issued by the intermediary, that entitle them to exercise their rights in the company.⁵⁷ Evidently, this new system of membership interest trading dramatically facilitates the transfer of the *quote*, using the online platform as the place where supply and demand come together, in a way very similar to a stock exchange. Again, the point of the compatibility of this rule with the general s.r.l. principle that the company's membership interests cannot be bid for in the open market remains unsolved, as the answer depends on the definition one gives of "bid to the general public" present in Art. 2468, ICC.

The model articles needed for the online incorporation, luckily with a more developed self-awareness than those available for the simplified s.r.l., were laid down by two Ministerial Decrees (Ministry of Economic Development): February 17th, 2016 (on the guidelines for the drawing up of the articles), and October 28th, 2016 (the proper model article).

54 As this way of incorporation does not require the notarial form of the deed, this raises issues for compatibility with the already cited Art. 10, Directive (EU) 2017/1132. Starting from a different case, but basically on the same issue: Licini (2015) 390 ff.

55 Art. 100ter Legislative Decree February 24th, 1998, no. 58 (hereinafter also "t.u.f." or "Financial Markets Code"), paragraph 2bis.

56 Again, a new deviation from the general rule present in the Financial Markets Code, Art. 23, paragraph 1, laying down the prescription that all the contracts related to investment services must be in written form.

57 Art. 100ter t.u.f., paragraph 2bis, lett. c).

To sum up, the derogations from the general rules applicable to the s.r.l. were first laid down for the Innovative Start-ups, and later extended to the Innovative SMEs. This naturally has repercussions in the general regulation of the s.r.l.s, but one could think that this is due to the innovative character of these companies, and the lawmakers' clear aim to promote innovation.

3.2.3. *The general extension of specific rules*

This counter-argument becomes hardly defensible when it comes to the second extension of the derogations, decided in April 2017, again by means of a Governmental Decree.⁵⁸ The structure of the legal provision is extremely simple; its fallout, epoch-making.

The black letter of the law is, indeed, extremely concise: "In Art. 26, paragraphs 2, 5 and 6 of the Governmental Decree October 18th, 2012, no. 179, converted, with amendments, into Law no. 221, December 17th, 2012, , the words 'Innovative Start-ups' and 'Innovative Start-up', wherever they occur, are replaced by 'SME'". Even if there is not a complete extension to the entire realm of the SMEs of all the rules applicable to the Innovative Start-ups (as only some paragraphs are referenced, and not all of them), many important provisions become nevertheless applicable to the latter.

As for the objective extension of the exceptions to the general rule, it deals again with the most relevant issues we have discussed so far.

Regarding the possibility for the s.r.l. to issue categorized membership interests, the *quote* can be aggregated in homogenous classes, each with its proper rights. As the norm does not mention paragraph 3 of Art. 26, d.lgs. 179/2012, it is questionable whether the s.r.l. SMEs are entitled to issue classes of membership interests with partial or even no voting rights. However, the answer should be affirmative, due to the wording of paragraph 3: "the companies paragraph 2 refers to".⁵⁹

As regards market access, the extended scope of the derogation mentioned in paragraph 5, d.lgs. 179/2012, now allows all the SMEs established in the form of an s.r.l. to use the online platform in order to take advantage of the crowdfunding for the initial placement of their membership interests, and for the facilitated transfer of the *quote* by means of enabled intermediaries.

Furthermore, the deviation is also extended for the permission of financial

⁵⁸ Governmental Decree April 24th, 2017, no. 50, converted into Law no. 96, Art. 5, June 21st, 2017.

⁵⁹ For a very convincing overall panorama, see Cian (2018) and Speranzin (2018).

assistance to the company's employees, as derogation to Art. 2474 ICC, that forbids in a general way any kind of financial assistance for the s.r.l.

Now, from the objective point of view, there is nothing new in the extensions. The disruptive novelty regards the subjective aspect. In fact, if so far we have faced rather subjectively-limited derogations, justified on the basis of a supposed policy in favour of innovation, the extension we are now dealing with has nothing to do with innovation, as all the exceptions are applicable to every s.r.l. SME, regardless of its innovative feature. The point is that the lawmakers have made the understanding of what an s.r.l. SME is anything but clear.

We had as a reference model the s.r.l. Innovative SMEs, already discussed, where the legislation explicitly made reference to the definition of an SME provided for by the EU Recommendation 2003/361/EC;⁶⁰ the d.l. 50/2017, in spite of the huge fallout of its Art. 57 on the general system of the s.r.l., does not even mention the criteria for a company being held as an SME. We can reasonably assume that they are the same as we have some evidence of this, not in the d.l. 50/2017,⁶¹ but in the Financial Markets Code, which regulates SME access to the open market via the online platform. It is easy to remember that the possibility for an s.r.l. to use specific online platforms for placing its membership interests by means of a crowdfunding operation was first granted only to Innovative Start-ups. The Decree that introduced the Innovative Start-ups consistently modified the Financial Markets code, in order to regulate the online platforms;⁶² the eventual extensions (first to Innovative SMEs, and later just to SMEs) simply intervened in the field of financial markets by amending those original provisions. This means that in the current version of

⁶⁰ Art. 4, paragraph 1, Decree 3/2015. The definition of Recommendation 2003/361/EC can be found above, footnote 49.

⁶¹ Governmental Decree April 24th, 2017, converted into Law no. 96, June 21st, 2017,. No definition was present either in the Act for State Financial Stability 232/2016, Art. 1, paragraph 70, which was the first but incomplete source for the extension of the regime originally intended just for the Innovative Start-ups to all the SMEs in the form of the s.r.l., at least in the area of financial markets. Such regulatory intervention, then, had to be integrated by the d.l. 50/2017, in order to rectify some applicative mistake brought in by Law 232/2016, and this is why, in the interest of a simplification in the exposition and due to the temporal proximity of the two different amendments, I did not mention Law 232/2016 in the text.

⁶² Namely, Arts 50*quinquies* and 100*ter* of the Financial Markets Code, introduced by Art. 30, d.l. 179/2012.

Arts 50*quinquies* and 100*ter* t.u.f., where there was originally a reference to the Innovative Start-ups, we can now find only a general mention of SMEs. The need for a clear definition of SME for the purposes of the access to the market was therefore felt also in the field of financial markets law. Art. 1 of the Financial Markets Code provides for a definition of the platform, in paragraph 5*novies*. Again, the paragraph was introduced by d.l. 179/2012, and eventually amended several times; in particular, the Legislative Decree for the implementation of EU Directive 2014/65/EU⁶³ introduced a definition of an SME. This definition, which should be held applicable also for the purpose of the interpretation of the word SME in the d.l. 179/2012, refers to the notion given by the EU Law, no longer in the Recommendation 2003/361/EC, but in Regulation (EU) 2017/1129, Art. 2, paragraph 1, lett. f. This definition encompasses the one present in the old 2003 Recommendation (“companies, which, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000”), adding a further, alternative, criterion (“small and medium-sized enterprises as defined in point (13) of Article 4(1) of Directive 2014/65/EU”). This latter notion is “companies that had an average market capitalisation of less than EUR 200 000 000 on the basis of end-year quotes for the previous three calendar years”.⁶⁴

Now, evidently the second part of the definition is not (yet?) applicable to the s.r.l., as it implies a rather high market capitalisation, while we do not have a fully developed market for s.r.l.’s membership interests.⁶⁵ The first part, on the other hand, does not add anything new to what we already knew from the Recommendation 2003/361/EC: this will also be the interpretative criterion for the d.l. 179/2012.

What does this mean, in actual fact? It means that, finally, the deviations from the rules given in the Civil Code are applicable to all the s.r.l. that, according to their last accounts, “meet two of the following criteria: an average

63 Legislative Decree August 3rd, 2017, no. 129, art. 1, paragraph 1, let. dd).

64 It should be noted that, consistently with the disjointed system we are describing, the Financial Markets Code, again in Art. 1, paragraph 2, lett. *w-quater.1* already has a (totally different) definition of an SME, that should not be used for the interpretation of the situation referred to here, as it is not compatible with the realm of private companies.

65 We must remember that the definition of SME crosses the different company types, and is thus applicable to the s.r.l. as well as to the s.p.a. that fulfils the requirements.

number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000". This means, as stated by a prominent Italian scholar,⁶⁶ that the definition covers 99.8% of the over one million existing Italian s.r.l. This being said, the distinctive feature of the s.r.l. as a company that cannot have recourse to the capital market has almost disappeared,⁶⁷ as is confirmed also by the Financial Markets Code itself. In Art. 100ter, paragraph 1bis, added by the already mentioned d.lgs. 129/2017, there is the following statement: "As a derogation to Art. 2468, paragraph 1, ICC, membership interests of SMEs established as s.r.l. can be subject to public bid of financial products, also by means of the platform for the raising of capital, as far as this Code admits it".

As is evident, the revolution is almost complete.⁶⁸

3.2.4. *The final step: delegated management again*

There is now only one obstacle for seeing an image of the s.r.l. fully comparable with the s.p.a.: the persisting possibility for the member of the s.r.l. to manage the company along with the directors, in spite of not being specifically appointed as a director (and without the use of the category of the so-called "shadow director"). If the description I have made so far of the evolution of the s.r.l. is clear enough, it should be evident that all the other hallmark features of the s.r.l. have already faded away.

The last chapter of this certainly not straightforward and creeping vicissitude is in the new Code of Business Crisis and Insolvency, which replaced the Bankruptcy Code in January 2019.⁶⁹ The Code is the product of a reformation

66 Giuseppe Zanarone, in his keynote speech during the congress *La società a responsabilità limitata. Un modello "transtipico"*, held in Turin, March 21st, 2019.

67 The paradox is that of the 0.2% must be regarded as the "real" s.r.l.: those companies that are by their size more similar to the s.p.a., that are subject to the general rules of the s.r.l.

68 Furthermore, we can add that the State Financial Stability Act for the year 2019 (Law December 30th, 2018, no. 145, in Art. 1, paragraphs 236 seqq.) extended the use of online platforms, intended so far for equity crowdfunding and membership interest transfer, also to debenture financial instruments issued by SMEs, exactly as is possible for the s.p.a. in the (traditional) financial market. A few limitations are nonetheless present in Art. 100ter, paragraph 1ter, Financial Markets Code, which states that only specific professional investors are entitled to undersign debenture instruments issued by SMEs.

69 Legislative Decree January 12th, 2019, no. 14; many amendments to the rules re-

process in the field of the crisis of the enterprise that began in the early years of 2000, and is not over yet. Since 2005, in particular, there have been many regulatory interventions each year, step-by-step changing many of the tools provided for by the Bankruptcy Law. The new Code, which has been issued by means of a Legislative Decree issued by the Government based on a Parliamentary Act that set down the basic principles to be followed,⁷⁰ will enter into force only in September 2021. The Legislative Decree 14/2019, besides encompassing the Insolvency Code, also contains a few (major) amendments to the Civil Code, which – unlike the entire part on insolvency – already entered into force in January 2019. One of them, perhaps the most discussed so far, deals specifically with company management.⁷¹

Using wording that was already present in the rules applicable to the s.p.a., the d.lgs. 14/2019 extended (not just) to the s.r.l. (but to all companies, and even to partnerships) the principle that an organisation's exclusive management belongs solely to its directors.⁷² In this way, the members are excluded, at least apparently, from the s.r.l.'s management.

The scope of this last amendment is naturally huge, even if we consider it alone; if, on the contrary, we put together this and all the recent modifications that have been affecting the s.r.l. over the last eight years, it is clear that the turnabout is actually radical. The point, however, is: did the Legislative Decree on the establishment of the Insolvency Code have the substantive power to change such a core theme of the s.r.l. as an autonomous

ferred to in the text have been proposed so far, and lastly approved by the Government on October 18th, 2020 and published on the Italian Official Gazette, as Legislative Decree October 26th, 2020, n. 147. According to Art. 40 of such Decree, fortunately, the directors' exclusive management we refer to in the text is now limited to the creation of adequate procedures and guidelines for the administrative, organisational and accounting-related profiles.

⁷⁰ Which is, by itself, the sign of another major transition in Italian - and not just Italian – Enterprise Law, which no longer sees bankruptcy as a social stigma, but an occasion for a “fresh start”, as pointed out also in EU documents, for instance “Report of the expert group: A second chance for entrepreneurs: Prevention of bankruptcy, simplification of Bankruptcy procedures and support for a fresh start”, January 2011, available online: <https://ec.europa.eu/docsroom/documents/10451/attachments/1/translations/en/renditions/native>

⁷¹ For different opinions on the issue: Rossi/Di Cataldo (2018), Ibba (2019), 250 ff., De Angelis (2019), 14 ff., Calvosa (2019).

⁷² Arts. 2357, 2475 Civil Code.

company form? In fact, the Insolvency Code only had the task of dealing with insolvent companies and enterprises, also by preventing insolvencies, while the rule on directors' exclusive management power is always applicable to companies and partnerships, and not only in the proximity of an insolvency situation. Furthermore, even if the Insolvency Code introduced the new rule, it did not amend or repeal any of the still existing regulations, which control, for instance, the liability of those members who intentionally decided or authorised acts (i.e.: acting as directors in their management capability) that caused damage to the company.⁷³

These circumstances, among others, led the literature to adopt, in this first year after the issuance of the Insolvency Code, an undecided, or, better, a divided approach. The key division is between those who still think that there should be an autonomous place for the s.r.l., and thus believe that the interpretation of the new legislation must be somehow restrictive⁷⁴; and others who hold that, in spite of there not being a formal repeal of all the remaining regulations linked to the amended ones, the s.r.l. is now similar to the s.p.a. also as far as managerial liability is concerned. To put it shortly, the Italian scholars are discordant on either resisting or surrendering to the new idea of the s.r.l.

This leads us to some final remarks. Or, better, to some remarks, as we have already seen that very few conclusions can be held as final when it comes to the Italian s.r.l.

4. Some possible final remarks

The short journey we have made through the vicissitudes of the Italian s.r.l. over the last few years have shown rather clearly that we have been facing an undoubted transition. It is very hard to say whether this transition has currently come to an end, or not. Actually, I think it depends very much not only on the data relating to legislation, but also on the scholars' opinion, once it has stabilized, and – above all – on the courts' decisions, once a meaningful amount of time has passed to benefit also from jurisprudential interpretation.

If we look just at the legislative data, the panorama is rather clear. The general idea is that the s.r.l. is losing all of its distinctive features, apart from the persisting possibility of a tailor-made design which benefits also from the

⁷³ Art. 2476 Civil Code.

⁷⁴ According to the new wording laid down in D.Lgs. 147/2020, this seems to be the winning interpretation.

partnership rules, if the founding members so decide. The difference from the s.p.a., therefore, would simply be an enhanced degree of customisation, possible in the s.r.l., and not allowed (or, at least, not so widely) in the s.p.a. Besides this, the s.r.l. would not be substantially different from the s.p.a.

This situation is likely to have several outcomes. On the one hand, the first general idea would be that there is no need for two different company forms in Italian Business Law. If we say that the key legal features of the s.p.a. and the s.r.l. are substantially the same,⁷⁵ there is no reason for maintaining two organisational forms: just one company form, perhaps with a modular approach, would probably be sufficient. This conclusion has to do with a specific Company Law policy that, evidently, the Italian lawmaker still has not adopted in a formal and systematic way. Nevertheless, the legislation described here shows that this should be understood as the substantial line of conduct.

The second fallout is probably more interesting, and deals with the interpretation of the regulations and company's articles related to the s.r.l. In spite of being an autonomous company form, the corpus of the regulations specifically applicable to the *società a responsabilità limitata* is far smaller than those laid down for the regulation of the *società per azioni*.⁷⁶ This means that many of the legal tools known by the s.r.l. are not fully regulated, as happens in the case of the s.p.a., and to a greater extent for listed s.p.a. The price paid for the freedom of designing the company enjoyed by the founding members of an s.r.l. is that the rules emanating from the members' free will must on the one hand comply with the mandatory regulations, and on the other hand, when they deviate from a legal default solution, should include a reasonably complete set of prescriptions. When this does not happen, which is rather frequent in practice, the need for an interpretation becomes urgent; and the same happens with the interpretation of the legal norms applicable to an s.r.l., when the regulatory framework is not complete.

In these cases, however, the interpretation must take place not considering just the wording of the legislation, which is often insufficient for finding an adequate solution, but the actual and comprehensive situation of the specific company whose rules are being interpreted. This applies even more when it comes to the s.r.l., which by virtue of the members' autonomy is legit-

⁷⁵ Naturally, besides the minimum capital required for the establishment of a company, and the higher degree of customisation proper to the s.r.l.

⁷⁶ Just with rough figures, a little more than 30 articles for the s.r.l. against more than 150 for the s.p.a.

imated – and currently even more than ever – to assume extremely different basic attitudes, from para-partnership, to para-public company. A one-size-fits-all interpretative approach naturally cannot work properly, and finding interpretative benchmarks, and criteria for deciding when to use a certain benchmark instead of another, is indispensable.

One could be tempted to think that, at the end of the day, even the counter-reformation trend we examined above does not substantially change the panorama. If it is true that the newer laws allow an s.r.l. to be more similar to an s.p.a., this does not mean that it *must* necessarily be so. This is just an option, and not an obligation: when the members decide to use this opportunity, and thus to structure the s.r.l. in a form more similar to the s.p.a., then (also from the interpretative point of view) the s.p.a. will become, for that actual company, the paradigm for solving the exegetic problems that could arise. This is naturally true. The fallout could nevertheless be an unwanted and somehow epidemic expansion of the s.p.a. rules as an interpretative benchmark for the s.r.l. also in cases where it is not strictly necessary. This scenario would substantially deprive of any relevance the formally still existing distinction between the s.p.a. and the s.r.l., to the detriment of those s.r.l.s that are, in the range of all the possible configurations, closer to partnerships, or even to those in the “neutral” middle sector.⁷⁷

Again on the issue of the interpretation, however, there is also another side to the story. We have so far considered the interpretation from the s.p.a. (i.e.: using originally s.p.a. principles and rules) to the s.r.l.; a substantial equalisation, however, is likely to have outcomes also the other way around, from s.r.l. to s.p.a. Indeed, there are some rules present in the s.r.l. corpus that do not have an equivalent in the s.p.a., for instance as far as the corporate governance models are concerned,⁷⁸ or again for the treatment of the company’s financing by members other than contributions.⁷⁹

If we really admit such an extended substantial assimilation between the s.r.l. and the s.p.a., we should also admit some kind of an osmosis as far as the formal rules are involved, irrespective of an explicit reference to the use of the s.p.a. or s.r.l. rules when specific regulation is missing respectively in s.r.l. or in s.p.a.

⁷⁷ On this issue, see again Cian (2019).

⁷⁸ Art. 2475 Civil Code allows the s.r.l. the use of the governance systems specific to partnerships (Art. 2357 s. Civil Code), which is not (explicitly?) admitted for the s.p.a.

⁷⁹ See Art. 2467 Civil Code.

Personally, I am not sure at all that this is a desirable solution, because, again, this would go against the idea of an s.r.l. as the main organisation form for “real” SMEs, and micro-enterprises, where the use of the rules established for the s.p.a. could be extremely resource-consuming. Naturally, not all of the above mentioned risks can be avoided just by means of interpretative choices; the attitude of the legislator for making the s.r.l.’s legal environment closer to that of the s.p.a. is undeniable, and must be taken into full consideration when dealing with the “new” s.r.l. This is also the case if we can try to weaken – in my opinion, correctly – the last disruptive fallout coming from the Insolvency Code: the previous amendments we discussed are not subject to an equally reductive interpretation, and they do not deal only with national Italian Law. Actually, even if private company law has traditionally been out of the main scope of application of the harmonisation process put in place by the European Union in the field of Company Law, leaving private companies to a substantial regulatory competition among the Member States,⁸⁰ we have already seen that the general provision on the access of SMEs – and thus, of private companies – to capital markets comes from an EU legal instrument.⁸¹ This European Union attitude, evidently, on the one hand, cannot take into consideration all of the peculiarities specific to private companies in every Member State – and thus disregards, for instance, the prohibition to access capital markets set down by Art. 2468, paragraph 1, ICC – and in the flexible terms of a Directive tries to establish a not-too-problematic common legal framework regarding the goals, leaving the States relative freedom with reference to the actual means. On the other hand, it indicates that the ultimate distinction that the European lawmaker is drawing is *not* based on the formal type according to which the companies are formed, but on the substantive data relating to their dimension, i.e. a distinction between large enterprises, and SMEs. Such a situation seems to be followed, at least partially, also by the Italian Law: the approximation of the s.r.l. and s.p.a. rules means that the basic rules laid down for the s.p.a. are generally applicable also to the s.r.l., *de facto* creating just one company macro-type. Furthermore, the specific rules set down for larger companies, generically identifiable as open and listed companies, create a new specific class of companies, which, as we have

⁸⁰ Bartolacelli (2017).

⁸¹ Directive 2014/65/EU of the European Parliament and the Council, on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (so-called MiFID 2 Directive).

already seen, do not necessarily belong just to the realm of the s.p.a. In conclusion, we are facing a complete paradigm shift.

The scenario we have just depicted, however, allows for a couple of further more general remarks on another transition we are currently facing – also, but not only – in Italian Company Law.

On the one hand, it is rather clear that we are currently passing through a time of dangerous superficiality in the drafting of regulatory texts. The bigger risk – or certainty? – is that this has to do more with a conceptual indecision than with technically poor skills in legal drafting. Too often, it is not fully clear what the single Acts are actually meant to regulate, in their scope of application, or even in the very rules they are supposed to set down. In an extremely short time, an Act can be subject to several reiterated amendments, which substantially modify the original settings, as is evident, for instance, if we look at the vicissitudes of the simplified s.r.l.⁸²

The effect of this on the technical means of legislation should be evident to the shrewder readers: the vast majority of the amendments made in the field of Company Law during the last years have been brought in by means of a Governmental Decree (*decreto legge*). The *decreto legge* is by its very nature an exceptional measure allowed under the Italian Constitution to grant the central Government the opportunity to regulate a specific issue with no need for a prior passage through Parliament. This permits the Government to issue ad hoc rules that are needed in situations of emergency, and Parliament has the right to ratify these emergency rules within 60 days. Now, it is evident that none of the rules described above has an emergency nature. On the contrary, all of them are long-lasting modifications, whose *raison d'être* did not lie in occasional circumstances, but in a – hopefully conscious – change of paradigm.

On the other hand, as a Governmental Decree is usually issued in a very short time, there is not always the opportunity for the government to use its best discernment in drafting the legislation. This supplementary request for wisdom is de facto transferred to the Parliament, while converting, within 60 days, the Decree into a proper Act. The system works properly if there is not an abuse in the use of the Governmental Decree; otherwise, Parliament gets clogged up with Decree conversions and their short deadlines prevents it

82 And not to mention that, during the years 2012/13 only, a further low-cost sub-version of the s.r.l., the *società a responsabilità limitata a capitale ridotto*, appeared as an alternative to the simplified s.r.l. See, for further details, Bartolacelli (2016), pp. 670-673.

from paying the due attention to the examination of each one of them.⁸³ This is exactly what commonly happens with Company Law-related Governmental Decrees: the formal conversion into an Act normally simply confirms the original text, or even adds further rules to it, without repealing anything.⁸⁴ The final consequence is that an in-depth investigation into the measures contained in a Governmental Decree is rather rare, with the obvious fallout on the general quality of the legislative action.

Again, the above mentioned situation leads us to the final issue I would like to underline: the relevance of the sources, and of their stability. Classically speaking, the system of the main sources in Italian Company Law is not particularly difficult to understand: the main provisions for all the partnerships and companies lie in the Civil Code. The additional rules for listed companies are in a specific Financial Markets Code (*Testo Unico dell'Intermediazione Finanziaria*), and special rules for some peculiar sectors (Insurances, Banks...) have their specific Acts and Codes. In general, we can say that it is a sort of irradiation system: the Civil Code is the sun, and its rays expand to the sectorial specific rules.

Even without considering other very relevant consequences,⁸⁵ we must here call to mind that in 2017, the most numerically relevant regulatory modification to the law governing the s.r.l., which affected the 99.8% of Italian private companies, took place by means of a Governmental Decree that did not even change a paragraph in the Civil Code. The d.l. 50/2017, and its Conversion Act, simply extended to virtually every s.r.l. some of the substantial rules applicable (originally, only) to the Innovative Start-ups; and these latter rules, in turn, were laid down by means of another Governmental Decree, derogating, but not amending the Civil Code provisions.

The paradoxical situation we now witness is a company form, the s.r.l., whose regulation – according to the general system – should be almost entirely present in the Civil Code, that has derogations to the general rules provided for by a Governmental Decree, and applicable to the almost entirety of the concerned companies, applicable by virtue of another Governmental

83 See also, in this book, the chapter by Gianni Di Cosimo.

84 Also because the Governmental Decree by its very nature enters into force immediately after being issued. This means that an eventual Conversion Act by Parliament that repeals a part of the content of the Decree, or even does not convert it within the deadline, causes an actual prejudice to the people who validly relied on the rules present in the Decree and in force since its issue.

85 Speranzin (2019).

Decree. The hierarchy of the sources of the s.r.l. is evidently upside down, and this goes to the detriment of the people possibly interested in founding an s.r.l., who are not in the position of being personally aware of the full applicable regulatory framework.

On the other hand, it seems that the trust in the certainty and the stability of the regulations and the legislative systems is not among the priorities of the Italian lawmaker. We will see in the near future if the legislative amendments that really revolutionized the face of the s.r.l., apart from creating a chaotic situation from the interpretative point of view, at least succeeded in providing a further development in the use of this legal tool.

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The evolution of the form of government in Italy

Giovanni Di Cosimo

1. Parliamentary government; 2. Two phases; 3. Weak rationalization; 4. Parliament and Government; 5. Parties in transformation; 6. Alternation in Government; 7. Strengthening the Government; 8. Two scenarios

1. Parliamentary government

The Constituent Assembly opted for a form of parliamentary government. A decisive argument put forward during the discussion in favour of the parliamentary system was the concern over an excessive concentration of power. The wish not to repeat the experience of the fascist regime as well as the veil of ignorance regarding the result of the political elections that were to be held on 18th April, 1948 led the political forces to prefer a parliamentary government in which the executive and legislative branches were bound by a relationship of trust as this was thought to best safeguard the losers.¹ The adoption of the symmetric bicameral system that assigns the same powers to the two chambers can also be ascribed to this line of reasoning.

Similar concerns conditioned the choice of electoral regulations and led to the adoption of the proportional system which faithfully reflects the balance of power between the parties decided by the electorate, unlike the majoritarian systems that reward the political forces that emerge as winners at the polls. Even the decision to introduce a new level of decentralized government, halfway between the State and the local administrative bodies (communes and provinces) can be seen as associated with the diffidence felt towards the concentration of power. In fact, the legislative function was distributed upon the centre-periphery axis, albeit in a rather unequal way.

In short, the Constituent Assembly steered towards institutional solutions that focused on the balanced distribution of power regarding the form of government (parliamentary), the form of state (regional) and the electoral law (proportional representation).² As we shall see, this orientation seems,

1 Paladin (2004) 61.

2 The principal concern of the Constituent Assembly was “to guarantee a balance in public powers, above all preventing the predominance of the executive in the system which

at least partly and in various ways, to have been abandoned in the course of time. The evolution of the form of government has taken a different direction given that the equilibrium between Parliament and Government has shifted in favour of the latter.

2. Two phases

In over seventy years, many events have shaken the republican institutions. Consider, just to cite some episodes, the resignation in 1964 of President Segni who was seriously ill; of the Lockheed trial in 1977 against two ministers found guilty of corruption by the Constitutional Court; of the formation of the Andreotti IV Cabinet in 1978, that saw the communist party have a parliamentary majority for the first time, an event which coincided with the kidnapping of Aldo Moro by the terrorist organization The Red Brigades. Moro was a Christian Democrat politician who had worked to promote the extension of the government coalition to include a part of the left. Consider also the parliamentary speech of the ex Prime Minister Craxi in 1992 in which he admitted that the funding of the parties was for the most part illegal. More generally, there was a succession of different political phases ranging from the initial centrism to centre left to the so-called five-party coalition.

Yet, in this whole period there were no important changes in the internal balance of the parliamentary form of government. The political orientation, in other words, the big political decisions made at national level, continued to be taken within the circuit between the Parliament and the Government, with the former in the predominant role. In fact, it largely endorsed the will of the parties who were the undisputed protagonists of republican life.

With the 1993 referendum things changed significantly as it spelled the end of proportional representation, one of the cornerstones on which rested the equilibrium of the form of government in place until then. A mixed system was then introduced that aimed to entrust the electorate with not only the selection of members of parliament³ but also with the choice of government. From then on the political panorama changed profoundly so that the old parties were replaced by new political groups; at this point even the ideological divisions had much less importance and were no longer centred around the conflict between the soviet block and western countries.

was considered the cause of the dysfunctions and crisis of the liberal pre-fascist regime". Ghisalberti (2010) 422.

3 Cassese (2014) 82.

Of course, even in this phase, moments of institutional tension are evident (for example, the 2011 government crisis when the President of the Republic faced with the plummeting confidence in the financial markets in the country appointed a technocrat who was not a member of the parties; or the re-election of the President in 2013 for the first time in the history of the Republic waiving the customary rule that aims at avoiding excessive length of the presidential mandate; or again, the laborious formation of the Government after the March 2018 elections, marked by the conflict over the nomination of the Treasury Minister and by the subsequent request to impeach the President put forward by the head of the relative majority party and then speedily withdrawn). But what is new after 1993 is that the internal equilibrium of the form of parliamentary government changed and a process of evolution in the form of government was set in motion.

3. Weak rationalization

The root of it all is the brief duration of the governments, the government instability. Strictly speaking, this had been a problem even before but was only seen as serious in the second phase, when the negative conditioning it exerted on decision-making became even stronger.⁴ Political parties therefore implemented institutional measures to tackle it and achieve so-called governability. And it is these institutional measures themselves that altered the initial balance.

Let us take a closer look at this point. According to the current analysis, one of the reasons given to explain the government instability is the terseness of the constitutional rules relating to the form of government (actually another still more important cause is the political instability which however cannot be tackled with institutional measures because it depends on causes that are endogenous to the party system, causes that can be ascribed to the nature of political culture). When the Constituent Assembly following Perassi's agenda approved on 5th September, 1946, stated it was in favour of the parliamentary system, it suggested introducing "suitable constitutional provisions to safeguard the need for stability of government action and to prevent the degeneration of parliamentarianism." However the final constitutional text gives a restrictive interpretation of the mechanisms of stabilization; it outlines a low

4 However it is also true that the length of the government does not automatically assure the efficiency of its action: see Sartori (2017) 520.

rationalized parliamentary government, basically limiting itself to envisaging the role of the President of the Republic as that of guarantor and political arbiter while to the Constitutional Court it assigned the task of guaranteeing the supremacy of the constitution.

It is actually these attempts to find a solution to the weak rationalization that have set in motion the evolutionary process of the form of government. In short, the evolution of the form of government is connected with a series of concepts that link the weak rationalization to the terseness of the constitutional text held responsible for government instability. Viewed in reverse order, starting from government instability, it is possible to trace back to the supposed cause which is the terseness of the constitutional text, and therefore to the need to increase the rationalization of the parliamentary government through measures, that, and this is the point that interests us, have the effect of alternating the equilibria of the form of government.

Over the years since the establishment of the Republic, several institutional measures have been tried in order to stabilize the form of government following the guidance of the Perassi agenda: the path of electoral reform (starting from 1953 when the “swindle law” was approved, whose majoritarian effects never actually came into force); restructuring the parties, and constitutional reform.⁵ What these three paths have in common is that they brought about evolutionary and modifying effects to the form of government. It should be pointed out that over time other evolutionary effects stemmed from the relations between constitutional bodies. This was a factor that emerged from the practice and which is evident in the standpoint of the rationalization itself.⁶

In conclusion, in order to understand how the form of government has evolved, it is necessary to bear in mind all these factors. In so doing, we see that the combination of the institutional measures put in place to overcome the weak rationalization of the form of government (the constitutional and electoral reforms, as well as the restructuring of the parties) and the practice which also tends towards that goal, produce three important developments: the first relating to the relationship between the Legislature and the Executive; the second to the role of the parties; the third to the government coalitions.

⁵ Elia (2008) 7 ff.

⁶ On the concept of constitutional amendments see Bartole (2019) 335 ff.

4. Parliament and Government

On several occasions over the years the legislator has focused attention on the relationship between the Legislature and the Executive. Political parties have pushed for both constitutional and electoral reforms. However some reforms have not even seen the light of day while others have been of short duration.

As early as the 1980s, the opportunity to reform the republican Constitution began to be discussed. From different quarters amendments were called for in support of the need to consolidate the executive. However, the work of the bicameral commissions set up for the purpose came to nought. The constitutional rules relating to the relationship between Parliament, Government and the President of the Republic remained unaltered.

On two occasions Parliament definitively approved important constitutional reforms. The first time in the Autumn of 2005 the centre-right launched a reform that concentrated power in the hands of the Prime Minister, outlining a system that has been defined as “absolute premiership”.⁷ However the following year the reform was rejected by popular referendum. The success of the reform of electoral law, approved at the same time as the constitutional reform, was more short-lived. In 2014 the Constitutional Court found it unconstitutional on account of the majority bonus which “causes an excessive split between the composition of the political representative body, which is at the hub of of the representative democracy system and the form of parliamentary government foreseen by the Constitution, and the will of the citizens expressed through the vote, which is the principal instrument of the manifestation of popular sovereignty.” (sent.1/2014).

Eleven years on and it was the turn of the centre-left majority to put forward a constitutional reform which, among other things, impacted on the balance of the form of government, in the sense that it strengthened the Government and Prime Minister, although in a different and less disruptive way compared with the preceding attempt.⁸ Yet the reform was rejected in the December 2016 referendum, suffering the same fate as that of the centre-right.

At the same time, the centre-left launched a new electoral law formulated within the same reform project, just as the centre-right had done. The goal of combining the constitutional amendment and electoral change was to strengthen the Government. Just like the preceding one, this law was also

⁷ Elia (2005).

⁸ Cheli (2016) 2 f.; Pace (2016).

quashed by the Constitutional Court, which observed that the goal of achieving government stability excessively compromised the representative nature of the parliamentary assembly contravening the principle of the balance of power, given that “in a form of parliamentary government, each electoral system, even though it must foster the formation of a stable government, can only primarily be intended to assure the constitutional value of representation” (sent. 35/2017).

Recently the developments in the form of government could be conditioned by the reduction in the number of parliamentarians approved in the current legislature. The immediate effect of this constitutional change risks further weakening Parliament, with the consequent impact on the equilibrium of the government.⁹

As already stated, all these reforms aim to re-enforce the Executive without really succeeding. It is important to note that the goal is achieved anyway due to some changes in the relationship between Parliament and Government that have slipped into the established practices, that is, as a result of unwritten rules, the behaviour of the constitutional bodies, and mainly of the Government itself. I will recap briefly.¹⁰ The first is the progressive predominance of government legislation over parliamentary law: a quantitative and qualitative supremacy since the most important political decisions are adopted through the regulatory laws of the Government, in particular the legislative decree. The second is the emergence of the Executive as the principal interlocutor of European institutions which is having an increasing impact on the internal legal system. The third is the growing power of the executive in the organization of the public administration. The fourth is the ever increasing abuse by the Government of certain institutions of parliamentary life, in particular the confidence vote combined with the use of major amendments. The latter is the progressive imposition of the will of the Government in defining the content of the budgets put before Parliament.¹¹

5. Parties in transformation

Another important development involves the parties which have been transformed over time with the result that even their role in the functioning

⁹ See Ciaurro (2019) 113 f.; Algostino (2019).

¹⁰ For a more detailed analysis cf. Di Cosimo (2014) 34 ff.

¹¹ Cf. Di Cosimo (2019 a) 207 ff.

of the parliamentary government has changed.¹² In recent times, the transformation has followed two principal paths.¹³

The first is summarized by the expression personal parties.¹⁴ From the beginning of the Republic the parties were places in which to make decisions concerning power that were intended to be then transferred to the institutional circuit. However the twentieth century mass-based parties were also places of collective reflection aimed at giving a well-debated foundation to those decisions. Whereas the current parties have almost completely lost this planning function and seem to be mainly electoral machines at the service of their leader, so that the political policies express primarily his/her will and that of his/her acolytes.

The second path of transformation concerns the digital parties.¹⁵ Forms of political communication have changed as a result of the internet and information technologies. Supporters' loyalty is progressively won through social media and it is above all the leader who puts him/herself in a direct relationship with the followers. Furthermore, the use of the internet alters the organization of the parties. Fundamental functions like the selection of candidates for elections are now carried out using digital platforms to which members have access. The 5 Star Movement has been a pioneer in this since it chose its political leader in September 2017 using its Rousseau platform. It then confirmed him in the role after the disastrous defeat in the European Elections of May 2019, and a few months later rejected his political line on regional elections.

Hence both paths of transformation, summarized under the labels personal party and digital party are competing to boost the role of their leaders, the heads of the party, giving rise to the second important development in parliamentary government. Other ideas based on the concept of direct democracy and political disintermediation which are taking hold in the political cultural arena¹⁶ are leading to the same result. These are ideas that downgrade Parliament to a mere conduit of political communication and which consider of paramount importance the digital channel where tools like the above-mentioned platform operate.¹⁷

Above all, if the first two important developments in the form of govern-

12 On the transformation of the parties see Cossiri (2018); De Fiores (2018); R. Calvano (2017); Scuto (2017).

13 See Di Cosimo (2019 b).

14 Calise (2010); Musella (2019).

15 See Gerbaudo (2019).

16 See Bassanini (2019) 45 ff.

17 Morrone (2018) 11.

ment are considered together, it is evident that a process of concentration of power in favour of the Government and the party leaders is underway and that this reaches its apex when the head of the Government is at the same time a party leader as occurred with Berlusconi and Renzi.

6. Alternation in Government

The third important development concerns the freeing up of the “blocked democracy”, namely the situation where the government was continuously led by the Christian Democrats and their allies because of the *conventio ad excludendum* which was then dropped at the end of the Seventies.¹⁸ Finally with the 1994 elections the bipolar approach was established and the alternation of the political forces in government. The coalitions of centre-right and centre-left competed for the government headed by leaders nominated as Prime Minister. All this came about due to the new electoral regulations that led to the abandoning of proportional representation.¹⁹ Obviously the decision to structure the political system in two alternative poles played an important role.

Nevertheless in 2011 as touched on above, at the height of the grave economic-financial crisis, the mechanism jammed making it necessary to form a technical government under the economist Monti. Two years later, the return of the political governments did not go hand-in-hand with the re-establishment of the alternation between the coalitions. The success in the polls of the 5 Star Movement led to the restructuring of the political system based on three political orientations. The situation was repeated in the 2018 elections partly as a result of a new electoral law approved the preceding year which arouses fears that the period of alternation between too opposing poles is over, replaced by alliances that are made after the vote.

7. Strengthening of the Government

In the history of Italy’s institutions continuity and discontinuity co-exist. If, on the one hand, in the seventy years of the Republic the constitution-

¹⁸ The *conventio ad excludendum* is “an agreement, that lays down that one or more parties are considered outside the area disposable for parliamentary support of a Cabinet (...) this agreement *ad excludendum* becomes an actual rule of the game, binding for all constitutional players”: Elia (2009) 204.

¹⁹ Pasquino (2017) 5 f.

al rule concerning the parliamentary government has remained unaltered, on the other, its characteristics have been modified by the changes brought in through practice. The constitutional rules have remained the same since 1948, but the structure of the form of government is markedly different. The changes have had debatable effects such as, principally, the greater concentration of power, owing to the consolidation of the Executive branch with respect to that of the Legislative and to the transformation of the parties. At this point, a contraposition exists between the constitutional rules that place Parliament at the centre of the system, and the practice that grants a preeminent role to the Government and Prime Minister. However, it should be pointed out that the first Conti Government was an exception because the leadership was in the hands of the two deputy prime ministers rather than the Premier.

This practice, which strengthens, the Executive is the demonstration of the way in which the evolution of the form of government is heading in the opposite direction to that indicated by the Constituent Assembly. Conditioned by the “dictator complex”, it was concerned about the balanced distribution of power among the constitutional bodies. And it is of significance that the turning point did not come about as a result of structural reforms, that is, of deliberate plans to modify the institutional rules, but as a consequence of practice.

It should also be pointed out that the strengthening of the Government took place despite the fact that in the 2006 and 2016 referendums the electorate demonstrated that it did not want this outcome. This was possible because, on the one hand, the Constitution grants the electorate the power to halt the initiatives of the constitutional legislator, but on the other, it is also true that some of the causes of government strengthening are outside the remit of the volition of the electorate. For example, relations with the European Union, the abuse of Government regulatory tools and the action of the Government in Parliament.

Lastly, it is significant that the strengthening of the government has paradoxically not led to the goal of greater government stability which has fueled the entire evolutionary process.

8. Two scenarios

In conclusion, the question which arises concerns the importance of the evolutionary process. Has a new form of government been put in place that increases the powers of the Executive and, in particular, those who lead it or

is the process still ongoing, and therefore this a transitional period the outcome of which is unknown?

The interpretation that a new form of government has replaced the old implies that parliamentary government has already been shelved, when in fact the constitutional rules continue to contemplate it. The grave consequence of this, therefore, is the negation of the prescriptive value of the Constitution regarding an essential aspect of the legal system of the Republic. In reality, it appears that this disruptive scenario has not yet occurred. The flexible nature of parliamentary government is specifically against it given its capacity to adapt itself to the changing political institutional scene partly as a result of the criticality of the constitutional rule concerning the reciprocal relations between the political bodies.²⁰ At the end of the day, even the solution found to the government crisis in August 2019 shows that Parliament can still play a decisive role. It returned to centre stage in a crucial moment of the functioning of the parliamentary government whereas it played a lesser role in the aspects mentioned above. Parliamentary government operates as long as the three political bodies - Parliament, Government and the President of the Republic - exercise the competences that the Constitution bestows on them. Or rather, this is the situation until one of them usurps the competences of the other, which appears not to have happened yet, despite the undoubted abuse that has taken place (for example, as regards the issuing of interlocutory decrees.)

The interpretation which most fittingly describes the current state of affairs is that we are experiencing a different version of parliamentary government which changes and is modified along the way, exploiting the margins of flexibility allowed by the parliamentary system. It is a version that does not mean the abandonment of the parliamentary model chosen by the Constitution. This interpretation acknowledges that there could be evolution in the future, signs of which however appear doubtful. Given that until now the impetus for changing the established practices has not been strong enough to cause the abandonment of parliamentary government, further developments could, equally, definitively cause its breakdown or, on the contrary, mitigate the conflict with the constitutional plan. The will of the electorate will be fundamental even though it can only be directly expressed in the terrain of institutional reforms since voters do not possess the effective tools to intervene in the practice. The behaviour of the parties will also be decisive as they could reverse the deformative processes.

²⁰ Regarding the flexibility of the Constitution, see Fioravanti (2008).

Finally, an important task is awaiting the Constitutional Court. In the spotlight is the case concerning the 2019 budget law, when the Government imposed an approval time that precluded parliamentary debate. However, the Constitutional Court did not penalize this serious infringement of parliamentary prerogatives, limiting itself to issuing a warning for the future.²¹ A year on and the situation was repeated during the approval of the 2020 budget, when the new majority reduced the parliamentary prerogatives in much the same way. This raises fears that we are facing the nth slippage in terms of practice, a further de facto transformation in an important matter like the approval of the budget. But this would mean questioning the meaning of the evolutionary process, it would no longer be taken for granted that it led to a different version of the parliamentary system. The repetition of episodes like these involving the reduction of Parliamentary prerogatives seriously risks actually causing the definitive abandonment of parliamentary government.

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²¹ The Court warns that “in other situations a similar reduction of the parliamentarians’ constitutional function could lead to different outcomes” (ord. 17/2019).

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