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ARTICLES // ARTIGOS

KARL-HEINZ LADEUR

ARTUR STAMFORD DA SILVA

OLIVER EBERL, FLORIAN RODL

CLAUDIA ROSANE ROESLER

VIRGÍLIO AFONSO DA SILVA

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EDITORIAL
// NOTA EDITORIAL

The University of Brasilia Law Journal (Revista Direito.UnB), now in its second volume, features a range of high quality and carefully selected articles in the legal literature. As the previous volume, we assume that scholarly researches should be easily available throughout the world, and therefore all articles are published both in Portuguese and English.

This second volume brings however some relevant changes. First of all, in accordance with the strictest international journals standards, our journal is now published every four months, each volume encompassing thereby three issues. At the same time, each issue will have a reduced number of articles, exactly to make the selection even more rigorous and foster a more updated flow of the journal.

To this end, the first issue of this volume comprises five articles. It features the article titled *The Relationship between Public Law and Social Norms in Constitutionalism – Domestic, European, and Global*, written by Karl-Heinz Ladeur, of the Hamburg University in Germany. His article provides an impressive analysis of how the current transformation of state law also derives from internal mechanisms of contemporary society, especially in the context of state fragmentation and growing instability of social norms. His careful discussion, which examines distinct nuances of such modifications in social norms, raises new questions and debates in the field of constitutional and international law.

Subsequently, Artur Stamford da Silva, in his article titled *Reflexive Legal Decision Theory: Law, Social Change and Social Movements*, presents a fascinating research on the relationship between the legal system and its environment by observing the distinct claims normally brought by social movements in legal decisions. Drawing from Niklas Luhmann's system theory and many concrete examples, his text offers an innovative approach which challenges the usual conclusions normally found in traditional debates on legal argumentation.

The third article, titled *On the Political Economy of the Transnationalization of Popular Sovereignty*, by Oliver Eberl and Florian Rodl, raises a compelling debate over popular sovereignty. Especially by placing side by side Jürgen Habermas's and Ingeborg Maus's theories, both authors are willing to prove that one cannot discuss popular sovereignty without a clear understanding of political economics in the current scenario of fragmented global society.

Cláudia Roesler examines, in her article *Between the Paroxysm of Reasons and No Reason at All: Paradoxes of a Legal Practice*, the lack of rationality found in Brazilian Higher Court's decisions, based above all on the Theory of Legal Argumentation. This is a very thorough research which not only unfolds some serious argumentative problems in decision-making but also carries out a diagnosis of possible causes for such a practice in Brazil.

Finally, this issue of our University of Brasilia Law Journal (Revista Direito.UnB) ends with a thought-provoking article by Virgílio Afonso da Silva, whose title – *The Brazilian Supreme Court Needs Iolaus: A Reply to Marcelo Neves' Objections to Balancing and Optimization* – already points out its main goal. In a very careful and critical analysis of Marcelo Neves' work

Entre Hidra e Hercules (Between Hidra e Hercules), Silva aims to prove that, despite the interesting and innovative proposals Neves brings forward, his objections, when deeply examined, do not find grounds nor are useful as a viable alternative to the prevailing model of rules and principles in the current landscape of constitutional law.

As we see, this issue, which launches a new phase of the University of Brasilia Law Journal (Revista Direito.UnB), features a rich material of researches and groundbreaking debates over the Brazilian and global law. By publishing articles of such quality, we expect that the University of Brasilia Law Journal (Revista Direito.UnB) fulfills its purpose of spreading knowledge, enriching the academic discussion, and showing the relevance of publishing legal research according to the highest standards of international journals.

Brasilia, December 2015.

Juliano Zaiden Benvindo
Editor-in-Chief

ARTICLES
// ARTIGOS

THE RELATIONSHIP BETWEEN PUBLIC LAW AND SOCIAL NORMS IN CONSTITUTIONALISM — DOMESTIC, EUROPEAN, AND GLOBAL // A RELAÇÃO ENTRE DIREITO PÚBLICO E NORMAS SOCIAIS NO CONSTITUCIONALISMO — NACIONAL, EUROPEU E GLOBAL

KARL-HEINZ LADEUR

>> ABSTRACT // RESUMO

The globalisation process is a serious challenge for legal theory including the conception of a constitution beyond the state. The paper tries to develop the idea that globalisation is not only a process that undermines the territorial state form outside. There is an internal side to the globalisation process that disrupts the stable hierarchical structure of state law inasmuch as the dynamic of transformation of post-modern societies in particular undermines the stability of social norms that formed the infrastructure of state-based law as well as the law itself. The increasing dynamic of the self-transformation of these social norms opens a new perspective both on domestic constitutional law and on the law beyond the state. // O processo de globalização é um sério desafio para a teoria jurídica, incluindo a concepção de uma constituição para além do Estado. O presente artigo busca desenvolver a tese de que a globalização não é apenas um processo que enfraquece o Estado territorial externamente. Há uma face interna para o processo de globalização, que rompe a estrutura hierárquica estável da lei estatal da mesma forma que a dinâmica da transformação das sociedades pós-modernas, sobretudo, debilita a estabilidade das normas sociais que formaram a infraestrutura do direito estatal, bem como o direito em si. A dinâmica crescente da auto-transformação dessas normas sociais abre uma nova perspectiva tanto no direito constitucional interno e quanto no direito extra estatal.

>> KEYWORDS // PALAVRAS-CHAVE

Globalisation; State; Constitution; Public Law; Social Norms. // Globalização; Estado; Constituição; Direito Público; Normas Sociais.

>> ABOUT THE AUTHOR // SOBRE O AUTOR

Professor of Public Law at the University of Hamburg, Germany. // Professor de Direito Público da Universidade de Hamburgo, Alemanha.

>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

The article is based on a presentation given at the University of Warwick, June 27, 2014. Translated to Portuguese by Teo Pastor. // Artigo baseado na palestra ministrada na Universidade de Warwick, em 27 de junho de 2014. Tradução para o português de Teo Pastor.

1. TOWARDS THE CONCEPTION OF A "CONFLICT OF NORMS" MODEL FOR THE RELATIONSHIP BETWEEN LEGAL AND SOCIAL NORMS

Last century, in the 1960s, one could observe, both in the literature on civil rights and in the jurisprudence of the German Constitutional Court (FCC), a gradual change from a conception of civil rights as strictly negative liberties towards a more "institutional" view that takes the functional role of freedom of opinion and freedom of the press into consideration.[1] It is quite interesting that the new line of conflict was determined by a perspective on procedural questions and the burden of proof in borderline cases of conflict of freedom of opinion and the protection of personality rights. How about publishing articles that mix facts and opinion? How about reporting on uncertain factual constellations? In German criminal and civil law oft he late 19th and the early 20th century , there had been clear general rules about the burden of proof and the ensuing risk that were shifted to the communicators. The press was not regarded as being entitled to any "privilege" — this was just a formal conflict in which the active part is supposed to be the legitimate bearer of the risk. On the contrary! There is a norm in the Criminal Code that allows a person to communicate "uncertain facts" to an addressee in cases of a legitimate private interest — for example, as a claimant or defendant in a court procedure. The press was not regarded as having a "public role" to play — they made use of private rights just like anybody else.[2]

By now, this has changed completely: the press is regarded as having a role to play in the process of the formation of public opinion. This change finds its repercussion in the fact that, for example, in the case of a report that mixes facts and opinion, there is a presumption that the whole report has the character of an opinion — and, as a consequence, the freedom of the press is expanded in an important way.[3]

Starting from this transformation, I would take the view that one should re-formulate the theory of constitutional rights in a much more radical way, instead of just adapting the doctrine in a pragmatic way as is the case. I would regard this transformation as a signal of a much broader transformation: civil rights are increasingly "historicised" — as Marcel Gauchet has put it. Increasingly, certain factual constellations that are touched upon by the use of civil rights are treated in a differential way — instead of ignoring the factual consequences of a right.[4]

This evolution is ambivalent: in Germany, there is a tendency to transform the state into a protective agency that favours the use of civil rights, instead of regarding it as the potential adversary of freedom. This evolution contributes to the expansion of what one may call judicial or "legal constitutionalism"[5] with the BVerfG at the centre of the constitutional system interpreting constitutional liberties in an expansive way and, at the same time, establishing a practice of "balancing" conflicting rights and interests on a case-by-case basis. "Balancing"[6] is the privileged method advocated by the FCC — if one may call this a method at all. At the same time, the state itself glides into a position in which the difference between a state

competence and the use of a right is more and more undermined: the state increasingly does not impose limits on civil liberties but acts as a representative of the interests — protected by individual rights — of persons who, for some reason or other, cannot play an active role in certain constellations. The new public dimension of rights is increasingly shifted to the state — through the court as the privileged institution for balancing. In one way or another, there is a resurrection of the individual negative freedom whose collective dimension is expropriated by the state.

In my view, both the old and the new constellation need a better theoretical and practical infrastructure. I take the view that, in both constellations, it is the relationship between social norms and legal rights or legal norms that has, in general, been transformed. In the former "society of individuals", we had a stable relationship between a distributed mode of "experience", a common knowledge including the practical repertory of acts, conventions, patterns of co-ordination, etc., and the law — including civil rights. This stable relationship could remain more or less invisible because it changed only slowly and continuously and from case to case — without major interruptions (disruption). This can be demonstrated with reference to freedom of the press, which found its limit in a common social code of "honour" that drew a rather clear line between the private and the public realms - until the beginning of the twentieth century.[7]

2. THE EXAMPLE OF THE MEDIA AS A FIELD OF SELF-ORGANISATION OF SOCIAL NORMS

To simplify a bit, I would assume that, from the 1960s onwards, we have an increasing tension between the law and the social norms. I would call the new societal model the "society of organisations" — this means that social norms increasingly undergo a reflexive organised re-construction: they no longer emerge primarily spontaneously, they are transformed by co-ordinated interactions, but also subject to more intense reactions to social transformations, emotional (protest) and organised — including explicit standard-setting.[8] The traditional stable lines of differentiation, *i.e.*, the separation of the public and the private spheres, crumble. This, in my view, is the explanation for the transformation of the role of the freedom of the press in particular: the rules that dictate what can be said in public and what cannot be said are developed in an experimental mode by the press both in co-operation and in conflict with other groups and the state (judiciary). There is implicit co-operation between the press formulating professional rules and developing patterns of "management" of conflicting interests, on the one hand — and of the courts that react to these practices by supporting them, interrupting certain approaches, influencing their concretisation by handing a problem back for new consideration, etc. In this way, there is a new, more active role of private organisations and groups in the process of generating social norms. One might call this a "negotiated order"[9] that replaces the stable order of the past. In my view, this evolution should not be suppressed by referring alone to

"balancing" by courts. Some balancing might be unavoidable as a default rule, but primarily — especially with a view to legal theory and the role of a rational doctrine[10] — we need a model that contains a conceptual idea of how civil rights evolve in the process of social change in general, and the transformation of social norms in particular.

With regard to the media, one could talk about a productive relationship between the self-organisation of a field of action in society and a regulatory approach of the law, including private law in this field. On the one hand, there is a privately self-organised body of professional norms for the media, which evolves under the pressure to adapt to the transformation of the public, and which proceeds in an experimental way from case to case.[11] At the same time, the role of the courts in adapting the law and its rather vague norms in many fields to the rapidly changing postmodern society is simplified by the pre-structuring of patterns of behaviour and of solving conflicts though professional norms. Clearly, the courts do not follow these norms blindly, but there is a kind of co-operative approach[12] to the generation of a whole network of operations of the media, changing social values, and the consideration of conflicting interests, a network that generates a heterarchical web of practical patterns of conflict resolution.[13] The importance of this co-operation between courts and professions is demonstrated by its almost complete absence in Internet communication and its fragmented character.

I would like to refer to a second example in order to illustrate for the necessity of the co-operation between courts and social groups, which emerges in the process of forming protest groups. The constellation is different, but nonetheless there is also a transformation of the phenomenon of protest that can no longer be rationalised as being a supplementary mode of political communication, beside the media and below the level of the state. Demonstrations can also have a more self-referential character that organises communications primarily among participants as "formless intuitions", and takes on an artistic character. In my view, this evolution has to find its repercussion in the understanding of the legal character of the civil right to demonstration.[14] Unfortunately, I cannot go into details here. But the law has to develop the interpretation of the civil liberty that is at stake here, in co-operation with the changing phenomena of protest and the norms that emerge from its practice.

3. THE APPROACH OF THE MODEL OF "CONFLICT OF LAWS" IN INTERNATIONAL PRIVATE LAW

Social norms within the realm of specific autonomies that are guaranteed by civil rights are not only to be attributed to organisations but also to the spontaneous interactive use of civil rights. This idea would transform the "insular individualism" into an "interactive individualism"[15] version that would include the protection of norms that are practiced within groups and networks, that emerge within the field of action protected by the respective civil right — communicative rights in particular.

For the coordination of social norms and legal norms[16], including civil rights, one could think about a model that follows the patterns that have been developed in International Private Law (IPL): in IPL, there is an increasing willingness, in global law in particular, to accept the necessity of "rule-seeking" in the realm of global law, which is centred round the search for a "common policy" that emerges from the co-operation of different legal systems.[17] This would be different from the traditional decision in IPL on the "conflict of norms" with a view to the determination of the applicability of one specific norm as opposed to another. Nonetheless, both are regarded as being mutually exclusive. We need legal approaches to the evolving phenomena of a deepening tension between vague legal norms which, in the "society of individuals", could refer to common knowledge, experience, stable patterns of co-ordination, a repertory of "normal" actions, and the dynamic process of change of postmodern social norms.

I do not want to go into further details here. Rather, I would like to show that this approach can also be helpful in the understanding of the new phenomena of "global law".[18] The hypothesis that I would like to venture is that the fragmentation and pluralisation of the law is[19], to a large extent, to be attributed to the increasing tension between state law and social norms, both within the state and beyond its limits in the global realm. So, one should not separate the domestic, the European, and the global dimensions of law. The focus on the relationship between social norms and the law can also shed some light on the internal differentiation of the legal system that can be observed in the last decades.[20] What I call the evolution from the "society of individuals" to the "society of organisations" and finally to the "society of networks" can be helpful as frames of reference for the analysis and conceptual distinctions of different types of social norms as the containers of the "common knowledge" upon which the law can draw. And this might be helpful also with reference to both domestic and European constitutionalism.

4. THE EXAMPLE OF EUROPEAN "HORIZONTAL CONSTITUTIONALISM" — THE ROLE OF THE ECHR

One can observe a shift from "hierarchical constitutionalism" to "horizontal constitutionalism" — which is also the phenomenon that Gunther Teubner's conception of a "societal constitutionalism" is focused upon.[21] I will come back on this question later. First, I would like to address the question of pluralism as it has emerged in the jurisprudence of the ECHR. The formula for managing pluralism enshrined in the European Convention on Human Rights is the attribution of a "margin of appreciation" to Member States.[22] This is somewhat misleading under the postmodern conditions of increasing societal pluralism in Member States. According to the approach outlined here, one would re-interpret this formula by shifting the reference from states to societies: it is the "margin of appreciation of societies" that should be taken into consideration in finding a balanced relationship between domestic and European human rights law. This would also

include the possibility of differentiating the degrees of homogeneity and diversity in Europe on a sliding scale. For example, there should be much more respect for the constellations of co-operation between state law and social standards or social norms that try to co-ordinate the interest of the public and the protection of privacy. Why should cultural rights be interpreted in a uniform way, if societies and their social norms related to religion[23], schooling[24], media etc. differ considerably?[25] Under the conditions of a kind of "negotiated" model of co-ordination of the public and private realms[26], the "management" of difference can only be shifted to a web of judgments[27] that establish a distributed order of cases that also allows — to a certain extent — orientation to be found by drawing on a number of similar cases and decisions. Such a web cannot be expected to emerge from a European practice formulated by a supranational court because of the limited number of cases that have to be decided at European level.[28]

This approach would also allow for a more differentiated construction of global law.

5. "CONSTITUTIONAL NORMS OF CIVIL SOCIETY" BEYOND THE SPHERE OF THE NATIONAL CONSTITUTION?

It may contribute to defining the concept represented here to consider briefly the approach adopted by Gunther Teubner. He takes the view (summarised here with a certain element of simplification) that society's subsystems, through their expansion beyond the boundaries of the national state, create the societal basis for a "world law"[29] which, finds its repercussion, for example in transnational commercial law, "corporate governance" regimes in private and public law and (hybrid) standards. This type of governance brings about an autonomous "civil society" *self-constitutionalisation* extending beyond the sphere of the national law, yet not as far as a (political) "world constitution" in the true sense of the word[30] — Teubner regards these self-organised ordering as leading to merely "constitutional *fragments*". This constitutionalisations (and not merely juridification) is also evident in the increase in reflexive processes which is also observed here, by which spontaneously generated norms or norms which are controlled through "secondary norms", are measured against basic requirements of practice. The emphasis here is on new kinds of links between the intrinsic rationality of commercial organisations and the self-organised observation thereof by third parties through the connection with non-economic rationalities, which are becoming institutionalised by means of (for example) monitoring processes involving NGOs. This is explicitly regarded as a variant of "societal *constitutionalisation*[31]" in the narrow sense, and is understood as a functional equivalent of, and also therefore an alternative to, the conventional national constitution.

Traditional constitutionalism is located in the political subsystem that can no longer be regarded as being the leading subsystem as opposed to the economic and other subsystems. It cannot monopolise the function of constitution building in postmodern societies. National constitutional law

cannot lay claim to any hierarchy vis-à-vis the societal processes of self-organisation; on the contrary, both political and societal constitutionalisation processes exist in a heterarchical relationship which is embodied in the link between the qualitatively different networks of constitutional norms (generated by both the political and other subsystems of society). This is based on the assumption "...that in the process of globalisation the affirmation of constitutional norms is shifted from the political system on to different sectors of society, which generate constitutional norms of civil society in parallel with political constitutional norms".[32]

6. THE TRANSNATIONAL NETWORKS OF THE LAW

However plausible it may appear to assume that the origin of law cannot be traced back to any privileged source of national will, because the internal self-organisation of the law in particular would thereby remain overshadowed by an entire architecture consisting of different rules and meta-rules (the blending together of norm and application, reflexion procedures, methodical principles, linking of law and social norms), it is nevertheless also problematic to illustrate the pluralisation of (in particular) global law primarily in the reproduction of "normative communities"[33] (Paul Schiff Berman) and as a result to neglect the new challenge of the formation of order under conditions of complexity that does not only lead to a multiplicity of "legislators" but also to a heterogeneity of norms and their relationship to the fragmented character of "common knowledge", once the close link between a distributed process of generation and use of experience and the universal law has fallen apart.[34]

The conventional legal architecture, which is geared to unity, is not dissolved, but becomes more mobile. For Gunther Teubner, however, observation of the dynamic is restricted to the relations *between* the individual "fragments of the constitution".[35] The fact that these are not themselves closed, but are defined by a dynamic process of overlapping norms and practices of varying provenance, is ignored. The process of the transnationalisation of the law implies and permits a greater level of heterogeneity, it permits experimentation, it relaxes the rules of connection between social and legal norms, it differentiates between methods for different contexts, it requires rules to deal with conflict of laws, it allows the relationship between rule and application to be reversed, and is satisfied with only partial juridification through the defining of procedures without any preconception as to the result. "Transnational law" does not establish a new homogeneous global level of norm building. It includes the necessity to coordinate norms that are generated on different levels and within competing constituencies.[36] It even needs norms that retranslate global norms into domestic ones, and at the same time it needs legal norms that organise the participation of national actors, public and private, at the global level. It can also operate with norms whose legal character can — either wholly or on a temporary basis — remain open to change, or which only become legally relevant at points of contact with the national law, for example if a violation against

social rules justifies the legal charge of negligence in regard to a breach of contract. However, it is surely important not to overplay the associated transformation and to differentiate normativity. The "constitutionalism of society" is therefore conceptually much more rigid than can be said of concepts which in many respects regard a clear distinction between "internal" and "external" in global law as impossible. In this respect the concept of a "constitutional fragmentation" appears to be too limited in its perspective: it risks missing the heterogeneity of the different norms and their origins. This is why I would rather use the concept of "network" of norms – a concept that includes the distinction of "nodes" that organise a certain intensity of exchange and coordination among different norms and "structural holes" that are characterized by "loose coupling" or unresolved conflicts. Thus — leaving other considerations aside — even for transnational "company law" the "contamination" by externally generated models of Codes of Conduct, political pressure, international law obligations, and transnational effects of national and regional regulation is almost impossible to distinguish from the closing down of an "internal constitution".

The "self-constitutionalisation hypothesis" does not pay enough attention to the fact that the state does not disappear — not at all. It takes on the character of a "disaggregated state" (A. M. Slaughter) that allows for more flexible action at the heterogeneous global level. The "law of the networks", as already mentioned, is acentric, it constitutes a multiplicity of nodes upon which relationships are arranged, but it also forms a potential relationing of *all* nodes that can be related to each other in the "networks of the law". The effect of the processing of law and its relationship to other social norms and practices in this network is *ex ante* difficult to calculate, but the legal "validity symbol" which is geared to hierarchical reproduction is transformed, in a heterarchical "order far from equilibrium"[37], into a plurality of linking models which, by means of cases, deal with legal and in particular discursive interrelations (and thus ever new constraints and possibilities for connection), which at the same time exclude others or place them under an increased obligation to justify themselves.

In this regard postmodern law permits greater reflexivity, *i.e.* in light of the multiplicity of possible candidates for the "legal value" of operations, the question (which requires a strategic answer) as to whether a norm should be treated as law arises more frequently.

7. "SELF-CONSTITUTIONALISATION" OF REGIMES BY "SECONDARY NORMS"?

On the basis of the example of what Gunther Teubner[38] refers to as "Unternehmensrecht" (codes of corporate governance), it seems extremely doubtful that any set of regulations ought to be treated as law, either internally by self-observation on the part of the players or externally by attribution. Above all, however, this cannot be laid down by a "corporate constitution" (to be treated on a par with the "political" constitution) in "world society" with effect for the national constitutional law (which is

localised at the same level). H. L. A. Hart's "secondary norms"[39] cannot, on the basis of the self-observation of the emergence of "primary norms" in "sectors of society" outside the political system, dispose of the boundaries between law and non-law by way of "self-constitutionalisation". This would be a circular argument: even social (non legal) norms can be firmly established and secured by means of a "constitution". Whether *law* arises as a result is however quite a different question, which can only be answered by recourse to functional equivalences of the "law of networks" to hierarchical law. In accordance with similar constructs of "legal pluralism". Gunther Teubner's theory of transnational law — as we have said — amounts to constructing a plurality of deterritorialised "transnational regimes"[40] on the basis of the model of the state, and creating the non circumvenable (although also variable) concept of "a kind of" unity of the law through "conflict-of-laws rules".

The assumption that there is a differentiation of an autonomous world law, and that these law systems boundaries on an *issue*-specific basis, and claim "global validity"[41] is scarcely plausible even for civil law, since the systems cannot be completely emancipated from territorially established law — even for the enforcement of arbitral judgements. Even harder to follow, however, is the thesis that the evolution of the new world law can be understood as a renewal of the difference between a legal system and its social environment systems. How is it possible to construe this? Could this be interpreted as stating that "world law" is not some product of new internal differentiations within the legal system, but rather that the "big bang" of the self-generation of the law through a system/environment distinction is being repeated within the legal system through the formation of a kind of "second order law", which is developing its own forms and internal differentiations? Only thus is it possible to explain the assumption (which is otherwise difficult to follow) that the "self-constitutionalisation" within world law is supposed to have the same status as state-based constitutional law. A similar argument is presented by Andreas Fischer-Lescano[42], who sees "normative expectation" as being grounded not only in "political law-making", but also "in the sphere of human rights, specifically in the system of the mass media", which are becoming a forum for "colère publique" (this goes back to Durkheim). The monopoly to which "statist international law" lays claim must be opened up to include new sources of law that emerge from the law making capacity of civil society.

8. THE "SELF-CONSTITUTIONALISATION THESIS" AND THE PROBLEM OF THE PARTICIPATION OF THE STATE IN THE FORMATION OF GLOBAL NORMS

In any event it seems more productive, in the context of describing the emerging "global law" that extends beyond the sphere of the state but not as far as that of conventional international law, to accentuate first of all the conditions under which "territorial" law is linked with the transformation of social rules and knowledge systems, i.e. the conditions which

allow the unity of "global law" to appear only as "order far from equilibrium".[43] Their self-transformation in the conditions of the postmodern era is to be described as a process of rearrangement within a "differentiation process", which initially occurs within territorialised law and is then continued in the process of globalisation.

The postmodern "national" law of the "society of networks" is not fundamentally so very different from the fragmented global law that exists beyond the sphere of the state. Starting from this assumption, it seems easier to envisage that on the one hand, in a global law order which is entirely characterised by heterarchy and asynchrony, new legal forms are being generated which are geared to operating with incompleteness[44] and which are in particular procedural-reflexive and to some extent also strategically dimensioned, while at the same time the experimental transnational cooperation with national law (which is also changing), which is aimed at the stimulus of self-regulation, cannot be separated from global law (particularly in the sphere of global administrative law or the constitutionalisation of new procedural constraints aimed at making sovereignty more "permeable").

The theory of "world law" as envisaged by Fischer-Lescano and Teubner, which is of necessity only reproduced here in simplified form, appears excessively complex (even disregarding theoretical objections to the structure) without any balancing effect being provided through additional gains in knowledge. By contrast, the concept of an evolution of the law as outlined here, which attributes to the legal system a higher capacity for self-modelling with the aid of "sub-models", extending beyond the opening and coupling mechanisms as previously discussed, is capable of a more precise conception of the transformation processes of the law not only in the territorialised but also in its dterritorialised and fragmented order.[45] Not only can it observe a fragmentation of individual "legal systems" in the factual dimension, but also, in particular, it can illustrate the fragmentation of the law in the time dimension as a process — and thus the asynchrony of the effects of the individual "sub-models". Thus the answers to the challenge posed to the law by Internet communication are to be found not only (and perhaps not even primarily) in the observation of globalisation. On the contrary it is also necessary for there to be a conversion from social norm formation, which is centred on the mass media, to the heterarchical processes of the emergence of social norms and the coordination of these norms with the formation of law. This does not however lead to the disappearance of older layers of norms, but gives rise to new conflicts and therefore further need for coordination. In my opinion the "world law" reading for which I have offered a critique here tends to neglect a particular feature of the law which consists in its not being „patternless" and in its establishing a defined impersonal "management of rules" and a network of connection constraints and possibilities for controlling uncertainty that extends even beyond the boundaries of territorially established law. The postulated closing down of "self-constitutionalised" transnational systems blocks access to the heterarchical procedural rationality of overlapping *networks of the law* (and of other norms) that consists of different "nodes" and patterns of relationships.

>> ENDNOTES

[1] (Reports oft he Federal Constitutional Court) BVerfGE 61, 1, 8; 85, 1, 15; 90, 1, 15; cf. for the "institutional" dimension of civil rights to communication *Helmut Ridder*, Die soziale Ordnung des Grundgestzes, Wiesbaden: Westdeutscher Verlag 1975, p. 85 et seq., *Karl-Heinz Ladeur*, Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie, Kritische Justiz 32 (1999), p. 281.

[2] (Reports of the Reichsgericht, criminal law) RGSt 8, 19; 15, 17; 59, 172; 64, 10; *Reinhard* Ricker & Johamnnes Weberling, Handbuch des Presserechts, Munich: Beck 2012, § 53 No. 41 et seq.

[3] BVerfGE 54, 288; 61, 1: functional distinction between value judgment and the communication of a "fact" according tot he relecvance of public opinion.

[4] *Karl-Heinz Ladeur*, Die transsubjektive Dimension der Grundrechte, in: Stephan Korioth/ Thomas Vestng/Ino Augsberg (eds.), Grundrechte als Phönomene der kollektiven Ordnung, Tübingen: Mohr 2014, p. 17.

[5] *Richard Bellamy*, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, Cambridge: Cambridge University Press 2007, p. 1 et seq.

[6] *Robert Alexy*, Theorie der Grundrechte, Frankfurt a. M.: Suhrkamp 1986, p. 71 et seq; 410 et seq.; *Alexander Heinold*, Die Prinzipientheorie bei Ronald Dworkin und Robert Alexy, Berlin: Duncker & Humblot 2011; Matthias Klatt (ed.), Prinzipientheorie und Theorie der Abwägung, Tübingen: Mohr 2013; for a critic cf. *Philipp Reimer*, "...und machet zu Jüngern alle Völker"?, Der Staat 52 (2013), p. 27.

[7] *Karl-Heinz Ladeur*, Das Medienrecht und die Ökonomie der Aufmerksamkeit, Köln: von Halem 2007.

[8] Cf. the contribuitions in: Christian Joerges, Karl-Heinz Ladeur & Ellen Vos (eds.), Integrating Scientific Expertis into Regulatory Decision Making, Baden-Baden: Nomos 1997; *Lawrence Busch*, Standards: Recipes for Reality, Cambridge, MA: MIT Press 2013.

[9] *Jody Freeman & Laura I. Langbein*, Regulatory Negotiation and the Legitimacy Benefit, New York University Environmental Law Journal 9 (2000), p. 60.

[10] For a Critique cf. *Niklas Luhmann*, Das Recht der Gesellschaft, Franlfurt a. M.: Suhrkamp 1993, p. 33.

[11] This why Ridder talked about "impersonal rights" that guarantee processes (media communication etc.) *Ridder*, loc. cit., p. 85

[12] For the changing role of the relationship between public and private cf. *Gralf-Peter Calliess & Peer Zumbansen*, Rough Consensus and Running Code, Oxford: Hart 2012; Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, Minnesota Law Review 89 (2004), S. 382.

[13] *Joanne Scott & Susan P. Sturm*, Courts as Catalysts: Rethinking the Judicial Role in New Governance, in Columbia Journal of European Law (13) 2007, p. 565.

[14] *Karl-Heinz Ladeur*, Wandel der Demonstrationsfreiheit — neue Formen der Aktionskunst, to appear in: Der Staat 54 (2015).

[15] *Yaron Ezrahi*, The Descent of Icarus: Science and the Transformation of Contemporary Democracy, Cambridge, MA: Harvard University Press 1990, p. 186.

[16] Cf. generally *Thomas Vesting*, Rechtstheorie, Munich: C. H. Beck 2007, No. 188.

[17] *Ralf Michaels & Joost Pauwelyn*, Conflict of Norms or Conflict of Laws? Diferent Techniques in the Fragmentation of Public International Law, 22 Duke Journal of Comparative & International Law 2012, p. 349; *Christian Joerges*, Kollisionsrecht als verfassungsrechtliche Form, in: Nicole Deitelhoff/Jens Steffek (eds.), Was bleibt vom Staat? Demokratie, Recht und Verfassung im globalen Zeitalter, Frankfurt a. M./New York 2009: Campus, p. 309.

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[19] *Nico Krisch*, Beyond Constitutionalism: The Pluralist Structure of Postnational Law, Oxford: Oxford University Press 2010, p. 226, 283.

[20] Cf. for the Phenomenology of of different types of "norm collision" *Marcelo Neves*, Transconstitutionalism, Oxford: Hart 2012.

[21] *Gunther Teubner*, Constitutional Fragments: Societal Constitutionalism and Globalization, Oxford: Oxford University Presss 2012; for a critique cf. *Karl-Heinz Ladeur*, Die Evolution des Rechts und die Möglichkeit eines globalen Rechts jenseits des Staates, Ancilla iuris, 11.10.2012 — http://www.anci.ch/karl-heinz_ladeur

[22] *Dean Spielmann*, Current Legal Problems Lecture: Whither the Margin of Appreciation? http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf — Dean Spielmann is the president of the CEDH.

[23] ECHR , Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2008, 1217 — the Norwegian "State Church" system was regarded as incompatible with the Convention.

[24] ECHR, NVwZ 2011, 737 ("Lautsi" — crucifix in a Italian School) — this judgment gives more leeway to Member Staates with respect to cultural traditions; cf. with reference to an earlier decision *Ino Augsberg & Kai Engelbrecht*, Staatlicher Gebrauch religiöser Symbole im Lichte der uropäischen Menschenrechtskonvention, JZ 2010, 450.

[25] Cf. for example the differing judgments of the ECHR, Neue Juristische Wochenschrift (NJW) 2004, 2647, and the German FCC, BVerfG, NJW 2012, 756; NJW 2011, 740; BVerfGE 120, 180; Zeitschrift für Urheber- und Medienrecht-Rechtsprechungsdienst (ZUM-RD 2007), 1; NJW 2005, 1857; NJW 2003, 3262, on the conflict between personal rights including privacy on the one hand and the role oft he freedom of the press on the other hand.

[26] *Lobel*, loc. cit; *Calliess & Zumbansen*, loc. cit.

[27] *Scott & Sturm*, loc. cit.

[28] The ECHR has even problems in establishing a certain consistency in fields of its practice that raise the above-mentioned questions, cf. for example two later judgments that differ considerably from the judgment in the case of "Caroline von Monaco/Hannover I"; ECHR, NJW 2012, 1053 (Springer Publishing); ECHR, NJW 2012, 1058 ("Caroline II").

[29] *Teubner*, loc. cit., p. 45; *Andreas Fischer-Lescano*, Globalverfassung. Die Geltungsbegründung der Menschenrechte, Weilerswist: Velbrück 2005, p. 247 et seq.

[30] Cf. now the overview of different trends of "constitucionalization" *Lars Viellechner*, Verfassung als Chiffre: Zur Konvergenz von konstitutionalistischen und pluralistischen Perspektiven auf die Globalisierung des Rechts, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 75 (2015), p. 231.

[31] *David Sciulli*, Theory of Societal Constitutionalism. Foundations of a Non-Marxist Critical Theory, Cambridge: Cambridge University Press 2010, *Teubner*, loc. cit.

[32] *Teubner*, loc. cit.

[33] *Paul Schiff Berman*, Global Legal Pluralism: A Jurisprudence Beyond Borders, Cambridge: Cambridge University Press 2012, p. 164.

[34] *Ann-Marie Slaugter*, A New World Order, Princeton: Princeton University Press 2004, p. 12.

[35] *Teubner*, loc. cit.

[36] *Teubner*, loc. cit.; also *Krisch*, loc. cit.

[37] Cf. *Henri Atlan*, Entre le cristal et la fumée, Paris: Seuil 1979.

[38] *Teubner*, loc. cit., p. 77.

[39] *H. L. A. Hart*, The Law as the Union of Primary and Secondary Rules, Oxford: Oxford University Press 1961, p. 76.

[40] *Teubner*, loc. cit., p. 74.

[41] *Teubner*, loc. cit., p. 74.

[42] *Fischer-Lescano*, loc. cit., p. 67 et seq.

[43] *Atlan*, loc. cit.

[44] *Charles F. Sabel & William H. Simon*, Contextualizing Regimes. Institutionalization as a Response to the Limits of Interpretation and Policy Engineering, Michigan Law Review 110 (2012), p. 1265; *Matthew C. Jennejohn*, Innovation, Collaboration, and Contract Design, Columbia Law and Economics Working Paper No. 319, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014420

[45] *Jutta Brunnée & Stephen J. Toope*, International Law and Constructivism, in Columbia Journal of Transnational Law 39 (2000), p. 19.

REFLEXIVE LEGAL DECISION THEORY: LAW, SOCIAL CHANGE, AND SOCIAL MOVEMENTS*

// TEORIA REFLEXIVA DA DECISÃO JURÍDICA: DIREITO, MUDANÇA SOCIAL E MOVIMENTOS SOCIAIS.

ARTUR STAMFORD DA SILVA

>> ABSTRACT // RESUMO

Setting out from court decisions collected from the sites of tribunals of the Brazilian judicial authority, we identify pleas for inclusions and exclusions in law, permitting us to observe the adaptation of law (system of communication on the licit/illicit) for movements within society. The observations are guided by the application of elements of systems theory (recursivity, auto and hetero reference, reflexive circularity, second order observation, heterarchy, autopoiesis) to human social communication. The research done up to this point indicates that the reflexive perspective applied to the juridical decision offers distinct readings from those provided by juridical hermeneutics and by the theory of juridical argumentation. // A partir de decisões judiciais coletadas em sites de tribunais do poder judiciário brasileiro, identificamos inclusões e exclusões de pleitos sociais no direito, o que nos permitiu observar a adaptação do direito (sistema de comunicação sobre lícito/ilícito) a movimentos da sociedade. As observações estão pautadas pela aplicação de elementos da teoria dos sistemas (recursividade, auto e heterorreferência, circularidade reflexiva, observação de segunda ordem, heterarquia, autopoiesis) à comunicação social. As pesquisas até aqui realizadas indicam que a perspectiva reflexiva aplicada à decisão jurídica oferece leituras distintas daquelas fornecidas pela hermenêutica jurídica e pela teoria da argumentação jurídica.

>> KEYWORDS // PALAVRAS-CHAVE

Legal decision; social movements; systems theory; self-constituting discourse[1]. // Decisão jurídica; movimentos sociais; teoria dos sistemas; discurso constituinte.

>> ABOUT THE AUTHOR // SOBRE O AUTOR

Associate Professor of the Federal University of Pernambuco (UFPE). // Professor Associado da Universidade Federal de Pernambuco (UFPE).

>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

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1. FROM CYBERNETIC REFLEXIVITY TO THE REFLEXIVITY OF THE JURIDICAL DECISION

In the analysis of judicial decisions collected from the site of the STJ (*Superior Tribunal de Justiça*, Supreme Court) and the STF (*Superior Tribunal Federal*, Supreme Federal Court), and from the data collected during trials at the Forum of Recife (and by way of informal conversations with magistrates, prosecutors, defense attorneys, lawyers, chief secretaries, justice officials) we observe that a court decision contains factors and information beyond what is found in legislation, doctrine, jurisprudence and juridical customs. The juridical system thus allows for processes of adaptation in the midst of society's variety of changes. Under this perspective, I propose a reflexive theory of the juridical decision — being a theory which makes it viable to research the presence of social movements' discourses for the construction of law in society. After all, political and economic pressures, for example, influence but do not determine court decisions.

The starting point for the reflexive theory of the juridical decision is the reflexive circularity[2] of communication (we only communicate through communication) within the molds of cybernetics[3], which postulates that "society is an autopoietic system based on sense-bound communication; it is constituted by communication and only communication; it consists of all communication. Communication reproduces itself by communication"[4].

After researching court decisions on themes related to social issues[5] (testimony by video conference of a prisoner; petty crime; social orientation, property and the MST; anencephaly; homosexuality as a family unit; legal equity; the lawfulness of evidence seen as illicit) we observe that the decision of a concrete case cannot be confused with legal systemic decision. Thus, we distinguish the judicial decision (court's decision) from the juridical decision. The judicial decision is information in the system of law; and the juridical decision, in turn, as an operation of the system of law. A decision taken to a lawyer, prosecutor, promoter or a judge is not yet legal system, but information to be recognized or not for a legal system. In view of this, distinct responses with respect to the dichotomies between hermeneutic confrontations and the theory of juridical argumentation took place, as exposed in the first part of this work.

One of the consequences of reflexive circularity is that "it is not possible to not communicate"[6]. Therefore, ambiguity and vagueness do not prevent human beings from communicating, as demonstrated in Harold Garfinkel's ethno-methodology. Thus it is not a matter of returning to Cratylus through Plato to follow up on the relationship between words and things. This would be, as Foucault will always remind us, to insist upon the theory of truth as representation. An escape route from the dichotomies of words and things is reflexive legal decision theory, which takes up the ideas of theory on society as a system of communication[7] (Niklas Luhmann) and provides — from the socio-cognitive theory of understanding as inference[8] (Luiz A. Marcuschi) and from the theory of constituent discourse[9] (Maingueneau) — the conception of discourse as *transphrastique organization*. This is because discourse is submitted to

an organization situated beyond the phrase, there coexisting rules of a discursive organization or community, as well as the fact that discourse is orientated in space and time, being a form of acting, interactive, contextualized, assumed and reigned over by rules, considered in the middle of an inter-discourse[10].

Reflexive legal decision theory is not just a sum of theories; but it is interdisciplinary, resulting in a theory which makes it viable to observe the juridical decision as an operation of society's law. After all,

> *[T]o think in terms of circular systems forces us to move away from the notion that, for example, event A occurs first and event B is determined by the occurrence of A, since, due to the same faulty logic, one could affirm that event B precedes A, depending on where, arbitrarily, we would choose to break the continuity of the circle*[11].

Reflexive circularity, it is worthy of note, is neither preoccupied with the beginning nor the end, nor origin nor future, which does not imply ignoring historicity in the formation of values in human society. However, it does entail the idea of "society not being organized through causal results (*outputs* as *inputs*) nor in the form of results of mathematical operations, but reflexively; that is to say, through the application of communication to communication"[12]. After all, communicating is not only transmitting information, but a process of constant production of information. At each point of communication a re-entry occurs (recursivity) of knowledge upon knowledge itself[13]. For this reason, the theoretical path set by reflexivity to observe juridical decisions will not trail a search for the origin of the decision, as if it were the causal result of an application of information prepared beforehand, since legislative texts, previous judicial decisions, doctrines and customs do not determine the judicial decision to be taken — therefore they do not determine the juridical decision previously. This is how we arrive at the recursive circularity of the "systems which observe"[14].

Applied to the juridical decision, the circular reflexive perspective in communication offers distinct responses for dichotomies resulting from clashes in theory of the kind which are ruled over by causality, taking the question of completeness of juridical order as an example. When the sufficiency of state law for a decision to be juridical is being debated, it involves the relationship between law and politics, taking into consideration the subject of fundamental norm in Kelsen and Bobbio's theory on juridical order — the certainty of law and juridical safety as guarantees of the State of Law. When the risks of a decision becoming a precedent are being discussed, it is the relationship between law and morality which is involved — and then there is the decider's power of decision (arbitrariness). When the capacity of law to regulate itself and manage itself is under debate, it involves subjects like juridical pluralism and the relationship between law and social change.

Exploring elements of the theory of systems (recursiveness, auto and hetero referentiality, reflexive circularity, second order observation,

heterarchy, autopoiesis) in humans' social communication, we will present how reflexive theory of the judicial decision leads with the dichotomies between completeness and certainty in law and the arbitrariness of the judger. We follow on to present the perspective on discourse as a social element, to then expose some of the research done.

2. SYSTEMIC BASE: REFLEXIVITY AND DICHOTOMIES IN THE JURIDICAL DECISION

The reflexive theory of the juridical decision parts from the supposition that law is the system of communication of society responsible for licit/illicit sense, as in Niklas Luhmann. In being communication, law is a system of communication, not a physical, biological or psychic entity, but human and social. Being a system, law is not to be confused with communication of the moment (that which is determined by time and space) nor with an organization, but with the systemic level of observation[15]. In a nutshell: reflexive theory in the juridical decision guides itself by the systemic perspective, and therefore neither by interational nor organizational guidelines.

Under this perspective, inside the sphere of the completeness of juridical ordering, if there is a legal blind spot, the explanations of Hans Kelsen and Norberto Bobbio will not exist. There is neither an occasion to speak of "blank juridical space", nor the maxim "what is not prohibited is permitted", as a principle of completeness. Nor even the hetero and auto integration of law itself, in Bobbio's conception, since this author considers there being a hierarchy between the methods of hetero integration and auto integration in juridical ordering: "in each ordering there is an uncertain zone of non-regulated cases, but which have a potential place in the sphere of influence of visibly regulated cases"[16]. Within the scope of that text, it is sufficient for the reader to remember that the completeness of state law involves the guarantee of a judicial decision not being arbitrary, since it should be necessarily justified by the quoting of the legislative text which is the foundation of the decision taken. In reflexive theory, the completeness of a system finds its answer in the theorem of incompleteness by Kurt Gödel.

For Kurt Gödel a system can only be formally complete. In reality it is necessarily incomplete, as occurs, for example, with the set of real numbers which, to be complete, contains inconsistent elements (in this case, infinity). The two theorems of Kurt Gödel are:

> Theorem 1 — Each formal system S which incorporates Z and which has a finite number of axioms, having rules of substitution and implication as the only principles of inference, is an incomplete system;
>
> Theorem 2 — In each S system it is impossible to deduce the principle with which S is consistent.[17]

With these theorems, Gödel demonstrates that, in the midst of paradoxes, it is not about proving the inconsistency of one of the paradoxes in order to resolve the paradox; nor is it sufficient, in order to deal with a paradox, to look to a third paradox, or a new theory — for example, that which occurred with the theory of types, proposed by Bertrand Russell to resolve the problem of the completeness of set theory. It is not a matter of seeking to eliminate the paradox, but of deparadoxing it to jump to another paradox. In terms of the juridical decision, hence law, we have the gödelization of juridical rationality[18]. Therefore law, to be a complete system, is bound to be incomplete. Consequently, the judicial decision as the existing operation of law contains non-juridical elements which are processed by the juridical system in their reflexivity, not prior to the case, and necessarily through legislation.

While in Gödel the reflexive theory of the juridical decision does not remain stagnant before the paradox of the completeness of the juridical system, in Heinz von Foerster the reflexive theory of the judicial decision has via law an observing system. Inside this perspective the matter of the precedent, therein the matter of a judicial decision integrating law, has earned new controversies.

Applying the idea of law as a system of communication in society, not as juridical interaction or as a juridical organization, the judicial decision is not to be confused with the juridical decision; while a judicial decision is a decision made in a delimited time and space, it is the act of a jurist (of a certain deputy, lawyer, prosecutor, attorney or judge), in a judicial case it is information for the legal system, but not yet integrated into the legal system. By juridical decision we have an operation of society's law system. Therefore it is a reflex of law's observing system (understanding — *Verstehen*), an expression of information (*Mitteilung*)[19]. Since law is an observing system, a judicial decision becomes a precedent in the case where the law continues its observation of it. That is to say, through recursivity, the judicial decision comes to have the form of law, or further still, the judicial decision takes on the form of the juridical decision, of the operation of society's law. To be clear, observing systems, as affirmed by Heinz von Foerster (2002), are those capable of learning and not trivial machines[20]; they observe at the second level, since they learn from the observations of other systems; they are self-referential and procure from their own elements, their reaction in the midst of the novelties of their environment.

In other words, holding law as an observing system steers reflexive theory away from juridical decision (with its dichotomies like law and society, or law and politics), since the judge's power of decision, in the judicial case, is restricted to the sphere of interaction. In the interactive environment the judicial decision is thought of as the act of the magistrate who hands down the decision. However, in the systemic sphere, the judicial decision is expressed information to be understood by the system. Distinct from the judicial decision, the juridical decision is an operation of society's system of law. In reflexive theory, for a judicial decision to come to have a part in society's law, therefore becoming a precedent, it needs to be replicated, that is, recursively return to be communicated, as referential.

As long as it is the decision of a concrete case, the judicial decision is information launched towards law which will operate recursively, according to its auto referencing, therefore being able to autopoietically produce law in society. In the end, autopoiesis is "the production of internal indetermination in the system"[21].

Data collected on the sites of tribunals, NGOs and social organizations (church, organized civil society, blogs of judicial activists); from newspaper reports, bibliographies and legislation, permitted us to observe the presence of discourses belonging to social movements and which influence judicial decisions. From these observations, we question the viability of thinking about law as a self-referring system while it is capable of learning from its environment.

The research up to this point indicates that considering law as an observing system makes it viable to understand that neither does law simply incorporate (*order from order*) information, nor does it disunite (*order from disorder*) upon living through the interferences of its environment — as in the cases pointed out by Erwin Schrodinger in the text "What is life?" — but, similar to the self-referring systems of Heinz von Foerster, law is a system which learns with its environment (*order from noise*) while capable of incorporating irritations from its environment, those irritations which, in a self-referencing way, make the strengthening or loss of energy viable in the maintenance and/or mutation of its own elements.

The procedures of law in the face of external factors do not happen automatically, but under the influence of limits, from the relation of law with itself (law is a *self-organizing system*), and its relationship with its environment (law is a system structurally coupled with its environment). Law is not isolated, but in permanent contact with and in relationship to its environment (formed by society, by the other systems of society, as well as with physical systems like machines; by biological factors; by psychic factors)[22]. In the end it is because we live in society and produce, reproduce, and produce images and communication which make sense because we imagine and communicate. We do this not because of reproducing or producing, but for our capacity to compose. For living in society, we develop human communication in a way of how human communication is[23]. We clarify here that composition is not a result of the properties of the components of society, but a construction within, and living with, society[24].

At last, the third dichotomy referring to law's capacity to reproduce itself from its own elements. This dichotomy is precisely about law's autopoiesis and hence its capacity to co-exist with its own environment, from the structural coupling of society's legal system to its environment.

We begin with a reminder that observing is, at the same time, selecting and distinguishing[25], from which there results the sense of being recursive. Sense retains a past (history, memory) at the same time as it becomes current (reference to the present). When we communicate we operate by observation and, therefore, we distinguish the communication reference area from the subject area which will not participate in communication.

Sense, therefore, contains a marked reference (the internal side of sense) and one which is not marked (the external side of sense). This is what we gather from the "laws of form"[26] in George Spencer-Browne's terms. For the one who knows the act of distinguishing is implicit. Knowledge gains form in a medium which makes its formation viable. Knowing is to mark, design and limit knowledge; it is to distinguish that which marks and that which does not mark a determined piece of knowledge. The marked side of what we know designates a frontier (limit) around something, in this way separating it from everything else, at the same time as it distinguishes the marked side from the rest. It establishes a frontier between the known and the unknown; and it involves the crossing from the limited side of knowledge to the side of the unknown.

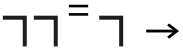
The paradox of knowledge containing, in itself, the known and the unknown, the marked side and the non-marked side of understanding is undone with the theory of the two-sided forms, for which the form has the following axioms and laws:

The distinction is a perfect continence.

Axiom 1: The law of the calling. The value of a calling done again has the value of the calling.

Axiom 2: The law of transposition. The value of a transposition done again has the value of a transposition.

From these axioms, Spencer-Browne develops the form of condensation and the form of cancelation, with the laws of form:

 → First law of form (law of condensation) = Form of Replication

 → Second law of form (law of cancelation) = Form of Creation

In a form, therefore, there is contained replication (historical) and creativity (present). As each form is constituted by a medium (medium/form differentiation) it contains as much something to which it refers (the form of the form) as something to which it does not refer (medium of the form or the environment which made the formation of the form viable). In this way, the form has two sides: the internal (the form) and the external (the medium). Law has the legal and the illicit as its two sides: being in the environment that which is *not* law.

It is with Louis H. Kauffman that we have greater clarity on the subject. Following the laws of form of Spencer-Brown, Kauffman brings the terms self-reference and recursivity to systems theory with knot theory[27]. For Kauffman, systems contain themselves (the internal side) and their environment (the external side). As the form has elements of the medium, systems contain elements of the environment, since if the systems are not balanced, in harmony with their environment, they will cease to exist.

Furthermore the internal environment is distinguished from the external environment of the system. That is to say, self-reference (reference to itself, to its internal environment) from hetero-reference (reference to the external environment).

Applying the perspective of the theory of observing systems to human communication, we must, when we communicate, promote a distinction between the subject of the conversation and what is not the subject of the conversation. Without this distinction there is no conversation. Above all, one does not have a conversation about everything at the same time. This distinction, indispensable for there to be conversation, involves the realization of a series of other distinctions for the conversation to develop. Accepting that this is so, it is agreed that in the flow of conversation the subject is constantly reintroduced (*re-entry*). It is precisely for this reason that we continue the conversation on the same subject during a conversation at the same time that, to continue talking, we necessarily include new information in the conversation. It is always possible to change the subject, yet this "is another conversation". The re-entry of the subject of a conversation in the conversation, for us to continue maintained in the same conversation, is given by the promotion of new selections/distinctions and the selections/distinctions that follow. This operation of select/distinguish is called observation, occurring when we communicate.

Reference to the subject is processed again at each distinction at the same time that the inclusion of new reflections occur, happening in the measure of their relevance to the subject of the conversation. The first movement is what Louis H. Kauffman calls recursivity of the form in the form; in the second there is self-reference[28]. Each sense, in this way, has its meaning in its own sense (self-reference) at the same time as it refers to the non-referenced side of the distinction (hetero-reference)[29].

To carefully consider what is affirmed up to this point permits one to admit that all sense has an internal referenced side and an external side, the latter temporarily non-referenced, but potentially present and which can come to be referenced at any time.

In this perspective, law is all communication on licit-illicit which occurs in society. In the words of Luhmann:

> *[O]nly communication oriented by the code of law belongs to the juridical system, just that communication which firmly maps licit/illicit values (*Recht/Unrecht*). Because of this only communication of this type searches and affirms a recurring integration in the network of the law system. Only communication of this nature requires from the code a form of* autopoietic *openness, as a necessity for more communication in the law system. This type of communication can occur in daily life for a large variety of reasons*[30].

In these circumstances, deciding upon juridical cases is to attribute sense to something. It is to distinguish between the licit and the illicit. To agree with such an affirmation means admitting that each judicial case provokes information in the system of law, being for the law to put such

information into operation – therefore to observe (mark, signal and distinguish) which will be the side to be marked (licit/illicit) and that which is not to be marked (environment). In this conception, data and information referring to the factual in a trial pass documents brought to trial through a self-referencing filter according to what is relevant and not relevant. This is what the legal actors do — lawyers, attorneys, prosecutors — in their petitions and spoken arguments during judicial audiences. They select and filter what to include and not to include in their arguments for the judicial case.

Do not think for a moment, upon reading this, that we have reduced the paths for social movements to the sphere of judicial processes. We know that political and economic paths are used too. However, for the aims of this text we only explore research relevant in the juridical field. We refer to moments when social movements make protests, as well as to when the MST occupies a land to pressure the government to promote or facilitate agrarian reform. This debate led us to consider the subject under discussion: how do we classify a discourse as juridical and not political or economic? This question leads us to Dominique Mainguenau's theory of constituent discourses.

3. THE LINGUISTIC BASE FOR THE REFLEXIVE THEORY OF THE JURIDICAL DECISION

With systems theory we obtain systemic analytical categories like recursivity, self-reference and autopoiesis to deal with the juridical decision as an operation of the legal system; thus, it is not as though it were an act of decision or even the power of decision.[31] Even so questions persist, mainly involving linguistic controversies. For example, to deal with how much each participant dedicates themselves to outline footage for a statement in order to make their arguments legitimate, we turn to Dominique Maingueneau's theory of constituent discourse, from which we take out the idea that, as much as an uttered argument is not juridical, discursively one can identify the pretense to develop an argument as integral to a discourse, in our case juridical discourse.

With Maingueneau we have the distinction between utterance and discourse, fundamental for the identification of the place from where a speaker parts to enunciate and explain their arguments. While enunciation is an "establishing device for the construction of sense and for the subjects who recognize themselves in this"[32], discourse is the "organization of restrictions which regulate an activity"[33], which leads to the idea that discourses limit language, for "they should textually generate the paradoxes which their statute implies"[34]. As an alternative to these paradoxes Maingueneau proposes constituent discourses, those which — for their normative dimensions ("a process through which discourse installs itself, constructing its own emergence in interdiscourse") and political ones ("modes of organization, discursive cohesion") — plan to demarcate "the space which encompasses the infinity of 'common places' which circulate in the collectivity"[35].

Constituent discourses are those which proceed by "not recognizing any other authority beyond their own, not admitting any other discourses above them. This means that the variety of verbal production zones (conversation, the press, administrative documents, etc.) do not exert influence over them; on the contrary, there exists a constant interaction between constituent and non-constituent discourses, as well as between constituent discourses"[36]. Similarly to observing systems and *autopoietic* systems, constituent discourses are constituted by a memory and a capacity for adaptation to what is to come. If it were not so, it would not be discourse but utterance, since "discursive formations possess two dimensions — on one side their relationship with themselves, on the other, there relationship with what is exterior to them. However, it is worth thinking, from the outset, of identity as a way of organizing the relationship with what is imagined"[37].

Applying this information to the reflexive theory of the juridical decision, a discourse is juridical not because it is uttered by a jurist, but for managing law's form of sense. A discourse is juridical when it refers to something as licit or illicit. In the analysis of Maingueneau's discourse we read that "when linguists need to face enunciative heterogeneity, they are led to distinguish two forms of the presence of the 'Other' in the discourse: 'shown' heterogeneity and 'constitutive' heterogeneity"[38]. "Shown" heterogeneity "permits one to apprehend delimited sequences which clearly show their alterity (cited discourse, etc.)" and "constitutive" heterogeneity is linked to the dialecticism of all discourse, therefore, to the "discursive universe", to the delimiting horizon of discursive formations due to the conjuncture in which it occurs. When debating over whether or not something is licit or illicit one sees that law's discursive universe delimits which elements will have a greater possibility of entering the discursive field of law.

We remember that a "field of discourse" is "a set of discursive formations which come together to compete with each other, they delimit themselves reciprocally in a determined region of the discursive universe"[39]. The discursive space, contained in the interior of discursive fields, represents "subsets of discursive formations which the analyst judges relevant, for his purposes, to place into a relationship with one another"[40]. For Maingueneau "interdiscourse consists of a process of unceasing reconfiguration in which the discursive formation is carried [...] to incorporate pre-constructed elements produced beyond it"[41]. Consequently the juridical discourse is not isolated from other constitutive discourses (politics, philosophy, literature, etc.).

In Maingueneau the utterances of constitutive discourses are closed in their internal organization at the same time as they are re-inscribable in other discourses (they are capable of imposing and remodeling themselves to include new enunciations)[42], which takes us back to the conception that "the world has the potential for unlimited surprises; it is virtual information, however, that needs systems to generate information; better said, to give sense of information to certain selected irritations. Consequently, all identity should be understood as the result of the processing of information"[43].

With reflexive theory, therefore, society and discourse are seen as traces of the continuity and, at the same time, of the discontinuity of text, of utterance, of social life, of discourse, since the said and the unsaid are integral parts of what is said. Applying this conception to the juridical decision, we can observe the construction of law and therefore the formation of sense for law, starting with judicial decisions and in these identifying the discourses of social movements. We observe the adaptation of law to social life, since social change is not necessarily illicit and juridical practice does reveal this. The ambivalence order/ change in law is observable from the judicial decision since "the direction is the frontier and the subversion of the frontier, the negotiation between points of stabilization of speech and forces which exceed all localities"[44], as well as the fact that "to enunciate is not only to express ideas, but also try to construct and make legitimate the framework of enunciation"[45]; and furthermore

> *[...] In the discursive space, the Other is neither a fragment that can be localized, nor a quotation, nor an exterior entity; it is not necessary for it to be located because of a visible rupture in the compactness of the discourse. It is found at the root of a Self always prone to being decentered in relation to itself, which is at no moment susceptible to being considered a figure with a fullness of autonomy. It is what is lacking, systematically, in a discourse and what permits it to close in on itself. It was that part of sense which was necessary for the discourse to sacrifice in order to construct its identity. From this comes* the essentially dialogic character of each utterance in discourse*, being impossible to disassociate the interaction of discourses having intra-discursive functioning. This overlapping of the Self and the Other removes from the semantic coherence of discursive formations whatever character of 'essence', in the case that the insertion of such an essence in the story would be additional; it is not from there that the discursive lining has its principle of unity, for it comes from a conflict which is articulated"*[46].

In order not to confuse discourse with utterance, argument or text, Maingueneau proposes as discourse the "constituted artefact to and for an analytical procedure which will have the function of situating and configuring, in a given space-time, the utterances kept on file[47]". The complexity of the term *discourse* leads us to the idea of it being, simultaneously, constituted by the following characteristics: a) it poses itself as a *transphrastique* organization (discourse is an organization situated beyond the phrase, thereby existing rules of an organization, of a discursive community; b) it is orientated; c) it is a form of action; d) it is interactive; e) it is contextualized; f) it is assumed; g) it is ruled over by rules or norms; h) it is considered in the center of an inter-discourse[48].

Each one of these characteristics of discourse will not be clarified here, yet it is due to them that this conception of discourse is situated in the pragmatic perspective and, additionally, differentiated from text and utterance. While texts are "verbal units belonging to a discourse *genre*, utterance, distinct from enunciation, is a "verbal mark of an event which is the enunciation"[49].

We visualize juridical discourse as a kind of discourse which contains rules, limits, organic substance (discourse, as a *transphrastique* unit, is submitted to the rules of organization which are current in a determined social group), temporality (the discourse is orientated even by developments over time), concept of space and time (the direction of the discourse requires the contextualization of the utterance, the identification of subjects as sources of personal, temporal and spatial references, besides modeling), constitutive interactivity (dialogism, interdiscourse).

With this notion of discourse included in the reflexive perspective of systems theory, we have a reflexive theory for the juridical decision, therefore a theory which deals with the juridical decision as an operation of the legal system and not yet included as law. The judicial decision is an enunciation, information to be processed in juridical discourse, in society's legal system.

We research cases where social movements seek rights in judicial processes to observe how pleas for rights promote inclusion and exclusion in state law.

4. RESEARCH

Amongst research already done we will first present the question of the legality of the use of video conference to hear the statement of a defendant in jail; following this, the research done on the case for inclusion in the expression "family unit" for the union between people of the same sex; and finally, the research on anencephaly.

With certain innovations, changes in means of communication created the possibility, by way of video-conference, of having a defendant interrogated in prison. In order for a change in criminal procedural law to occur, as envisaged in the Brazilian Constitution, it is necessary for the National Congress to legislate. The coupling between law and politics is a legal right, since changes in the practice of the Judiciary (organization of the system of law) require and depend upon changes in legislation promoted by the National Congress (organization of the political system).

In the state of São Paulo, Brazil, Law 11.819 was passed on the 5th of January 2005. It permitted the interrogation of the accused by video-conferencing, specifically for the very dangerous crime of drug-trafficking.

The lawyers who appealed took the case to the Supreme Court of Justice (STJ). This is the largest court for deciding appeals on Brazilian legislation, such as the Civil Code, the Penal Code, the Code of Civil Procedure, etc. It also went to the Federal Supreme Court, the largest forum to decide on cases and appeals relative to the application of Brazil's Federal Constitution. In this investigation we used texts from these Courts. Our research collected twenty-one (21) decisions by São Paulo's Court of Justice, three (3) decisions by the Supreme Court and seven (7) by the Federal Supreme Court.

Our reading of the decisions lead us to observe that consistently Law 11.819 was read as unconstitutional, since the National Congress is the competent power to pass laws referring to procedural law. The decisions of

São Paulo's court denied that the law was unconstitutional and added that there could not have been any violation of the rights of the accused prisoner when he was being interviewed by video-conference. On the contrary, rights were guaranteed due to the fact that the video-conference avoided the risk of the prisoner's escaping while he was being transported to the place where he would be heard, the Forum. Besides this, the video-conference bettered the police service and avoided public spending. For the accused to be transported it would be necessary to mobilize many police, vehicles and other resources, especially when the accused is a drug trafficker.

The appeals presented by the lawyers in the Supreme Court were unsuccessful since in this court the understanding of the interpretation of the Court in São Paulo was maintained. In *Habeas Corpus* HC 34020/SP, a report confirmed, on 15/09/2005, that: "the interrogation done by video-conference, in real time, does not violate the principle of the due legal process and its consequences". This interpretation was repeated on 10/05/2007, in *Habeas Corpus* HC 76046/SP, where the *Relator*[50] stated: "the stipulation of the video-conference system for interrogation of the accused does not offend the constitutional guarantees of the accused, who, in such circumstances, can count on the support of two lawyers, one of them in the hearing and the other in prison beside the accused".

Insisting upon the unconstitutional nature of Law 11.819 from São Paulo, lawyers were able to solicit *Habeas Corpus* in the Supreme Federal Court (STF). The President of the STF was responsible for judging claims for *Habeas Corpus* due to the urgency of the trial. We have observed that the first decisions were made in the sense of affirming that there was no unconstitutional element, maintaining the interpretation that the statement by videoconference was not illicit; these decisions were emitted on the 5th and 6th of July, 2007, already referring to the decision made for HC 90.900 on the 27th of March 2007. On 14/08/2007, *Habeas Corpus* 88.914-0/SP was judged by the Second Panel of the STF, considering Law 11.819 as unconstitutional upon affirming that video-conference is inhumane for producing loss of personal contact of the defendant with the individual who judges. Video-conference makes the service done by the Judicial Power a "mechanical and insensitive" activity. It affirms, moreover, that "anxious, the accused waits for the moment of being before a natural judge".

Our research is concerned with observing such changing behavior in the law as a system. The presence of discourses which tell us of the humanization of the statement held up against the communication on the reduction of risks involving the drug trafficker — and then there is the financial side in avoiding the costs of transportation — are elements that are observed and put forward as producing the direction law takes. It is not about observing one decision or another. Here one sees society's production of sense in law, that is to say, how it is possible for law to produce its own sense. It is not about observing the argument of a judge, a lawyer, or a prosecutor, but the law itself, the judicial decision, not the juridical decision or the judiciary's decision.

Our proposal is to warn about the necessity of observing law as an observing system, and therefore look at how the law operates through its

own decisions, since that information is observed by law as a system. The point here is that law operates as a system with its own decisions, not by the decision of magistrates or courts. Without removing the power of the magistrates, we uphold that the law is a social system not to be confused with the Judiciary as an organization of the juridical system[51].

We observe how jurists (lawyers, prosecutors and magistrates) exploit legislative texts and other factors of information to communicate the licit nature of the video-conference, and they do not identify the loss of any of the rights of the defendants. Those who communicated that Law 11.819 was illicit, therefore unconstitutional, also relied on legal texts and other factors to identify rights that were lost and that left defendants in a hard situation. What cannot be denied is the influence of economic and political factors in the law, since law is not isolated but distinct and coupled with other social systems. In any case, the presence of these is not explicit enough in the jurists' or magistrates' partaking in a decision in order to have sufficient data and be able to affirm that the juridical decision was a result of economic and political factors, and not legal factors and criteria. We observe the recursivity of law in the production of law. In Luhmann's word, "everything operating with sense always also reproduces the presence of this excluded element because the world of sense is a total world: what excludes it excludes it in itself"[52].

Another study revealed the paths followed by social movements to defend rights present in cases of relationships between people of the same sex (homosexuality). The rights present in the union between people of the same sex began in juridical debates which concerned property, when judicial actions involving the right to a pension, social security, and the division of assets in the couple's separation took place in the STJ, followed by questions on the right to raise children, adopt, etc., to the point where one approaches the juridical form of a family entity. An article by Maria Berenice Dias states that homosexual union is not only a question of economic sharing, it involves feelings. Patrimony had already become recognized in homosexual relationships. Berenice Dias alerts us about the "coming and going", in the Judiciary, of the recognition of rights for this type of human union, since more than 800 trials which go through the Judiciary come to be judged in various ways. The author identifies judicial decisions which recognized the rights to an inheritance, a pension, adoption and those related to changing name and sex on birth certificates[53].

On the 10th of February 1998, in Special Recourse 148897/MG, which passed through the 4th Panel of the Superior Court of Justice, with Minister Ruy Rosado de Aguiar as *relator*, homosexual union became, *de facto*, part of society. On the 17th of June 1999, Associate Judge Breno Moreira Mussi of Rio Grande do Sul State's Justice Court, *relator* of Bill of Review nº 599075496 — judged in the 8th Civil Chamber — decides that judicial actions involving union between people of the same sex should go through the Family Court. In this way, the "news" of the decision on the 5th of May 2011 in the Supreme Federal Court was not so new.

On the other hand, in 2004 decisions deciding that rights to be conceded for homosexual relationships were illicit continued and, in this same

year, there were also favorable decisions. Until today there are decisions which accept and others which do not accept the recognition of the union between two people of the same sex as family, as an entity legally considered to be a relationship of affection. In 2006 and 2007 there were decisions that were favorable for this recognition. Fairly recent research tells of a decision in 2008 in the STJ, Special Resource RE 820.475, which deals with the Declaration of Homosexual Union. In this action the STJ decided in favor of recognition, the arguments being that there was no legal impediment. Because of this lack of impediment Brazil's juridical order does not allow for prohibition of this act. The fact that the constitution establishes that the family is the union between men and women does not permit us to deduce that there is a prohibition against homosexual families. The law already recognizes the principle of affection in the context of family law. The appeal to non-juridical discourses calls our attention, which again indicates that the world vision of those judged is not limited to legal factors. For this reason, the production of sense in law is beyond the State, beyond the thirst for power which would wish to take control of the law-society relationship.

The production of sense in laws in cases of homosexuality had been taking form in parameters already present in the laws, but demanded the inclusion of information from other social systems. In the system of love, for example, it is the sentiment and affection which produce the meaning of family. In this system it makes sense to have the love sentiment, not the sex criterion. Family, in this way, is not just a relation between people of different sexes. Jurists gain information from the system of love to interpret and argue juridical cases, as we can read in the decision by the Federal Supreme Court on the 5th of May 2011.

With the decision by the Federal Supreme Court on the 5th of May 2011, the juridical system becomes remodeled, independent of change in legislation. On the 4th of May 2011 ten *amicus curiae* briefs were presented on the case. On the 5th of May the ministers of the Supreme Federal Court voted to arrive at the Court's decision.

We need not delve into the research in detail; however, we present the coupling between religious system, juridical system and political system. We will limit this debate to the question of the literalness of the expression "family entity". Representatives of the CNBB[54] and the AEB[55] confirmed the impossibility of there being another interpretation other than to deny that the harmony between two people of the same sex could be equated with the union between a man and a woman. This is because the constitutional text contains "stable union between man and woman" for the "family entity" to be licit. The other *amicus curiae* interventions, favorable to the new mode of family, put forth arguments by taking advantage of the side of the law which does not impede the development of affection in the family environment. The literalness in this case is the absence of prohibition expressed in the union of people of the same sex when the constitution delimits the family entity. In the constitutional text the expression "family entity" carries the inclusion of the homosexual relationship. Law readily recognizes other forms of family union

which diverge from the concept of "family entity" in terms of the union between man and the woman.

Also, the *amicus curiae* favorable towards equality relied on the constitutional principles of equality, liberty and dignity of the human person to argue that the *literalness* is consistent through diverse texts. They affirm that the idea of justice present in Brazil's federal constitution is guided by the unacceptableness of discrimination, and therefore all prejudiced legislation is unacceptable and unconstitutional, including the legislation which denies the recognition of union between people of the same sex as equivalent to the family entity. The "literalness" of the constitutional text (Art. 226, § 3°) finds its body of support in constitutional principles. There is a certain "unconstitutionality in the constitution", states Carmen Lúcia, Minister at the STF.

One of the results of our research is that literalness does not prevent us from having more than one interpretation[56]; even "in the production of sense through communication, recursivity is obtained above all through the words of language, those which — even though they are the same words — can be utilized in all sorts of situations"[57]. In Marcuschi we also find out that meaning is a sharing of knowledge[58], as will be demonstrated by our case studies. The content of an expression, or of a juridical institute, is not previously established in a text, in the power of a judge, or in any other place. This content is established constantly, since meaning can have the form of a coin that shows us two sides: memory and change; history and renewal[59]. In this way we can understand how it is possible to affirm that the absence of a specific juridical regime for the union between people of the same sex does not imply exclusion, in terms of current legislation, of this union as a type of family entity.

In this research we observe the presence of diverse factors in juridical decision making by juridical actors (definitely involved in the operation of society's system of law) who are not to be confused with judicial decision nor with the judiciary's decision. Law as a system in society is a system which observes and, as such, is capable of learning from its own environment, and therefore from a society endowed with its other social systems.

To finalize the discussion we present research on the issue of abortion. I would like to thank the participation of Thaís Guedes Alcoforado de Moraes for bringing forth the data on the subject. The idea of researching this theme had already occurred in the group, but finally became concrete when the acts of a doctor performing an "abortion" in Recife had become apparent. In Recife, Pernambuco, Brazil, on the 3rd of March 2009, with the consent of the mother, the operation was performed on a nine-year-old who had been raped by her stepfather, alleging that the continuity of the pregnancy would result in serious risks to the life of the child. The Archbishop of the cities of Recife and Olinda, Dom José Cardoso Sobrinho, excommunicated the doctor. In Recife's newspapers the Church's lawyer confirmed that he would represent the mother in the State Public Ministry.

Observing this case, we can localize the presence of diverse communication systems which exist in society: the juridical, political, scientific and religious systems being amongst them. This research allowed us to

observe the autonomy of law in the production of legal meaning — even in countries like Brazil, which are developing.

In Brazil abortion is illegal according to Brazil's Penal Code. The maximum sentence for abortion, be it by consent, can come to ten years in prison. Even though it is classified as a crime against life, the protected legal asset is not human life but its embryonic formation, the life inside of the uterus from its conception until the moments before birth. The subject has been debated in many developed and under-developed countries, and has grown due to cases of anencephalic fetus abortion. In Brazil there is no law to exclude the illegality of abortion at this stage. The debate includes social movements in defense of human rights, feminists, religious movements, educators and jurists.

This matter entered legalistic debate in 2004 when the National Confederation of Health Workers (CTNS) initiated, before the Federal Supreme Court, an Action of Non-Compliance with Fundamental Principles (ADPF 54) on this matter. Amongst the arguments there were cited the violation of Article 1, *IV* (the dignity of the human person), Article 5, *II* (the principle of legality, liberty and free will) and Articles 6, *caput*, and 196 (the Right to Health), all from the Federal Constitution. The acts by the Public Authority which were claimed to have caused injury were Articles 124, 126, caput and 128, items *I* and *II*, of the Penal Code. After six years of proceedings, ADPF 54 was judged by the STF on the 11th and 12th of April 2012, the vote of the reporting member prevailing by 8 to 2, determining the legality of abortion for an anencephalic fetus and, therefore, adding to Brazilian law yet another hypothesis for the decriminalization of abortion without altering the text of the Penal Code.

With this it can already be observed that law as a social system learns with its environment based on its own elements, internal criteria.

The information conveyed by the doctors was considered to pertain to the scientific system, with the position of the Federal Council for Medicine (CFM) and the Brazilian Federation of Associations for Gynecology and Obstetrics (FEBRASGO) in the public audience of ADPF 54. Both CFM and FEBRASGOconfirm that maintaining gestation in cases of anencephaly increases the risk to the mother. They point out health matters such as high blood pressure and increase in the volume of amniotic fluid, respiratory alterations, severe hemorrhaging by premature displacement of the placenta, post-birth hemorrhaging by womb deterioration and amniotic fluid embolism (a grave condition which causes acute breathing problems and altered blood coagulation). We must not forget the psychological impacts which the woman is subjected to. Doctor Roberto Luiz D'Ávila, representing the CFM in the public hearing for ADPF 54, stated that:

> *If we respect the autonomy [of the woman], this autonomy must be respected when she wishes to continue the pregnancy, for whatever reason, at whichever moment — but if she says "I cannot carry this baby — that will not be able to think — with me any longer, for it won't be a human person protected by Law, in the sense of having all of its potential"... this is why it is atypical in terms of the Penal Code. For the Penal*

> *Code — according to the understanding of a doctor who works from day to day in his surgery — what is important is life expectancy, with all the potential of someone who will come into being, with the promise of becoming somebody. This will not be the case for the anencephaly.*[60]

Based on this definition of brain death, FEBRASGO confirms that anticipating the birth of this kind of fetus is not an abortive procedure. They defend (in a similar way to CFM) this atypical conduct because it is not an abortion and therefore not a crime.

With regard to the religious perspective we collected information from the National Confederation of Bishops in Brazil (CNBB). The choice of this organization is justified for Catholicism's being Brazil's traditional religion. The CNBB published on its official site the "Notice from the CNBB on the Abortion of the 'Anencephalic' Fetus, Referring to Non-Compliance with Fundamental Principles, *Case* 54 of the Federal Supreme Court".[61] Data were also collected from the declaration by Padre Luiz Antônio Bento, National Adviser for the Episcopal Commission for Life and Family of the CNBB, which represented the CNBB in the public hearing related to Non-Compliance 54.[62]

For the CNBB abortion is "a direct and deliberate death, independent of how it is performed, on a human being in the initial phase of existence which continues until birth".[63] In the case of the anencephaly the permission to abort can lead to eugenics which, for Padre Luiz Antônio Barreto, has already left deep wounds in the history of humanity which will probably never be healed. The CNBB recognizes the suffering of the family and especially of who is pregnant with an anencephalic fetus, but considers that "this suffering does not justify nor authorizes the sacrifice of a child which is carried in the womb".[64] Amongst the teachings from the Bible explicitly mentioned by the CNBB we have: "Thou shall not kill" (Ex 20, 13); "Now choose [eternal] life, so that you and your children may live" (Deut 30:19); and the affirmation that Jesus Christ had arrived so "that they may have life and have it in abundance." (Jo 10,10).[65]

Amongst the jurists, what predominates is the vision that the burden placed on the woman to maintain the undesirable pregnancy with an anencephaly will lead to grave psychological disturbances in the pregnant woman because of the *torture* suffered, besides the degrading treatment foregone — that which is forbidden by item III of the 5th Article of our Federal Constitution. Besides this, such an imposition would violate the autonomy of the woman, representing one of the pillars of principalist theory, the most accepted in current Bioethics.[66] For Luiz Régis Prado anencephaly would not be biologically capable of concretizing into a viable human life, therefore anencephaly cannot be considered a case of "abortion". The woman is not responsible for taking the anencephaly from her body. The elements of an "abortion" are lacking to qualify the case of anencephaly as "abortion". For one to be able to say that there is a crime in our midst, we need to see some evidence of trickery, or that something is blameworthy.[67]

Before the time of the ADPF 54 judgment, when a pregnant woman had discovered that her fetus was anencephalic and in the case that she

wished to interrupt the pregnancy, she would have to look to Justice for this permission. In the absence of a legal benchmark, the magistrates pronounced decisions full of discrepancies and originating mainly in constitutional principles which, as they are so malleable, ended up confusing themselves with the idiosyncrasies of judges, harming the principle of juridical safety (art. 5º, XXXVI, da CF/88). Decisions from diverse tribunals in Brazil prevented the pregnant woman from proceeding to terminate the pregnancy. The STF (Supreme Federal Tribunal), in judgment, considered the abortion in the case of anencephaly to be illegal, also stating that:

> *The penal legislation and the Federal Constitution, as it is well known, protect life as the greatest good to be preserved. The hypotheses where abortion is legally permitted are included in a restricted sense, neither permitting an extensive interpretation, nor analogy* in malam partem. *There must prevail, in these cases, the principle of legal reserve. The Legislator did not include on the list of hypotheses for authorizing abortion, foreseen in article 128 of the Penal Code, the case described in this trial. The maximum that the defenders of the proposed conduct can do is lament the omission, but never demand of the Magistrate, interpreter of Law, that there be added a further hypothesis which would have been excluded on purpose by the Legislator.*[68]

The STF, upon judging ADPF 54, made it constitutional to interrupt the gestation of anencephalic fetuses, the majority of the ministers (8 against 2) accompanying the vote of the *Relator* Minister (Marco Aurélio). It was judged this way in the affirmation of Brazil as a secular state. Taking away the religious factor, scientific information was exposed in the case. Entities representative of the scientific system (medicine) could pronounce themselves in public audiences in the judgment of the STF, leading the ministers of the court to agree that anencephaly is equivalent to brain death for there not being life expectancy and, therefore, there is no reason to speak of violation of the right to life. Moreover it was recommended that the nomenclature should be altered to "interruption of pregnancy in the case of anencephaly", not "abortion". On the subject of the terminology that ought to be applied, the adjective "eugenics" was removed for being charged with much negative ideology.

The STF recognized, moreover, that "right to life" — *in this case not having been violated* — does not present a character of absoluteness, being relativized by Brazilian law when in conflict with other fundamental rights, and subject to history's diverse moments. It still contemplates the rights of the woman which are at play in the situation at hand, especially the right to health, understood not only as physical well-being but also psychological.

5. THE PURPOSE OF REFLEXIVE LEGAL DECISION THEORY

Reflexive theory of the legal decision (**TRDJ** — *Teoria Reflexiva da Decisão Jurídica*) helps towards an understanding of movements in law in the

construction of sense for social situations unforseen in legislation, for example petty crime, the function of the social contract, social bonds, homosexuality, abandonment, etc., as well as changes in reading and, therefore, in the sense of historical terms such as contract, family, property, etc.

To affirm that law adapts itself to society does not imply affirming that law is always just and tuned into society. On the contrary, it is society, in its movements, which provokes changes in law. While the velocity of change can be very slow and the unwillingness of jurists, strong and stubborn, one can still conclude that neither does the law go in the other direction in relation to social movements, nor does it ignore them.

Our research has permitted us to observe the presence and influence of discourses of social movements in juridical decisions, as well as the presence and influence of economic, political and religious discourses, etc. For all of these reasons, it is more difficult to conclude that law is an instrument of power in the hands of the dominant, that law is a system in favor of corruption, of criminality.

To affirm that **TRDJ** identifies that law as a system of communication in society suffers mutations due to social changes does not imply defending that the law will always function, in countries like Brazil, as justice. After all, we cannot ignore that "civil law is the right of the rich and penal law the right of the poor" — meaning, for some, that "to respect laws is a signal of social, political and economic weakness", that economic and political interests influence law". Yet we understand that these interests do not determine law.

A theory, one might add, is not to be confused with a manifesto or with a model for happiness. Theory does not go beyond being an instrument for analysis. A theory is always and necessarily limited, above all because an observer "does not see what they do not see"[69]. Henceforth one cannot observe what was not observed. "Everything that is said is said by an observer"[70]. Theory learns from observations of another theory, being, in itself, second order observation. The observer is not a physical human being, an individual, but a system of observation in the shape of theory. Theory as an observing system learns from other theories. Being, therefore, reflexive, the theory itself observes (signals and distinguishes) each time it is applied. After all, circular reflexive systems act by self-observation and self-description, that is to say, the realization by the system itself by selection of elements and relationships between elements. Needless to say, "it is not possible to indicate without making a distinction"[71].

Admitting that self-organizing systems exist is to admit that the system lives in a constant state of interaction with the environment, an interaction which means recognizing that the system observes energy and order from its own environment, as well as existing a reality for the environment which does possess a structure[72] from which, applying the vision from Erwin Schrödinger's physics, Foerster presents the principle of "order from disorder". In Foerster's own words: "if I consider finite universe Uo ... and I imagine that this Uo universe has a closed surface which divides the same universe into two reciprocally distinct parts: one of the two parts is completely occupied by self-organizing system So, while the other we

can call 'environment' Ao of the self-organizing system: So & Ao = Uo. To this I may add that it makes no difference placing our self-organizing system into the interior or exterior of the closed surface. Undoubtedly, this self-organizing system permits selecting, at any moment, its own task of organizing itself, in its interval of time; its entropy will be necessarily diminished, which does not transform it into a mechanical system, but a thermodynamic one."[73]

In this logic, law reflects society. A reflex of its environment, law develops its own characteristics recursively, its elements, and its interior infiniteness; and, by means of its own elements (self-referencing), it reproduces itself (autopoiesis). This does not imply the isolation of the law, but hetero referencing around it since the exterior elements will irritate the law, leading it to react.

There can exist a society, however, where the law lives under a greater influence of economic and political factors than in other societies. There is no such thing as a society in which law is immune to economic and political interests. Law is a system of communication for society and is coupled, structurally, to its environment.

As well as not confusing juridical discourse with political or economic discourse, law is not to be confused with politics or economy.

In the end, being a reflexive theory, the theory itself being the object of theory; thus, up to this point, we can affirm that the information here is merely presented to be known about, available to be understood and subject to mutation.

>> ENDNOTES

* This paper was made possible by the CNPq, the National Council for Scientific and Technological Development – Brazil. Translation: Peter Malcolm Keays.

[1] Foerster, 2002: 289.

[2] Foerster, 2002: 289.

[3] Cybernetics as a theory of communication was developed at the Macy Conference. The mathematician Norbert Wiener was one of the most notable authors present. Even though the word "cybernetics" is strictly related to government, direction and control, during the Macy Conference (a set of meetings held in New York between 1946 and 1953) it served to give foundation to a theory of communication which parts from circular causality, there being neither linear causality nor tautological circularity, as in the constructivism of Heinz Van Foerster, Gregory Bateson and Humberto Maturana. For Wiener a piece of information (exterior message) is not completely received (in a pure way) by an element (an individual, a machine or an animal) within the sphere of communication. This is because there are forces of internal transformation for the same element. This element, taking in external information which transforms itself into internal information, is inclined towards future information. In the words of the author: "It is my thesis that the physical functioning of the living individual and the operation of some of the newer communication machines are precisely parallel in their analogous attempts to control entropy through feedback" (WIENER, 1954: 26-27).

[4] Luhmann, 1988: 50. In the original: "Die Gesellschaft ist ein autopoietisches System auf der Basis von sinnhafter Kommunikation. Sie besteht aus Kommunikationen, sie besteht nur aus Kommunikationen, sie besteht aus allen Kommunikationen. Sie reproduziert Kommunikation durch Kommunikation".

[5] STAMFORD DA SILVA, 2010: *passim*; STAMFORD DA SILVA, 2012a: *passim*; STAMFORD DA SILVA, 2012b: *passim*.

[6] Watzlawick; Beavin; Jackson, 2008: 67.

[7] Begging the question that communication is society's cell, Luhmann applies Spencer Browne's theory of differentiation (the theory of the form that has two sides), distinguishing between *medium*/form and system/medium to affirm that "Society is a system of sense", since society is organized in the form of sense (Luhmann, 2007: 28 e ss.).

[8] "understanding is social work" (Marcuschi, 2007a: 77; Marcuschi, 2008: 229).

[9] Constituent discourses take the position of "not recognizing any other authority beyond their own, not admitting any other discourses above them. This means that the variety of verbal production zones (conversation, the press, administrative documents, etc.) do not exert influence over them; on the contrary, there exists a constant interaction between constituent and non-constituent discourses, as well as between constituent discourses" (Maingueneau, 2008: 37).

[10] Maingueneau, 2005a, p. 52-56; Maingueneau, 2005b, p. 21-25.

[11] Watzlawick, 2008: 40-41.

[12] Luhmann, 2006: 105.

[13] Luhmann, 2006: 28-30.

[14] Foerster, 1987.

[15] Luhmann, 1998: 3.

[16] Bobbio, 1995: 146.

[17] Gödel, 2006 [1968], 103-104.

[18] Stamford da Silva, 2009: 113-137.

[19] For Luhmann a piece of communication is composed of three selections: information; expression (*Mitteilung*) and comprehension (*Verstehen*). Luhmann, 2007: 49.

[20] Along with Warren McCulloch, Norbert Wiener, John von Neumann and other authors, Heinz von Foerster was the architect of cybernetics. It was he in particular who developed second-order cybernetic theory based on self-referring systems and on the importance of *eigenbehaviors* (self-behaviours) to explain complex phenomena. In the words of Von Foerster: this is the "cybernetics of observing systems". Von Foerster's famous distinction between trivial and non-trivial machines is an initial point for the recognition of the complexity of knowledge" (http://www.univie.ac.at/constructivism/HvF.htm).

[21] Luhmann, 2007: 46.

[22] Luhmann, 1998: 3.

[23] Maturana, 2009: 13; Luhmann, 1989: 29.

[24] Foerster, 2002: 319.

[25] Luhmann, 2007: 29.

[26] Spencer-Brown, 1969: *passim*; Matherne, 2009.

[27] Kauffman, 2010; Kauffman, 1987: 53-72.

[28] Kauffman, 1987: 67.

[29] Luhmann, 2007: 31; Maturana, 2009: 30.

[30] Luhmann, 2005: 45. In the original text: "Rechtssystem selbst gehört nur eine code-orientierte Kommunikation, nur eine Kommunikation, die eine Zuordnung der Werte» Recht« und »Unrecht« behauptet; denn nur eine solche Kommunikation sucht und behauptet eine rekurrente Vernetzung im Rechtssystem; nur eine solche Kommunikation nimmt den Code als Form der autopoietischen Offenheit, des Bedarfs für weitere Kommunikation im Rechtssystem in Anspruch. Das kann im täglichen Leben aus den verschiedensten Anlässen geschehen". LUHMANN, Niklas. Das Recht der Gesellschaft. Frankfurt: Suhrkamp, 1995, p. 67.

[31] Luhmann, 2005: 45. In the original text: "Rechtssystem selbst gehört nur eine code-orientierte Kommunikation, nur eine Kommunikation, die eine Zuordnung der Werte» Recht« und »Unrecht« behauptet; denn nur eine solche Kommunikation sucht und behauptet eine rekurrente Vernetzung im Rechtssystem; nur eine solche Kommunikation nimmt den Code als Form der autopoietischen Offenheit, des Bedarfs für weitere Kommunikation im Rechtssystem in Anspruch. Das kann im täglichen Leben aus den verschiedensten Anlässen geschehen". LUHMANN, Niklas. Das Recht der Gesellschaft. Frankfurt: Suhrkamp, 1995, p. 67.

[32] Maingueneau, 1997: 39-50.

[33] Maingueneau, 1997: 44.

[34] Maingueneau, 2008: 39.

[35] Maingueneau, 2008: 39.

[36] Maingueneau, 2008: 37.

[37] Maingueneau, 2008: 37.

[38] Maingueneau, 2007a, p. 33.

[39] Maingueneau, 2007a, p. 35.

[40] Maingueneau, 2007a, p. 37.

[41] Maingueneau, 1997: 113.

[42] Maingueneau, 2008: 37.

[43] Luhmann, 2007: 29.

[44] Maingueneau, 2008: 26.

[45] Maingueneau, 2005a: 93.

[46] Maingueneau, 2005b: 39.

[47] Maingueneau, 2005a: 61.

[48] Maingueneau, 2005a: 52-56; Maingueneau, 2005b: 21-25.

[49] Maingueneau, 2005a: 56-57.

[50] *Relator* is the reporting justice or rapporteur, to whom the process is distributed for describe the case and pronounce your opinion in the court hearing.

[51] LUHMANN, Niklas. *Law as a social system*. Transl. Klaus Ziegert, Oxford: Oxford University, 2004, p. 297.

[52] LUHMANN, Niklas. *Theory of society* (vol. 1). Transl. Rhodes Barrett. Stanford: Stanford University, 2012, p. 21.

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[54] National Confederation of Bishops of Brazil.

[55] An evangelist organization.

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[59] LUHMANN, Niklas. *Theory of society* (vol. 1). Transl. Rhodes Barrett. Stanford: Stanford University, 2012, p. 30.

[60] Federal Supreme Court [STF]. ADPF 54. Shorthand on the public hearing, 28/08/2008. Access: http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf

[61] National Confederation of Bishops in Brazil. Note by the CNBB on the abortion of the anencephalic fetus. Access: http://www.cnbb.org.br/site/imprensa/sala-de-imprensa/notas-e-declaracoes/1434-nota-da-cnbb-sobre-aborto-de-feto-anencefalico

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[65] Note by the National Confederation of Bishops of Brazil on "anencephalic" fetus. Access: http://www.cnbb.org.br/site/imprensa/sala-de-imprensa/notas-e-declaracoes/1434-nota-da-cnbb-sobre-aborto-de-feto-anencefalico

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[68] Supreme Court of Justice. *Habeas Corpus* 32.159/RJ. *Relator:* Minister Laurita Vaz. Date of judgment: 17/02/2004.

[69] Watzlawick; Beavin; Jackson, 2008: 67.

[70] Maturana; Varela, 2001: 32.

[71] Kauffman, 1987: 6.

[72] Foerster, 1987: 57.

[73] Foerster, 1987: 51-52.

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ON THE POLITICAL ECONOMY OF THE TRANSNATIONALIZATION OF POPULAR SOVEREIGNTY

// SOBRE A ECONOMIA POLÍTICA DA TRANSNACIONALIZAÇÃO DA SOBERANIA POPULAR

OLIVER EBERL & FLORIAN RODL

>> ABSTRACT // RESUMO

Transnationalization of popular sovereignty is Jürgen Habermas' answer to the "postnational constellation". His position of a supranational constitutionalization has been critized from the perspective of popular sovereignty by political theorist Ingeborg Maus. Although from the view of democratic theory of highest interest, this debate has so far focused primarily on articulating prospective institutional and procedural designs or criticizing existing ones but has neglected to sufficiently address the problem of effective democratic access to the economic sphere. The aim of this paper is to strengthen popular sovereignty theory by confronting the two competing positions with insights from political economy on the background of the "new constitutionalism". We show that Maus' idea to cut back "new constitutionalism" to the form of international agreements without supranational institutions runs into the same problems of equality between states that Habermas faces with his idea of "global governance without government". We show also that a further unification of Europe as envisioned by Habermas is undermined by structural obstacles of capitalist economy that Habermas does not take into account. Therefore, both models, although contrary positions, share similar problems. It is our result that popular sovereignty theory must counter legitimatory and socio-economic challenges simultaneously. // A transnacionalização da soberania popular é a resposta de Jürgen Habermas para o fenômeno da "constelação pós-nacional". A posição de Habermas sobre a constitucionalização supranacional foi criticada, sob a perspectiva da soberania popular, pelo teórico da ciência política Ingeborg Maus. Até agora, na visão da "teoria democrática de maior interesse" esse debate se manteve focado em articular propostas de designs institucionais ou procedimentais, ou em criticar articulações já existentes. No entanto, a discussão acabou negligenciando o aspecto fundamental do acesso democrático efetivo à esfera econômica. Esse artigo tem por objetivo fortalecer a teoria da soberania popular ao tratar das duas posições concorrentes, sob a visão da econômica política, em um contexto do "Novo Constitucionalismo". Mostramos que a ideia de Maus para restringir o "Novo Constitucionalismo" aos acordos internacionais, sem instituições supranacionais, acaba se deparando com as mesmas questões de igualdade entre Estados com que Habermas lida em seu projeto de "Um governo global sem governante". Nós mostramos também, que uma unificação mais profunda da Europa, como Habermas idealizou, acaba enfraquecida por obstáculos estruturais da Economia capitalista, que o autor não leva em conta. Portanto, os dois modelos, mesmo que em posições contrárias, possuem problemas em comum. A conclusão que obtivemos é a de que a teoria da soberania popular precisa opor, ao mesmo tempo, desafios de cunho "legitimador" e "sócio-econômicos".

>> KEYWORDS // PALAVRAS-CHAVE

Political Economics; Transnationalization; Popular Sovereignty; Jürgen Habermas; Democracy. // Economia Política; Transnacionalização; Soberania Popular; Jürgen Habermas; Democracia.

>> ABOUT THE AUTHORS // SOBRE OS AUTORES

Oliver – Researcher at the Institute of Political Science of the Technical University of Darmstadt, Germany.
Florian – Researcher at the Normative Orders a the Goethe University Frankfurt am Main. // Oliver – Pesquisador do Instituto de Ciência Política da Universidade Técnica de Darmstadt, Alemanha.
Florian – Pesquisador do "Normative Orders — Cluster of Excellence" da Universidade Goethe Frankfurt am Main.

>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

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1. THE CHALLENGE TO POPULAR SOVEREIGNTY THEORY

Popular sovereignty theory represents the revolutionary beginning of our democracies in the 18th century and it is normatively valid until today. It is a cornerstone of modernity because it claims that the political and the social order are subordinated to the principle of political equality. For two decades, popular sovereignty theory was engaged in finding institutional settings that can cope with the legitimacy need for political cooperation beyond the nation state as a reaction to globalization. Today popular sovereignty theory has to face the question whether its institutional models of a transnationalization of popular sovereignty can be put into practice on the background of the existing global economic structure and allow for a democratic intervention in these structures that abolish the principle of political equality. Only if popular sovereign theory can address this challenge, it will be able to prove its validity after 200 years of its revolutionary beginning.

Popular sovereignty means the competence of the people, i.e., all later subjects of the law, to make that law — be it constitutional or ordinary law.[1] The concept of the power of the people to give themselves a constitution as a written document that determines the further procedures of democratic law production makes it the antagonist of liberal theories. They determine that competence of the popular will in the limits of natural individual rights while popular sovereignty sees these natural rights as rights that have to become positive law — which can be expressed only by the popular will[2]. Therefore, we hold popular sovereignty theory to be the only democratic theory that can give an appropriate answer to the problem of the violent force that is expressed in law. If someone has given his or her consent to the law that is reinforced violently, then her or him is done no harm. This presupposes strong egalitarianism in lawmaking and a hierarchic order of the branches of the state with the legislative body as only accepted source of law on top. Additionally, popular sovereignty theory proclaims the omnipotence of the legislative body to intervene in social and economic structures.

But the assumption that only the people or its representatives are legitimized lawmakers poses a serious challenge for theories of popular sovereignty when it comes to global law. While liberal theories with its orientation on human rights and rather thin procedural requirements can accept juridical law formation even on supranational levels, popular sovereignty theory has to find a way to track the chain of legitimation[3] from the popular will formulated in the national parliaments to the emerging laws of the supranational level. Since Habermas diagnosed the "postnational constellation" he has done this by seeking for ways of a "transnationalization of popular sovereignty."[4] At the same time his Frankfurt colleague Ingeborg Maus is challenging all attempts of a supranational constitutionalization from the perspective of popular sovereignty.[5] But this debate has so far focused primarily on articulating prospective institutional and procedural designs or criticizing existing ones and has neglected to sufficiently address the problem of effective democratic access to the economic sphere

under existing conditions. In Habermas' recent debate with Wolfgang Streeck[6] about the future of the Euro it became obvious, that precisely this form of globally unleashed capitalism has not yet been granted sufficient attention and analytical efforts.[7] The main challenge popular sovereignty theory faces today, is to take the economic conditions at hand into account.

What we will do in the following is to confront the two competing positions of a transnationalization of popular sovereignty with insights from political economy. We begin our argument with a description of the current global legal order which accentuates its most significant characteristics as a "new constitutionalism" whose core lies in limiting the power of democratic politics to shape policy. This analysis includes the current form of legal constitution of global society in its political interconnections with the economy (II.). From this perspective, the problem with which popular sovereignty theory is confronted today comes into especially clear focus. We are presenting Maus's strategy of "democratic anti-constitutionalism" (III.) and Habermas' strategy of "progressive constitutionalization" (V.). Then we examine each of their scenarios in terms of its viability in light of the insights gained from critical political economy (IV. and VI.). We show that Maus' idea to cut back "new constitutionalism" to the form of international agreements without supranational institutions runs into the same problems of equality between states that Habermas faces with his idea of a "weltinnenpolitik" negotiated between global actors. As it is well known Habermas' model rests especially on the development of the European Union to a supranational actor with strong political institutions.[8] We show also that a further unification of Europe is undermined for economic reasons that Habermas does not take into account (VII.). Therefore, both models, although contrary positions, share similar problems. This analysis yields the result that a transnationalization of popular sovereignty must counter legitimatory and socioeconomic challenges simultaneously (VIII.).

2. "NEW CONSTITUTIONALISM" AS FRAME OF THE POLITICAL AND ECONOMIC ORDER OF WORLD SOCIETY

Our point of departure in describing the current political-economic order of world society is the interpretation of neoliberally dominated global legal order(s) as "new constitutionalism."[9] Steven Gill's neo-Gramscian analysis elucidates why the questions about the democratic form and the political-economic structure of global society are so closely interwoven. He characterizes disciplining neoliberalism as applying pressure on individuals and states, from IMF structural adjustment to transnational private law. The concept of "new constitutionalism" encompasses the complex interlinkages of national, supra-, inter-, and transnational legal orders which often have the effect of legally curtailing democratic and social achievements attained at the national level. Law generated and administered within the "new constitutionalism" is formulated and decided outside any democratic process that is open to scrutiny. As the scope of this law

expands, the potentials of democratic policies, and therefore also of social policies, are diminished to an ever greater extent.

Designating the totality of these first and foremost juridical or at least juridically induced orders as "new constitutionalism" is in the view of popular sovereignty theory absolutely appropriate. The "old" constitutionalism of the 19th century aimed at limiting the power of monarchies by means of a legal constitution in order to permit the structures of bourgeois society to develop.[10] "New constitutionalism" is based upon a comparable intention. Here, too, the purpose is to secure the functional structures of bourgeois society, but its opponent is no longer the rule of the monarchy, but the historically achieved extent of the rule of democracy in the Western welfare states, where it was possible to establish those social advances that are being withdrawn from democratic discussion and decision-making in the framework of the "new constitutionalism" by transferring authority to the transnational level. While the "old" constitutionalism is often interpreted as a necessary transitory stage on the way to the modern democratic constitution,[11] popular sovereignty theory, in contrast, considers constitutionalism only as a possible, not a necessary phase of transition.[12] The goal of the "new constitutionalism" is to put this successor of the old in its place, albeit without doing away with its democratic form, thereby producing post-democracy.[13] Therefore, it is hardly surprising that "new constitutionalism" became a reality beyond the democratic state in supranational and transnational regimes based on international law.

The most important elements of the "new constitutionalism" are the various levels of transnational free trade orders: the WTO at the global level, and especially NAFTA and the EU at the regional level. Committed to reducing tariffs and regulatory barriers to trade, all three regimes exert legal pressure to deregulate at the national level, which is intensified and made dynamic by the courts' institutionalized production of law. Above and beyond these free trade commitments, the "new constitutionalism" also includes manifold forms of protections of property used for economic purposes, which are guaranteed by international law. There are, first, the practically multilateralized regime of bilateral investment protection agreements, including the arbitration system[14] essential for its functioning, then the various international legal regimes concerning the global exploitability of "intellectual property," and thirdly the international commitment to recognizing an autonomous contractual order created by a transnational economic arbitration system. And finally in this context, the imposition of discipline on national monetary and fiscal policies, culminating in "monetary and fiscal constitutions" whose normative center is monetary stability as well as balanced budgets, is of central importance. This imposition of discipline takes place either by means of the direct economic power of the "financial markets" (*i.e.*: financial capital), previously liberated from regulation, being exerted over states encumbered with debt with the help of the credit and financing conditions of the IMF and the World Bank, and in particular in the European Union by the legal coercion of European law[15] which the Member States of the Eurozone must now internalize in constitutional law as well.[16]

3. DEMOCRATIC ANTI-CONSTITUTIONALISM

The counter-strategy of Maus' democratic anticonstitutionlism rests on a comprehensively reconstruction of popular sovereignty as the sole competence of the people (those subject to the law) to generate constitutions and laws.[17] The constitution has the task of placing the exercise of this competence in a hierarchical system of the separation of powers. By means of functional separation of powers, all state power is subordinate to democratic law. The central structural aspect of the sovereignty of the people is a political egalitarianism that lends all individuals subject to the law the same rights in the democratic process and that alone permits the reconciliation of the idea of individual autonomy with the required force of the law. The following additional aspects should be mentioned, which involve a fundamental skepticism concerning disengaging the concept of the constitution from its national frame of reference and to transfer it to supranational forms of government[18] that has itself been critically discussed.[19]

Making one's own laws requires that the members of the legislature understand the social world that they desire to shape through their laws, and that they are able to foresee the consequences of their attempts to guide developments by means of the law at least to some degree. It follows from this that the social world must not become too complex; it must still permit appropriate understanding by lawmakers. If democratic theory, not only popular sovereignty theory, does not want to deliver itself up to the systems, it must insist normatively on their being readily comprehensible, in contrast to the view that the complexity of the social world requires that it be left to regulate itself. The expansion of the political framework to an ever higher level, covering an ever greater geographical area, on the other hand, results in an increase in complexity that, in terms of formal democracy, would involve a loss of democratic means of control.

In addition, parliamentary democracies depend on a political-institutional infrastructure that makes it possible for political decisions to seem as if they are at least also the result of discourse in society.[20] This infrastructure includes in particular political parties, associations and mass media that must not merely exist in formal terms, but also vigorously fulfill their roles. The latter, however, usually requires a shared language. It must be a generally accessible language, that is, a language in which all strata of society can express themselves, not merely the functional elites who are able to adopt any appropriate *lingua franca*. If such a shared language as the basis for operating the political-institutional infrastructure of democracy is lacking, this automatically strengthens the power of the bureaucratic apparatuses, because in a situation in which the democratic infrastructure is institutionally weak, they can make unimpeded use of their advantages stemming from superior knowledge, lack of transparency and real power to shape policy.[21]

Finally, an untamed public that expresses itself via demonstrations, rallies, actions, initiatives and civil disobedience can only confront identifiable people bearing responsibility in comparatively manageable spaces.[22] To date, "politically effective publics" whose discussions can be transformed

into institutionalized democratic decisions exist only in nation-states.[23] Future decision-making centers at the supranational or global level could only be reached by publics of this kind with enormous effort, in spatial terms alone. This forces the untamed public to reduce its concerns drastically. In addition, it is faced with the task of turning itself into a transnational public, which also increases not only its own costs of action in terms of expense and time, but also confronts it with the problem of communicating in different languages.

All these aspects indicate that a democratic constitution beyond the nation-state would have to struggle with a significant loss of democratic quality. William E. Scheuerman[24] objected to this finding by stating that these are merely empirical phenomena that do not make the prospects for a democratic constitution of global society look bad in principle, but only temporarily. Overall, all of these technological and societal factors of the ongoing compression of space and time were changeable over time; therefore, the same is true of what can be considered comprehensible or overly complex.[25] According to this argument, it cannot be ruled out that a global transnational public is forming, founded upon the internet. Just as little can it be ruled out that language barriers will be overcome in the future.

To us, it seems more likely that the existing transnational class of corporate executives, politicians, and experts will persist,[26] and that its members will always be able to keep the majority of the population at arm's length because of their greater bureaucratic and expert technical knowledge and their superior ability to express themselves verbally, which the remainder of the popular will never be able to attain. But we also consider it misguided to diagnose the problem of the complexity of a global government as merely empirical in nature and therefore maybe temporal. Whether or not governing the world is a more complex task than, say, governing France, is surely an empirical question, but it must certainly and always be answered in the affirmative. For there is every indication that citizens are already rather overburdened with democratically governing their capitalist welfare states. Of course, this circumstance is regrettable, and political science dealt extensively with it in the last quarter of the 20th century.[27] There is little reason to believe that the difficulties analyzed then have been overcome today. It seems more than likely that such problems are being successfully neglected as theory pushes toward political global governance. In no way can it be viewed as unproblematic from a democratic perspective to exponentially increase complexity once again by establishing a world government.[28]

It must also be emphasized: At no point do the problems of a democratic constitution beyond the state mentioned here refer back to essentialist prerequisites of democracies, such as a prepolitical national identity which would be fed by, for example, a shared national, cultural or historical fate. The issue here is restricted to the strictly procedural conditions under which democratic constitutions operate.

Inasmuch as this line of argument designates the nation-state as, at the moment, the only functional sphere for democratic procedures, the

dissolution of the "new constitutionalism" can apparently look only like this: In order to regain policy-making opportunities for democratic constitutions at all, the already established forms of "new constitutionalism" must be reduced to forms that make them comprehensible as the expression of democratic self-determination. To this end, the inter-, trans-, and supranational regimes, detached from any democratic basis, must be stripped of their power and their regulatory authority must be returned to the democratic sites where law is produced in nation-states.[29] Then, in addition to national conflict of laws,[30] it is largely traditional international treaties that come into consideration as instruments for juridifying relations with other countries. The need to be ratified places the latter within the framework of a democratic constitution as a formal legislative act. Although international treaties are legal instruments based on compromise and consensus and negotiated by emissaries, they are formally and without reservation democratically codified law.[31]

Of course, the forms of "new constitutionalism" are also always founded on international treaties, from the global financial institutions such as the IMF and the World Bank through the free trade associations such as the EU and NAFTA to bi- and multilateral investment protection. We believe, however, that declaring these "new constitutionalism" regimes unproblematic in light of their formal democratic basis in parliamentary ratification of their constitutive acts would run counter to Maus's intention. Any preference for the law of international treaties as a form of codification of relations with other countries must be linked to the requirement that the treaties must not in fact set in operation any constitutionalization beyond national democracy, either.

There would be no room for subjective rights whose content and applicability would be defined by non-state courts and which private individuals could directly exert against existing state law, as is the case in the EU and in the framework of international investment protection, for instance. However, problems of a constitutional character can result not only from international treaties having direct domestic legal effect, but also from their material content. Requirements to refrain from non-tariff barriers to trade, indirect discrimination against or impediments to transnational business activity, for example, are capable of subjecting most state law to juridical control on the part of non-state courts. Such controls, which have equal standing with any existing constitutional limits of democratic lawmaking and which at times apply at a much deeper level than these limits do, makes the leeway available for democratic shaping of policy smaller, not just in marginal areas, but across the board. In other words, along with the conflict of laws, a non-constitutional law of international treaties in the sense outlined here constitutes the relevant form of shaping law that is compatible with democracy beyond the nation-state.

4. ON THE POLITICAL ECONOMY OF A WORLD SOCIETY FRAGMENTED INTO DEMOCRATIC STATES

How then does the strategy of democratic anti-constitutionalism appear in the light of political economy? In the present context, world-systems theory promises to be particularly enlightening.[32] For on the one hand, the theory's central unit of analysis is the world system, understood as an integrated system of highly different states, with its structure and hierarchy the result of a global division of labor for reproduction of global society.[33] That is why world-systems theory can shed much light on material disparities among states, posing a problem for democratic anti-constitutionalism. On the other hand, the nation-state continues to play a prominent role in world-systems theory analyses.[34] The dynamics of the world systems are to be explained most of all on the basis of relations states have among each other. Thus, the theory's analytical framework is not all that far removed from the categories of democratic anti-constitutionalism.

From the perspective of global systems theory, the central structural aspect of capitalism has always been (not only since the beginning of what is often called "globalization" and said to date from the late 20th century) the coexistence of a limitless, or global, economy and limited, or spatially fragmented political orders. In the absence of an overarching political order, the system is held together as a system only by an "axial" international division of labor.[35] The axial international division of labor brings us to a hierarchy of states that can be roughly divided into three tiers: the center, the periphery, and the semi-periphery. Especially in times of great crises, allocations to these categories can be organized anew, but states strive to defend or improve their positions within the hierarchy at other times as well.[36] Within each of the three tiers, this gives rise to hierarchization referring to a stable or threatened position or the prospect of moving up the ladder to the next tier, whereby the most powerful position is that of the hegemony at the center, a position which is, however, not always occupied.[37] The relationships between states are thus characterized not only by competition for a (better) position in the international division of labor, but are essentially determined by the unequal initial conditions in this competition. States — and therefore democracies — at a higher tier in the hierarchy tend to be in a position to dictate conditions to the states — and therefore democracies — at a lower tier.

This structure can be illustrated especially in the period preceding that of the new constitutionalism, to which the political order of global society in the form of democratic anti-constitutionalism corresponded, at least roughly. We refer here to the period of the relatively favorable post-World War II "golden age" of democratic self-government in the state framework.[38] Although there was considerable leeway for democratic policy-making thanks to fixed exchange rates, controls on flows of capital and controlled world trade, this room to maneuver existed from the outset only for the Western industrialized nations, and even for them, it was dominated by the structures of U.S. Hegemony,[39] what becomes especially clear in light of the transformation of the global financial system;[40] both aspects

place even the "golden age" in deep contradiction to the image of democracies on equal footing sketched out above in conceptual terms.

To the extent that democratic anti-constitutionalism signifies framing the international division of labor politically through straightforward treaties regarding international law, the political-economic problem comes into stark relief: This non-constitutionalist international law may, as emphasized above, indeed rest on a formal democratic foundation. But if there are serious imbalances between the contracting parties, the democratic freedom to conclude international treaties is just as illusory as the freedom of private individuals to conclude contracts. While in the latter case, the results of the imbalances are controlled by legal means (contract law), in the case of the law of international treaties there is unrestrained autonomy. The limiting norms of modern *ius cogens*[41] are far removed from even touching on the problem of socio-economic asymmetries.

That is why the conditions of inequality and exploitation inscribed in the international division of labor of the global capitalist system cannot be overcome by means of simple international-law treaties; yet they are the only ones permitted by democratic anti-constitutionalism. This perpetuation of inequality and exploitation, thus linked with democratic anti-constitutionalism, is, however, not only a problem of trans- or international justice.[42] It is a problem of democratic self-determination. Viewed from the perspective of the states the internal democratically constituted self-determination of the stronger party becomes the heteronomous limit of the democratically constituted self-determination of the weaker party. Democratic anti-constitutionalism would apparently be neutral toward the given hierarchically structured world order. In contrast to the case of neutrality of the democratic constitutional order, whose purest form is characterized exactly by fundamental neutrality vis-à-vis the outcomes of the democratic process,[43] no democratic process would be available in the international context that would at least open up the possibility of addressing or eliminating existing international socio-economic power relationships. Fundamental transformations aimed at a relevant change or even abolition of international hierarchies and power relationships are not possible within such a framework. Creating an egalitarian global order in the sense of equal material freedom of states to shape the world around them is referred here to a social transformation perspective which could precisely not be maintained in the course of ordinary democratic shaping of law.

This finding does not yet mean that the strategy of democratic anti-constitutionalism loses all its persuasiveness. It simply means that it still has not provided an answer as to how its intention to secure democratic freedom can be cope with the problem of the economic structure of world society.

5. PROGRESSIVE CONSTITUTIONALIZATION OF THE WORLD SOCIETY

This finding motivates to explore the possibilities of an alternative strategy for the transnationalization of popular sovereignty, the strategy of progressive constitutionalization[44] of Jürgen Habermas. His ambitious project is that of a "political constitution for the pluralist world society". The elaborate derivations and flourishes relating to that constitution of a world society, undertaken anew time and again, will not be taken into consideration here;[45] rather, we will limit our analysis at this point exclusively to the structure of Habermas's proposal. His model is founded upon mirroring a differentiation between juridical supranationalism and political intergovernmentalism derived from the theory of European integration[46] at the global level. Externally, juridical supranationalism shares the formal characteristics of the "new constitutionalism" by limiting the sovereignty of the states by legal means. However, its reach is strictly limited to peacekeeping and securing elementary human rights. The global organization has a hierarchical structure, makes binding laws and has the power to enforce them directly. In light of its limited responsibilities, namely preventing states from committing human rights violations internally and from waging war externally (which, as contents of (potentially) democratic self-determination, can in any case be defended only with difficulty), the need for democratic legitimation is low here.[47] Therefore, the purely juridical constitutional forms suffice.

Alongside this global supranationalism for securing peace and basic human rights, there is to be a regime that deals with global problems which require states to cooperate in order to come to grips with them. This is the well-known "global governance without a world government." Habermas makes basically the two following statements about this regime: The decisive actors are not today's nation-states, but a much smaller number of global players. These form a "system of negotiation" of which it is certain that "government representatives generally bear the responsibility and have the final word" within it and which therefore does not "provide a forum for legislative competences and corresponding processes of political will-formation."[48]

While we are told little about the institutionalization of international negotiations besides being given an additional description as a "central negotiation system" with "generalized competencies," or a non-hierarchical "organization that works multilaterally,"[49] Habermas provides all the more information about the global actors decisive in this system. Most of them are continental-scale entities for action that have yet to be created. According to Habermas, only entities of this magnitude (the U.S. and China are acknowledged as being capable of acting for themselves, possibly also India or Russia) are in a position to act globally, and only a relatively small negotiating group consisting of the continental global actors is capable of solving the urgent political problems of a global nature. In the final analysis the global actors are apparently to have the political form of states (although Habermas refuses to use this term, and calls them "global

players" or "continental regimes" instead). They have the political form of states, as on the one hand, they are to retain the use of force to enforce laws internally and on the other, they guarantee the democratic legitimation of the positions and outcomes of negotiations at the transnational level.

This imperative to form state-like global players, derived from Habermas's response to the problem of a constitutionalization of world society, also characterizes his position on the European Union. There, he advocates that the European Union should become a collective actor with the characteristic powers of a modern state to intervene internally, namely in the fields of taxes, economic regulation and social equity, as well as externally through typical external state functions. The project of making Europe a state is of such eminent importance that in the final analysis, Habermas has called for nothing less than a revolutionary breach of legality that aims explicitly at excluding the United Kingdom and at least accepts the possibility of expulsion of the Central and Eastern European countries.[50]

6. POLITICAL ECONOMY AND THE POLITICAL CONSTITUTION OF WORLD SOCIETY

If we take another direct look at the image sketched by Habermas, disregarding supranational constitutionalism concerning questions of peace and protection of basic human rights and concentrating on the political questions that require legitimation, then, in the final analysis, the following image emerges: state-like continental regimes, which are not necessarily democracies, negotiate. Now, it is not apparent how such transnational negotiation of legal norms is to differ from the negotiation of international treaties. Viewed dispassionately, this is the same picture drawn by democratic anti-constitutionalism. The decisive difference is merely that it is not based on the universe of states as they exist today, but demands that they be ordered anew as a system of continental states, so that the decisions will have the necessary authority and effectiveness. However — implicitly reflecting the objection to democratic anti-constitutionalism developed above — it is apparently hoped that making the continents into state-like regimes will result in a balance of powers, which, in contrast to the system of states as it exists today, could justify the expectation of reasonable and fair negotiation results. Here the same situation as in democratic anticonstitionalism occurs and with it the same problems.

In one of his most fundamental publications about Europe in which Habermas specifically takes up the question of transnationalization of popular sovereignty anew,[51] he also addresses the discussion about the possible state-like characteristics of global governance and modifies its supranational embeddedness.[52] His solution is to embed transnational global governance more strongly in the context of constitutionalized global society. He does this by stating that the supranational global organization is also to "oversee the factual balance of power ... in the transnational negotiation body" and to set binding minimum standards for the fields of

global governance as part of its task to concretize the human rights which are to be guaranteed by the states.[53]

By this, Habermas expands the competencies of the global organization to include global governance. While the global organization itself does not undertake material rule-making, it does set a material framework for law-making by imposing minimum standards and a procedural one by controlling bargaining power. The global organization has virtually delegated material rule-making to global governance, within material limits and under procedural conditions. Because the world organization takes on this dual control of global governance, it takes over responsibility for it. At this point the world organization can no longer be differentiated from a world republic that delegates certain questions to global governance as the suitable forum for negotiation.

By approaching the idea of a world republic so closely, Habermas undermines the strict limitation of the world organization's tasks which is of central importance to him in terms of the theory of legitimation. Only because the world organization was to be limited conceptually to the fields of war and peace and the protection of fundamental human rights, underpinned by universally shared moral norms whose application Habermas believes is less political than juridical in nature, was a lowering of the standards of legitimation possible at all.[54] Now, if this boundary is removed, democracy's fundamental requirement for equal and effective participation by all will also demand realization. The impossibility of it being realized at the global level, which Habermas himself recognized,[55] is the final objection to this revision of his model.

7. EUROPE AND THE TRANSNATIONALIZATION OF POPULAR SOVEREIGNTY

Let us turn to the other side of this sketch of progressive constitutionalization, the prospects for the formation of continental state-like regimes, and concentrate on the prime example of the Europe Union, as does Habermas. European integration currently has to grapple with two structural difficulties commonly known as the "democratic deficit"[56] and the "social deficit."[57] The current crisis of the euro has only made the two deficits more visible, more relevant and more painful. And it has led, with the euro bailout funds, the "fiscal compact," and new measures of macroeconomic surveillance, to considerable exacerbation of these deficits.[58] But basically, the structure of the problem, as it is presented here, has remained the same.

What many pro-European progressives, including Habermas, overlook is that the EU's democratic deficit is not simply a matter of the EU Commission's monopoly on legislative initiatives, or its missing parliamentary accountability, or the unequal footing between Parliament and Council, or the role of the European Council.[59] The democratic deficit amounting to a lack of political equality among European citizens is just as fundamental if not more so. The German Federal Constitutional Court rightly placed much emphasis on this aspect in its decision on the Treaty of Lisbon.[60]

If it is correct that legal coercion is legitimate only if everyone subject to it participated equally in creating it, then it is no quantité *négligeable* that European citizens are represented highly unequally in the parliamentary law-making body depending on their nationalities. Europeans citizens are represented even more unequally at the level of creating or changing the constitution, and this holds both for the present situation and for many well-intentioned and well-considered proposals for democratization.[61]

In contrast, Habermas at least outlines the act of revolutionary constitution-building as a vote on the part of a European people,[62] and one can imagine that he would approve of ensuring such powers to change the constitution in the future as well. He is silent concerning the modalities of parliamentary representation, however. And perhaps not by chance. For then, it would become all too obvious that from another perspective, the demand for democratization would reveal itself as an enormous increase in the power of the large Member States, in particular Germany. Against this background, it has rightly been emphasized that it belonged and still belongs to the prerequisites for the establishment and the continued existence of the Union that creation of a European constitution and laws is not carried out according to the principle of egalitarian representation.[63] If that is so, however, then one would have to distance oneself explicitly from postulates of democracy that always refer to egalitarian participation in the modern constitutional state-like regime without further qualification. Once that has been conceded, it becomes questionable at least for us whether one can still hold fast to the project of making Europe a state and whether one still desires to do so, on the basis that when it comes to the principle of egalitarian participation central to the democratic theory the European Union cannot but form an *aliud* to the modern constitutional state.

The unsolvability of the democratic deficit discussed here in terms of regarding European integration as the formation of a state-like regime, has political-economic underpinnings that have immediate application to the problem of the "social deficit." In a nutshell: The Member States of the Union not only relate to each other as partners in a supranational-federal entity whose transformation to a federal state they must consider. Under the current conditions of European integration, they are also first and foremost competing states which must seek a competitive edge under the exacerbated conditions of integrated markets and expanded financial markets.[64] From this perspective, European integration was and is a framework with a dual function: It improves the overall situation of the Member States in comparison with the rest of the world, but at the same time, Member States can achieve advantages in comparison with the other Member States.[65] The latter results in the fact that the interests of the Member States are not aligned in relation to European integration, either. This manifests itself above all concerning true social policy in the sense of a policy with direct redistributive functions.[66] Here, within the Union too, economic interests and institutions of the social welfare state collide, which, as Fritz Scharpf in particular has shown time and time again,[67] make integration of the sectors of true social policy (including industrial relations, social insurance, social welfare, public services) very improbable.

The euro sovereign-debt crisis and the policies for dealing with it provide the most vivid evidence for these diagnoses.[68] The common currency had permitted Germany to reattain its strong competitive position within the Union, which it had lost at the beginning of the millennium, by means of coordinated restraint in increasing wages on the part of the collective bargaining agents. The other euro countries were neither in a position structurally nor were they willing politically to respond with the same tools of lowering wages and cutting social services and benefits. This resulted in the unfair situation — which was enormously advantageous for Germany — of the euro being undervalued relative to the German economy and it being overvalued relative to the economies of the countries in debt today. As a consequence, German balance of trade surpluses continued to rise, as did the public and private deficits in the debtor countries; both are two sides of the same coin, even if the bank bailouts are also partially responsible for public debt.

The current crisis would actually make real communitarization of labor, economic, and social policy necessary, which would open up real latitude for democratic policy at the European level.[69] At the end of this process of communitarization, the Union would be barely distinguishable from a modern federal state in terms of its competencies. (This would surely put the principle of equal participation on the constitutional-policy agenda with a new and considerable urgency.).

In other words: The macroeconomic pressure to cure the Union's social deficit is stronger than it has ever been in the history of the Union. But the development is moving in the opposite direction. Germany — and by no means only the German government — is not willing to put the economic advantages of the monetary union up for negotiation by means of such communitarization. Instead, the focus is only on equipping the EU with those regulatory means that are necessary for the functional imperatives of the monetary union to prevail over the democratic policies in the Member States. Today, these means include in particular the European Stability Mechanism[70] with its strict requirements for the recipient countries, the Treaty on Stability, Coordination and Governance[71] as the crowning achievement when it comes to disciplining Member States' budgeting authority, and macroeconomic surveillance of Member States' labor, economic, and social policies.[72] These instruments do not require democratic control at the European level because the substance of the macroeconomic functional imperatives of monetary union, which is to cope without communitarization of labor, economic, and social policy, is a foregone conclusion: austerity as well as reductions in wages, social services and benefits.[73] This architecture of the monetary union — if it does not ultimately result in the demise of the euro — is ideally suited for securing not only Germany's economic but also its political hegemony within the Union over the long term. Even today, it would be impossible to organize a political alternative to this German hegemony within the Union. Of course, we must admit that the other Member States are not seriously pursuing the goal of genuine communitarization of labor, economic, and social policy, either. We consider this to be further evidence supporting

our hypothesis: The Member States and at least the majority of their populations will continue to be inclined to continue safeguarding the ability to compete in Europe rather than agreeing to the uncertain adventure of communitarization.

To explicitly counter any political voluntarism, we must emphasize the following: the problem is not predominantly rooted in lack of will on the part of current decision-makers, either in Germany or elsewhere; rather, this will, which is indeed lacking, merely reflects the underlying structural problem of the juxtaposition of competing states, each with its own economic structure. In general, an "internationalization of the state"[74] can be observed, for which European integration forms an important arena. But speaking quite generally, the internationalization of the state does not result in the cessation of competition between the states of the capitalist center, and this applies to the relationships between the important Member States of the European Union as well. For this reason, the prospects for a more democratic and social "Eurocapitalism" appear speculative. To put it pointedly: fragmentation into nation-states is a central characteristic of global capitalist socialization. The nation-state plays a central systemic role in it. Therefore, resolving the fragmentation into nation-states by forming a single world constitution logically amounts to transcending the conditions of capitalist socialization. But reducing political fragmentation by establishing a system of a few continental states would also encounter systemic resistance.

8. CONCLUSION

Our conclusion can initially be presented in form of a dilemma. We must postulate the restoration of the unity of liberal, democratic, and social contents which characterize the concept of the modern constitutional state in order to counter the "new constitutionalism" and find a political form for the transnationalization of popular sovereignty. One possibility would be to abolish any kind of constitutional function beyond the nation-state. Such an order in literally international form would, however, not offer any political-democratic leverage against the pervasive global socio-economic hierarchies and the power structures resulting from them. The formally guaranteed democratic autonomy of states would be a space of possibility for true self-determination at best for a handful of Western industrialized nations. This insight is one horn of the dilemma. But the course vigorously pursued to escape it merely ends at the other horn. The alternative of progressive — that is democratic and social — constitutionalization of world society proves to be unattainable, even in the favorable case of Europe. For within existing societal conditions, the nation-states occupy a central role, one that apparently cannot be eliminated.

To find a way out, our suggestion is to conceive of the two strategies not as in opposition to one another, but as complementary. That would mean first of all that they would each have to give up their claim to universal applicability. Neither a complete return to the nation-state nor progressive

constitutionalization can be satisfactory responses to the question faced by the theory of popular sovereignty. Instead, defensive and progressive aspects must be combined in a new strategy.

At this stage, it only seems possible to formulate some guidelines which could provide orientation for this strategy. Firstly, one would have to realize that frequently it is precisely the structures of the "new constitutionalism" which are ill-suited as precursors to democratic order, but instead have an opposite effect. In this respect, analysis must focus on the object and the substance of the constitutional regime; the form of constitutionalist legalization in and of itself can by no means be understood as progress. Every international-law regime with a constitutional character would have to be scrutinized as to its concrete contribution to the possibility of a democratic order of global society. The regime of the European monetary union contributes primarily to curtailing democratic self-determination in the countries involved and should urgently be replaced by a European monetary system based on the Bretton Woods model. Other negative examples include the regime of international investment protection or the various regimes of free trade in services.

On the other hand, as already suggested in the political-economy critique of democratic anti-constitutionalism, it does not seem possible to do without constitutionalist regimes entirely. On the contrary, they are indispensable in the following contexts: firstly, sustaining the potentials of social democracy at the state level, for example regulation of international flows of capital; secondly, smoothing out economic asymmetries by means of development aid, for instance regulation of patents on pharmaceuticals; thirdly, maintaining conditions for human life, for example climate protection regulation. The losses of democratic autonomy at the nation-state level that such regimes entail would in fact have to be addressed through elements of progressive constitutionalization, which, however, can in point of fact no longer push for a comprehensive political order in the form of a continental, let alone global state. The idea of democratization connected with such elements must therefore refer specifically to the international character of the constitutionalist regime and must refrain in particular from striving to emulate the blueprint of nation-state democracy. The model provided by the Community method of the European Union, according to which supranational law requires qualified assent by national government representatives, on the one hand, and the assent of an European Parliament with a degressive proportional composition, on the other, is not the worst model for this.

>> ENDNOTES

[1] Maus 1994a; 2011.

[2] Habermas, 1994.

[3] Habermas, 2008.

[4] Habermas, 2001; 2012.

[5] Maus, 2006; 2010. In the following, we will discuss mainly Jürgen Habermas and Ingeborg Maus as advocates of popular sovereignty theory. Although both are German (and Frankfurt) theorists, viewed systematically, they are the representatives of two idealized strategies within the camp of popular sovereignty theory that entails theorists like William E. Scheuerman, Andreas Kalyvas, Hauke Brunkhorst, Thomas McCarthy, and David Held. About Habermas' and Maus' internal theoretical commonalities, see Niesen, 2011.

[6] Streeck, 2011;2013; Habermas, 2013.

[7] Biebricher, Vogelmann, 2014.

[8] Habermas, 2012.

[9] Gill 2002; 2008: 161-175.

[10] Schonberger, 1997: 234, 239.

[11] Böckenförde, 2006.

[12] Maus, 1994b.

[13] Crouch 2004.

[14] Schneiderman, 2000.

[15] Gill 1998.

[16] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (so-called "Fiscal Compact"), available at http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf (9.11.2012).

[17] Maus, 2011.

[18] Maus, 2005; 2007; 2010; Grimm, 1995.

[19] Eberl, 2011.

[20] Deliberatively accentuated popular sovereignty theory speaks plausibly of a structural coupling of inclusive deliberation and egalitarian decision, see Brunkhorst (2002, p. 676).

[21] Habermas, too, always skeptical concerning substantialistic deliberations, recognizes the problem of linguistic diversity for a European public that does not exist as yet. Habermas hopes for a "transnationalization of existing national publics" (2009b, pp. 182 f.). Regarding the modest state of affairs and equally modest prospects see (Peters/ Brüggemann/ Königslöw/ Sifft/ Wessler/ Wimmel 2005).

[22] Maus,1992.

[23] Fraser, 2007.

[24] Scheuerman, 2011.

[25] Scheuerman 2011: 265; 2004.

[26] Brunkhorst, 2007.

[27] Scharpf, 1997.

[28] Even Habermas, who does not want the argument of increasing complexity due to larger territory to be understood necessarily as a change of "the quality of the process of opinion and will-formation" must concede that there is "the danger of systematic distortion to which the circuits of communication are subject in geographically extensive and heterogeneous political public spheres — especially under conditions of (almost) completely privatized media as in the United States." (Habermas 2012, p. 20 n. 28).

[29] Maus, 2010: 71

[30] On the conflict of laws as a democratic form of transnational juridification see (Maus 2006) and in depth (Rödl 2011).

[31] On the loss of material power suffered by the legislature in the case of international treaties as against internal law-making see (Neyer, pp. 151ff.); on the interpretation of the link between international self-binding and internal loss of democracy as "new reason of state" see (Wolf 2000).

[32] Hopkins, Wallerstein, 1982.

[33] Wallerstein, 2004: 16.

[34] For criticism, see Gill, 2004.

[35] Wallerstein, 1974: 66ff.

[36] Wallerstein, 1980: 74ff, 244ff.

[37] Wallerstein, 1980: 36ff.

[38] Margins, Schor, 1992; Hobsbawm, 1994; Crowch, 2004; Leibfried & Zur, 2005.

[39] Arrighi, 2009: 269ff.

[40] Helleiner, 1996.

[41] Frowein, 2009. See. Art. 53 sentence 2, The Vienna Convention on the Law of Treaties. This includes the bans on aggression, the slave trade, and genocide as well as the requirement to respect basic human rights.

[42] On the controversy about the conceptual locus of justice in the global framework, see Rawls, 1993 and Beitz, 1975 with opposing positions.

[43] Maus, 1994a, 235ff.

[44] We speak of "constitutionalization" instead of "constitutionalism" because we would like to reserve the latter term for projects that do not pursue democratic ambitions.

[45] Habermas, 1995; 2001; 2006; 2007; 2008a; 2008b; 2012.

[46] Weiler, 1991. In addition, Habermas is aware of the level of coordination of "'technical' issues in a broader sense," which he would like to place in networks of transnational experts (Habermas 2008a, p. 324 and Habermas 2008b, p. 446). Although we doubt that the fundamental differentiation between political and technical questions can be supported — it should be noted that Habermas considers the field of combating organized crime, sensitive in terms of basic rights, one of the technical questions — we leave this issue out here.

[47] Of course, much depends here on what one considers to be human rights violations. Convincingly narrow, in contrast, the concept in (Cohen 2006).

[48] Habermas, 2008a: 324.

[49] Habermas, 2008b: 446.

[50] Habermas, 2009a. In Habermas (2012: 50), the expansion of "political steering capacities" is limited to "core Europe," that is the "members of the European monetary zone" as well.

[51] Habermas, 2012.

[52] See Maus, 2007.

[53] Habermas, 2012: 68.

[54] Habermas, 2012: 62ff.

[55] Habermas, 2012: 61f.

[56] Siedentop, 2001; Hix, 2008.

[57] Scharpf 2010; Hopner & Schafer, 2010.

[58] Fossum & Menéndez, 2014.

[59] Habermas, 2012.

[60] German Constitutional Court, decision of June 30, 2009 – 2 BvE 2/08, margin no. 268 ff., available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html (September 12, 2010).

[61] See also Offe, 2013: 608.

[62] Habermas, 2009a: 103.

[65] Neyer, 2010: 905.

[64] Hirsch, 2005; See also Hurrelmann et al., 2008.

[65] The debates on the distribution of the costs of Greece's impending national bankruptcy and the macroeconomic effects of German low-wage policy are the most recent examples.

[66] Leibfried & Obinger, 2008.

[67] Scharpf, 1999; 2008; 2010.

[68] Scharpf, 2011 e Streeck, 2011.

[69] Habermas, Bofinger & Nida-Rümelin, 2012; Offe, 2013.

[70] Treaty establishing the European Stability Mechanism, available at http://www.european-council.europa.eu (last accessed: 12.11.2012)

[71] See above note 2.

[72] Regulation (EU) No. 1176/2011 on the prevention and correction of macroeconomic imbalances and Regulation (EU) No. 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.

[73] Current demands for democratization of these instruments are therefore fighting a losing political battle, or are induced to moderating demands for democratic self-determination to only call for direct election of the European executive leadership (Maduro et al. 2012).

[74] Hirsch, 2005; Sassen, 2006.

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BETWEEN THE PAROXYSM OF REASONS AND NO REASON AT ALL: PARADOXES OF A LEGAL PRACTICE // ENTRE O PAROXISMO DE RAZÕES E A RAZÃO NENHUMA: PARADOXOS DE UMA PRÁTICA JURÍDICA

CLAUDIA ROSANE ROESLER

>> ABSTRACT // RESUMO

An analysis of court decisions of the Brazilian Superior Courts, according to the theoretical instruments of the Theory of Legal Argumentation, indicated a substantial deficit of rationality in the justifications produced by the judges on the reasons grounding their decisions. There is a notable difficulty in clearly establishing the links between the decision taken and the reasons behind it, as well as in associating it with other elements of the legal order (general rules and jurisprudential standards). Institutional and historical conditionings can serve as plausible explanations for this scenario, and the present article seeks to explore, even if only initially, some of the hypotheses to explain this characteristic of the Brazilian argumentative practice. // Uma análise das decisões judiciais dos tribunais superiores brasileiros indica um acentuado déficit de racionalidade nas justificações produzidas pelos julgadores quanto às razões de suas decisões, se utilizados os instrumentos teóricos da Teoria da Argumentação Jurídica. Há uma notável dificuldade em se estabelecer claramente a vinculação entre a decisão tomada e suas razões, bem como em relacioná-la com outros elementos do ordenamento jurídico (normas gerais e padrões jurisprudenciais). Condicionamentos de caráter histórico e institucional podem servir como explicações plausíveis para este quadro e o presente artigo procura explorar, ainda que de modo inicial, algumas hipóteses explicativas da configuração da prática argumentativa brasileira.

>> KEYWORDS // PALAVRAS-CHAVE

Legal Argumentation; superior courts; argumentation theory; rationality. // Argumentação judicial; tribunais superiores; teoria da argumentação jurídica; racionalidade.

>> ABOUT THE AUTHOR // SOBRE O AUTOR

Professor of Legal Theory and Legal Philosophy at the University of Brasilia. // Professora de Teoria Geral e Filosofia do Direito da Universidade de Brasília.

>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

Result of the analysis made on the research project financed by CNPq, named "Legal Argumentation and Rational Control: The 'state of the art' of justification in the legal decisions of the Brazilian superior courts". English translation by Caio Martino. // Resultado da análise realizada no projeto de pesquisa financiado pelo CNPq, intitulado "Argumentação Judicial e Controle Racional: o "estado da arte" da justificação das decisões judiciais nos tribunais superiores brasileiros". Tradução para o inglês de Caio Martino.

1. INTRODUCTION

Over the last years we have been recurrently seeing from different theoretical perspectives a movement of criticism of the legal activity in Brazilian courts. In this criticism is highlighted the low technical quality of the decisions and the difficulty in conceiving of them a coherent line of justification. The general picture is, thus, of a huddle of more or less erratic decisions.

The present article seeks to analyze the argumentative practice of the Brazilian superior courts, focusing on the Federal Supreme Court (STF) and the Superior Court of Justice (STJ), to understand if such criticism — sometimes made more with a polemical approach rather than an academically-oriented one — can be supported by the actual argumentative practice of the referred courts. In the end, the analysis will allow us to raise a few hypotheses to explain the situation and to suggest new directions for the research.

For the purposes of the analysis, as will be explained in detail further ahead, the court decisions were selected from the Federal Supreme Court (STF) and the Superior Court of Justice (STJ). However, the hypothesis of work is more comprehensive and covers the characteristics of argumentative practices employed by the other superior courts, as its main objective is to outline the elements that will allows us to understand why such characteristics were found. It is evident that an empirical confirmation of the hypothesis would have to be provided so that the research could conclusively affirm that these characteristics are common to all superior courts.

The most general finding, analyzed from recent and relevant decisions, is that there is an abundant argumentation in most cases, and an absolutely laconic one in others that would require more care in the argumentation. In addition, there is always a difficulty in determining the relationship between the grounds listed and the decision taken, making the public and social control of the quality of the decision very difficult.

Paradoxically, however, these decisions — so rarely submitted to social control in view of their characteristic — have been applied more significantly on guaranteeing human rights in Brazil, producing an interesting finding: rights are affirmed through a decision-making culture of authoritative outlines.

The present study reflects on this situation, although it does not explore all the implications deriving from this paradox. Therefore, the study is divided in two sections. The first one explores the argumentative characteristics of some recent decisions of the Brazilian Superior Courts and seeks to offer a picture of what can be concluded after an analysis based on the instruments of the theory of legal argumentation. The second part presents the aforementioned hypotheses and raises questions capable of inspiring future studies.

2. ARGUMENTATION IN THE SUPERIOR COURTS AND ITS CHARACTERISTICS

In order to familiarize the reader in relation to the premises from which the analysis starts, it is important to bear in mind that the role of the Judicial branch in the creation of Law is one of the central aspects of contemporary legal theories and it represents a sort of point of confluence amongst the several theoretical perspectives on the legal phenomenon.

A set of elements can be reconstructed in order to justify our finding. This explanation certainly includes the centrality of the Constitution in contemporary legal systems and the broadening of the sense of legal norms that derive from this centrality. Articulated to it, the overcoming of theoretical models based on the conception of the formal validity of legal norms, replaced with theoretical models that emphasize the argumentative dimension of Law is also a key aspect; as well as the increasing importance of the Judicial branch in social regulation as a branch that not only settles individual disputes, but also significantly acts in the resolution of disputes between the other branches, between social groups and between the organized civil society and the State.

It should not be dismissed, on the other hand, the difficulty in finding institutional solutions for the control of the contemporary legal activity through models of recruiting and selection specifically designed for the context of a more technical and less political Judicial branch. Last but not least, the necessity of applying elements for the rational control of court decisions, present in their justifications, is also important in order to improve their social control.

More than a theoretical issue, however, this is a relevant practical question over which more knowledge needs to be produced, since it is expressed in important decisions that define the social regulation of contemporary States. Its suitable understanding implies the execution of careful and empirical analyses as to how legal argumentation is in fact carried out in each national context — since that, as it is well-known since the studies on Classical Rhetoric, the agent of the argumentation is inserted in an argumentative practice constantly reconstructed by consensuses presumed or reflected by the participants of that practice. Therefore, what is accepted as rationally grounded or capable of being accepted as a good reason depends, at least to some extent, on the adequate comprehension of the lexicon of a historically limited audience. The participants of a practice will develop their arguments by wielding authors and ideas, managing certain types of arguments and taking certain concepts as assumptions, eventually conforming to a peculiar content and argumentative framework, albeit naturalized and incorporated as the standard to be adopted.

In this sense, each legal argumentative environment constructs and naturalizes a "means of argumentation", which can be briefly defined as the formal standard used in the formulation and presentation of decisions, including its presentation in the form of votes, the existence or not of discussions and divergences consigned in the dockets, the use or not

of doctrinal and jurisprudential references, the presence of institutional, material and formal arguments.[1]

The present article has this understanding as the background; but, instead of continuing on the valid and important theoretical discussion of these aspects, it seeks to shed a light on the argumentative practice of the Brazilian superior courts, comprehending, as previously mentioned, that beyond the theoretical dimensions, it is necessary to verify how this reality is seen in each institutional context and how the judicial aspect of the legal practice is applied in the construction and reconstruction of rights.

With the intention of seeking an approximation that allowed understanding how this problematic is translated into the argumentative practice of the Brazilian courts, analyses were carried out on recent and relevant decisions taken by the Federal Supreme Court (STF) and the Superior Court of Justice (STJ). The present study chose a methodology of work that consisted in using the Toulmin model[2] for the internal analysis of court decisions, determining their argumentative structure, and the requisites for a rational decision proposed by Neil MacCormick[3] for the external analysis of the decisions. The research covered decisions taken by the STF and the STJ over recent years, and was carried out between 2011 and 2013.

For the year of 2011, the selected STF decision was on the application of the Amnesty Law[4]. In 2012 were selected the decisions of the STF and the STJ on the dangerousness of persons affected with mental disorders, and the analysis covered a total of 65 court rulings (14 rulings from the Federal Supreme Court and 51 from the Superior Court of Justice)[5]. In addition, the STF decision on the "Clean Record Law" was also examined, considering its incidence on the construction of political rights[6]. Deepening the analysis of the decision taken by the STF on the Amnesty Law, the research also produced a reflection on the dimension of gender in the court's discourse, seeking to understand if the court was specifically sensitive to violence against women over the period covered by the amnesty granted by the law under analysis[7].

In 2013 and under the perspective of the STJ, the choice was for the decision that discussed the applicability of the Dry Law (Especial Appeal 1,111,566-DF), considering its relevance for the protection of individual rights[8]. Covering the decisions of state courts and the STF decision, the court rulings recognizing or not the possibility of same-sex unions were also analyzed. The analysis covered 186 rulings from the courts of justice and the Direct Action of Unconstitutionality ADI 4,277[9].

The data collected in these analyses, as one can imagine, are very fertile and multi-faceted, requiring a deeper and meditated-upon reflection in order to allow the outline of a definitive "result" that defines the state of the art of justification in the Brazilian superior courts. Some findings, however, could not be discussed under the specific perspective of this work.

First of all, it seems quite evident that the decisions taken by the STF in controversial cases, such as some of the analyzed decisions (Same-sex Unions[10] and Amnesty Law[11]), are provided in extremely large rulings which are, therefore, of difficult technical analysis. The argumentation

made by the Justices covers such a broad and varied set of aspects and employ an equally broad and varied set of sources that the mere separation of the grounds of the decision — the *ratio decidendi* — and their comments or additions — *obiter dicta* — is practically an impossible endeavor. It should be added to the extension and amplitude of the references the peculiar characteristic that in some decisions there is no clear discussion among the judges on the **same issues**. Therefore, a synthesis of the grounds of the decision is a task given to the hermeneut, and it is made based on criteria that are external to the decision.

On this specific point, moreover, there are quite significant signs that the STJ follows the same patterns, as one can see, for example, in the analysis made on the judgment of the Especial Appeal that discussed the application of the "Dry Law", in which the justices clearly did not discuss the same arguments, making the comparative analysis or summary of the reasons used to decide the issue extremely difficult.[12]

It can also be noted that the system of collegiate decision adopted in Brazil — of individual votes previously prepared by the judges (and their advisors) based on the lawsuit and taken to the judgment session without the others having necessarily had a previous knowledge of the opinion of the rapporteur or of the opinion of each judge — contributes to that difficulty. In the majority of cases, it can be clearly noted a text structured beforehand, produced in the office, which either is not modified in the moment of the collegiate decision or, if it is, it comes simply added of new arguments or of a re-edition of arguments already listed in the main part of the vote of each judge[13].

This picture creates a reality that can be defined in short as a set of decisions rather than a collegiate decision, in which it is possible to find undisputed agreements and disagreements resulting in majority votes or unanimous decisions. In other words, although it is a collegiate decision, it is not always and exactly the product of a debate of the collegiate, but a superposition of legal positions, which redound in a decision, occasionally with agreement on the foundations, but not necessarily so[14].

It is evident that this institutional reality — the system of individual ready-made votes presented to the collegiate and the subsequent incorporation of everything that is said throughout the judgment session in the full ruling — would allow, in principle and in theory, a better control of the production of the decision, as everything is registered in the final text. The first paradox appears here, in the finding that this mechanism of extreme publicity of the reasons of the decisions of all and each one of the judges involved is exactly what causes this difficulty in understanding what the reasons for the decision were.

The next step of the decision taken in the plenary, which corresponds to its transformation in a syllabus that summarizes the decision taken by the collegiate, on its turn does not necessarily obey the reasonable assumption that it should represent a synthesis of all of the positions that defined the decision. Normally carried out by the rapporteur or by the judge who led the majority vote, it quite often represents only the grounds of his/her own opinion and does not clearly and comprehensibly incorporate what

was exposed by the others that, quite often, agreed on the decision but not on the same grounds.

It is quite evident that a reconstruction of the grounds of any court decision is a task to be made *a posteriori* and in an external way, i.e. by the hermeneut. In no court there is a clear identification of what the *ratio decidendi* are by the judges themselves. It is alarming, however, that the difficulty is such that a reasonable concordance between two technically capable and well-prepared hermeneuts cannot always be reached, and this refers to decisions of great impact in the Brazilian legal order, such as, for example, the decision that recognized same-sex unions. It is not, as one could perceive, an ordinary decision and it underlines the relevance of the judicial function, most of all because its adoption implied an interpretation quite distant from the literality of the constitutional text[15].

The sum of these factors results in a quite scary diagnosis which could be summarized as follows: it is possible to tell **what** was the decision taken, but not necessarily is it possible to understand what were the reasons behind it and, sometimes, what is the reach of the decision[16]. If we consider, as it usually happens in contemporary legal orders, that the jurisprudence orients or binds posterior decisions, it would be reasonable to suppose that there would be an increasing care in the explanation of the reasons, as the role of the Judicial branch is increasing significantly as a true regulator of social conducts, as pointed out in the beginning of this reflection.

Another important aspect that can be inferred from the referred analysis is on the use of the doctrine to support the construction of decisions. It was observed that there is an abundant use of references to authors, both national and foreign, frequently cited with an evident character of appeal to their authority, as the quotes or mentions made are not suitably discussed and inserted within the discursive context of the decision. It should be clarified that the adequate mention to theoretical concepts can even be desired and help in the comprehension of the reasons why a decision was taken. What is arguable, however, is the successive listing of authors whose congruence is of difficult perception. A symptomatic example of that is the vote of the rapporteur in the decision that recognized same-sex unions, in which, along 32 pages, 14 different authors are mentioned, ranging from Hans Kelsen to Carl Jung, going through spiritualist Chico Xavier, musician Caetano Veloso, and philosophers Jean-Paul Sartre, Hegel and Nietzsche. The second vote of the same decision cites 13 authors along 11 pages. The justice that signs it affirms, furthermore, that a sentence is and should be "what the judge felt to be appropriate, the sentiment of court" and in sequence makes, as he expressly affirms, a "digression" of about 9 pages to, in the end, adopt integrally the vote of the rapporteur. Such abundance of citations may be explained as an attempt to construct an image of erudition of the judge issuing the vote even more than — as would be expected in a case of such complexity and amplitude — an argumentation aimed at the understanding of a spectator that needs to be convinced of the correction of the reasons for which the decision was taken.

The analysis of the decisions also allows us to verify that there is little care in the application of the jurisprudence as a precedent that serves as the grounds for a new decision. Thus, not always the position previously adopted by the collegiate is maintained and sometimes there is not even a more careful discussion on the reasons why the court has changed its positioning. In a similar sense, but in the opposite direction, our judges seem to think that if there is an agreement with the already established jurisprudential current, the definitive argument is to simply refer to the previous decision, without discussing its pertinence to the new case, limiting themselves to invoking the decision without presenting any type of explanation of their reasons. In summary, it seems possible to affirm that here we also find a reasonable difficulty in understanding how the jurisprudence works as an element of control in the rationality of decisions in the context of an affirmation of the Judicial power as an important focus of the construction of rights.

In this sense, the position of the STJ seemed to be extremely serious and symptomatic in what was observed in the analysis[17] of its decisions on the application of civil commitment based on the dangerousness of the agent[18].

On this matter, the jurisprudence of the Federal Supreme Court was consolidated in the sense that the maximum duration of civil commitment is of thirty years. In the Superior Court of Justice, however, there were until recently three distinct orientations on this subject: (i) there is no maximum limit for the duration of civil commitment, whose extinction is conditioned to the cessation of the dangerousness; (ii) this limit is determined by the maximum penalty abstractly applied for the criminal offense committed; (iii) the duration of civil commitment is limited to a maximum of thirty years.

The aforementioned research showed that the majority of judgments were made by the same Panel and, therefore, the same issue was decided by a reasonably stable composition of judges.[19] In spite of that, it was found that jurisprudential changes are not being institutionally promoted through debates in collegiate institutions, but through a change in the individual understanding of each Justice[20].

As it can be easily perceived, the orientations found in the STJ are incompatible with one another and it is particularly serious to note that all of the rulings of the STJ analyzed in the aforementioned study were unanimously approved by the Justices that compose the integrating institutions of the court.

This analysis deserves some detailing as it can serve as a good observation point for the problem under examination. Having verified the argumentative structure of each of the selected rulings, a prevalence of arguments of deductive nature and of internal justification[21] of the decisions was noted. Apart from the unanimous approval by the judges that compose the collegiate institutions, the rulings do not have within themselves any discussions over the points of disagreement, i.e. the disagreement is not given due consideration when making decisions.

Apparently, therefore, our judges of the STJ understand these cases as "easy cases"[22], where there is no need to justify the premises applied more

broadly, being sufficient to mention them and "to apply the norm to the case *in concreto*". But more than that, if there are distinct jurisprudential orientations and the judgments are all by unanimity, it seems reasonable to suppose that the justices always follow the vote of the rapporteur, without discussion on the content of their positions, conceiving their duties as a mere adhesion to the opinion expressed by a colleague.

The argumentative problems found in the decisions on this matter, however, are not restricted to these. Some specific argumentative problems were identified and discussed in the outcomes of the research[23]. In short and for the purposes of illustration, it can be observed, on the relationship between law and psychiatry in the analyzed court decisions, that the silence of the courts on the problem of dangerousness can be interpreted as an argumentative deficit, as the very notion of "dangerousness" needed some grounds for its application in order to make sense in the context of a legal order that protects individual freedom and human dignity.

As these argumentative problems can clearly demonstrate, it is shocking to note that the freedom and the lives of those submitted to the control of the penal system are treated with no argumentative care and the cases judged are simply assumed as "easy cases", with no kind of external justification to rationally allow the discussion on the quality of the premises adopted. Good or bad luck, understood in their broadest possible sense, will play a relevant role in deciding the fate of claimants: if their *habeas corpus* petition depends on the rapporteur, their civil commitment will have duration of 30 years, a few years or will last until the dangerousness disappears. As the definition of dangerousness adopted in medical reports is absolutely broad and general[24], once again good or bad luck will act upon the observation of this requisite for the application of civil commitment.

Apparently, we are before a situation in the extreme opposite of what was verified in the judgment on the Amnesty Law and on the Same-sex Unions: instead of incredibly large texts, with an excess of reasons held, authors quoted and previous decisions cited (even if without the due argumentative conclusion), here there is an eloquent silence that allows the court to avoid the debate amongst positions, assuming as "natural" that each of the judges have their own opinion on the topic, but that it is also necessary to reach an agreement. The "agreement", here, is "everyone respecting each other's opinions" as to enable decisions by unanimity.

Having made the analysis on the characteristics of the decisions, the following section presents reflections on this argumentative practice.

3. FROM MANY REASONS TO NO REASON AT ALL: THE PARADOX OF LEGAL ARGUMENTATION IN BRAZILIAN COURTS

As we could see in the previous item of this work, apparently the Brazilian superior courts, in particular the Federal Supreme Court and the Higher Court of Justice, argument differently depending if the case is "easy" or "difficult". In the "easy cases" there is no explicit argumentation and the decision-makers limit themselves to invoking legal norms and

jurisprudential precedents, taking for granted the correction of their application to the case being judged. In those considered to be "difficult", on the opposite, there is a great exposition of elements and reasons to compose the rationale of the decision.

Paradoxically, however, as we could see in the case of civil commitment, there is no detailed and broad argumentation to justify the normative and factual premises, including in cases where there is disagreement among the judges. Here, however we want, the qualification of a case as "easy" seems like a push. In this case, it seems that it would be necessary to face the controversy so that from it could be drawn something beyond a position simply derived from authority and, in the absence of a superior authority clearly identified, from the numeric prevalence of the majority position. In other terms, even if we have a skeptical position on the rationality of court decisions, it seems obvious that addressing divergences is a desirable conduct to serve as a guide for future decisions. Not doing so is giving little importance to the duty of justification of court decisions; it is indicating that the court decides in a certain way because that group of circumstantially chosen people decided on that occasion that it was going to be that way.

From another perspective, if we focus on a case such as the one that recognized same-sex unions, it seems evident that the extensive argumentation of the ruling and the abundance of national and foreign scholars, quotes from the legislation and from foreign jurisprudence, rhetorical ornamentations and poetical exhilarations do not serve to the reasonable purpose of clarifying to the claimants the reasons why the court has found it plausible to recognize same-sex unions despite the fact that the constitutional text mentions that the stable union is between man and woman. Instead of the scarcity of arguments, the other side of the aforementioned paradox appears here as a paroxysm of reasons. So many are the reasons presented, that at the end we are no longer capable of summarizing them into a coherent set of arguments and an herculean interpretative effort is required in order to eventually say that the decision was taken by invoking, for example, the principle of human dignity, of freedom or of equality. The final result, despite the apparent abundance of grounds, seems to be the same: we know what the court has decided, but there are serious difficulties in showing how the decision was grounded and, even more than that, what consequences it implies for other future cases.

The illustration that both cases can give us show an image of the judicial function in the superior courts that relies on the authoritative aspects of the position, through which the judge feels authorized to express, in their decisions, more of their personal opinion (and their favorite authors, being jurists or not) than clearly and comprehensibly clarifying the reasons for their decision. Considering the institutional embarrassments already discussed in the previous item, the construction of the decision reveals more than what one would suppose at first glance: a sum of opinions and positions on what the legislation or the constitution means to say. The judge is, here, someone chosen by their erudition and by their technical capacity, who should constantly emphasize these characteristics and demonstrate their individuality.

This first part of the analysis could be summarized by indicating a low level of institutional commitment and an excessive attachment to the construction of a public image of the judge, possibly enhanced by their constant media exposure, in particular in "major" cases, followed and discussed by the press and, to some extent, by the public through televised sessions. If the media overexposure can work as an explanation for this exacerbation of the individual before the institution — the justice before the court — it should be underlined once again that this does not happen only in "major" cases. It would be easy, it seems, to blame the official TV channel of the Judiciary or the media and their interest on the "major" cases for the characteristics pointed out herein. On the contrary, as previously discussed, the analysis made of the decisions on the application of civil commitment, which by no means were appealing to the media or deserved much attention from the jurists, seem to confirm that each of the justices of the STJ votes "according to their own conscience" and thus produces an absolutely shocking situation of jurisprudential incoherence. The appellant can but expect that their request will be examined by a rapporteur whose position is the least onerous for their request. It means to say, furthermore, that apparently the brief of appeal presented by the attorneys, in an attempt to rationally convince them, produces little effect.

We could certainly find uncountable practical and institutional conditionings that would serve as explanation for this reality. Instead of blaming the official TV channel of the Judiciary and the media we could say that the means in which the holders of first-rank positions in the Judiciary are selected is what represents this great Gordian knot that needs to be disentangled. The procedural system could be discussed as well as its abundance of opportunities for taking a case to the STF or the STJ. Or maybe this list should also include an anathema to the Federal Constitution and its extensive list of rights.

It is also true that quoting a doctrine is not an evil in itself, and neither is making a discourse strongly anchored in rhetorical artifices to produce emotion[25]. However, it is a fact that the extremely long, almost incomprehensible decisions — where the doctrine is used as an appeal to the authority and as a demonstration of eruditeness — little contribute to the construction of a Judiciary on a par with the normative texts, including the constitutional ones, which affirm that the justification of reasons is mandatory as a mechanism of control of the judicial activity under the Rule of Law.

Somehow, it seems that the explanation should not be sought separately in these elements, but in a conjugation of both. When articulated, these elements point out to the conclusion required to really understand that the form of argumentation does not derive from the personal opinions of any justice, but that it is also impossible to avoid it being influenced by the kind of justice that we have.

Reflecting on this aspect, it can be said that this form of writing court decisions is not occasional or a mere expression of the individual idiosyncrasies of the justices. I believe that, to a greater or lesser extent, according to individual profiles, it reveals a well-rooted conviction that the judicial

function, especially in the superior courts, is that of expressing opinions or even the preferences of values of the justices, being more useful for the construction of their public image than to the clarification of the reasons for the decision. Behind the form of writing, it is reasonable to suppose that there is a conception of Law that privileges authoritative aspects rather than normative ones. Being straightforward, it seems that the justices express in the sentences what they believe Law to be according to their point of view, and they justify their decisions much more in view of their preferences rather than guided by a commitment to the normative texts. We have, therefore, a personal view of the judicial function and a conception of Law that relies on the authority of the decision much more than its correctness.

If this argument stand its ground, in order to advance on this reflection, it is now necessary to understand what is the role played by the constant invocation, here and there within the decisions, of technical standards required by another kind of judicial activity. If we are to believe in what many decisions of our courts are saying, they are doing nothing less than applying the good *standard* of the theory of post-positivist Law, wielding with alleged mastery texts from Dworkin and the famous weight formula of Alexy to guarantee rights and apply conditions of protection of citizenship. They act from a condition of argumentative legitimation to dismiss the position of the infra-constitutional legislator, for example, by invoking the rational capacity of the court to work as a counter-majoritarian mechanism of protection or the notion of argumentative representation. Therefore, these authors and their conceptions of Law are apparently behind the way of thinking and way of argumentation of our judges.

Without going into details on a complex discussion on the acceptability of these authors in Brazil or on what is or could be a post-positivist theory of law, it seems possible to affirm that there is a noticeable mismatch between the position adopted and the responsibilities that both authors recognize and recommend to the judicial function. If they were really Dworkinian or Alexyan, much more argumentative care in the reconstruction of precedents and in the clear presentation of the reasons of the decision would have to be employed. Therefore, somehow the summit of our Judiciary reads and uses from these authors what is convenient and what is convenient only...

Evidently, it is not expected or desired from a court, especially a constitutional one, a certain fidelity to a specific author or school of thought, and this argument is not claiming that. The important argument here is that maybe we are faced with something beyond what a superficial glance could reveal. Maybe we could say that behind this form of thinking and its expression in the decisions there is a set of more complex reasons, linked to the division of power and its use in the context of the Brazilian State, managed from a discourse that, while suggesting respect to the parameters of the Rule of Law, manipulates concepts as to allow the empowerment of the Judiciary in the confrontation with the other branches. Paradoxically, therefore, a theory of law and, within it, a theory of argumentation with strong rationalist pretentions are used in favor of an exercise of power

that does not match the idea of affirmation of rights, construction of citizenship or the Rule of Law.

This picture, in which, as we have seen, theories are managed and an argumentative form is conceived and is under constant use seems to resemble the historical formation of a legal culture with strong rhetorical and personal elements, whose roots would be interesting to investigate. Maybe by looking at the history of the institutions and the history of the Brazilian legal thought could help us comprehend this curious paradox through which the Brazilian citizenship sees rights being attributed, reconstructed and re-signified through decisions whose control is, if not impossible, of difficult reach.

Another very interesting aspect to be verified in continuity with the investigation already carried out is on the effective use of legal decisions of foreign courts as well as of foreign authors. As verified, there is a great profusion of references, whose character, at first glance, seems to be of rhetorical reinforcement, as an appeal to the authority. It is necessary, however, a more careful verification to evaluate if we are before a circulation of juridical models, with the incorporation of concepts, procedures and argumentative practices, or if it really is just a purely rhetorical invocation.

>> ENDNOTES

[1] Here we adopt the perspective summarized by Manuel Atienza in his recent "Course of Legal Argumentation", in which the author, from a reconstruction of the contributions from Raz and Summers (among other authors), classifies the reasons of the justification of a decision in material reasons (which relate to the actual content of the justified action, its evaluative quality), formal or authoritative reasons (those arising from the affirmation that they derive from the order of an authority recognized by the system) and institutional reasons (those arising from the division of competences or power among several institutions and that serve to justify why a course of action, although desirable, may not be within the competences of that who decides it). See, in particular, chapter IV — La concepción material: premisas e razones. ATIENZA, 2013, p. 275-287.

[2] TOULMIN, 2006, *passim*.

[3] MACCORMICK, 2008.

[4] ROESLER; SENRA, 2012.

[5] ROESLER; LAGE, 2013.

[6] Cfe. MOREIRA, 2012.

[7] ROESLER; SENRA, 2013.

[8] CHAIM, 2013.

[9] For the details of the analysis, see ROESLER; SANTOS, 2014.

[10] BRASIL. 2011. Supremo Tribunal Federal. **Ação Direta de Inconstitucionalidade Nº 4277**. Inteiro Teor do Acórdão. Relator: Min. Ayres Britto. Acess on April 5, 2012. Available at: <http://www.stf.jus.br/portal/geral/verPdfPaginado.asp?id=400547&tipo=TP&descricao=ADI%2F4277>.

[11] BRASIL. 2010. Supremo Tribunal Federal. Argüição de Descumprimento de Preceito Fundamental no. 153. Inteiro Teor do Acórdão. Relator: Min. Eros Grau. Access on August 3, 2011. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=612960>.

[12] BRASIL. 2012. Superior Tribunal de Justiça. Recurso Especial nº. 1.111.566/DF. Inteiro Teor do Acórdão. Relator: Min. Marco Aurélio Bellize. Access on July 8, 2013. Available at: <https://ww2.stj.jus.br/processo/jsp/revista/abreDocumento.jsp?componente=ITA&sequencial=1114564&num_registro=200900250862&data=20120904&formato=PDF>.

[13] As an example, it can be mentioned the vote of Justice Gilmar Mendes in the ruling of Direct Action of Unconstitutionality ADI 4277, in which it can be seen that the Justice starts by making a series of considerations and conceptual references in a kind of vague way and then mentions them again in a more systematic and organized manner in the final part of his vote. It is presumed that the first part was produced in the plenary and that the second had been written beforehand while studying the lawsuit in the office. BRASIL. 2011. Supremo Tribunal Federal. **Ação Direta de Inconstitucionalidade Nº 4277**. Inteiro Teor do Acórdão. Relator: Min. Ayres Britto. Access on April 5, 2012. Available at: <http://www.stf.jus.br/portal/geral/verPdfPaginado.asp?id=400547&tipo=TP&descricao=ADI%2F4277>. See in particular pages 728-751, in which the Justice briefly exposes his opinion and cites several authors (Perelman, Haberle, Alexy) and then the vote restarts, from page 752 until 806, citing again the same excerpts from the same authors along the same steam of thought already exposed in the preceding pages.

[14] In some cases decided by the superior courts the expression "median vote" is used meaning the position reached after a debate of the collegiate. In these occasions, one justice of the majority position is chosen to write the vote and they should make a summary of the agreement reached in the plenary. An example of this type of decision and how it is registered in the court ruling can be found in Direct Action of Unconstitutionality ADI 3105, judged by the STF in 2004.

[15] The constitutional text says the following:
"Art. 226. The family, basis of the society, enjoys special protection from the State.
(...)
§ 3º — For the effects of protection from the State, the stable union between man and women is recognized as family entity, and the law should facilitate its conversion into marriage."

[16] A good example of this reality could be the decision on same-sex unions, referenced above, over which there is still doubt whether it has also authorized adoptions by same-sex couples, something that will certainly need to be clarified by the STF in the near future.

[17] ROESLER; LAGE, 2013.

[18] The research carried out the surveying and analysis of all court rulings on this subject of the Federal Supreme Court (STF) and the Superior Court of Justice (STJ) that complied with the selection criteria. The jurisprudential research was carried out in the websites of the respective courts, using the keywords "dangerousness" and "non-imputability" or "diminished responsibility". A code was used to substitute part of the words so that a single search could also include results using the words "non-liable" or "non-imputable". Besides, a time delimitation criteria was adopted from July 13, 1984, date of publication of Law 7,209, which reformed the General Aspects of the Criminal Code, and Law 7,210 (Law of Criminal Enforcement), which compose the core of the current legal discipline on non-imputability and civil commitment, up to 15 June 2012, date of publication of the most recent ruling of the STJ by the time of the jurisprudential research. Overall, 14 rulings of the Federal Supreme Court and 51 of the Higher Court of Justice were analyzed.

[19] In the context of the research, only *HC 142.672/RS*, judged on April 10, 2010; *HC 70.497/SP*, judged on November 12, 2007; and *HC 27.993/SP*, judged on December 9, 2003, were assigned to the Sixth Panel. All other decisions were taken by the Fifth Panel.

[20] Taking into account only the current composition of the Fifth and Sixth Panel of the STJ and the rulings included in the research criteria, Justices Jorge Mussi and Gilson Dipp adopt the first orientation (inexistence of time limit). Justice Laurita Vaz, up to February 2008, also endorsed this opinion, but in two cases subsequent to September 2009 followed the STF jurisprudence. Likewise, Justice Arnaldo Esteves Lima, who was a member of the Fifth Panel and now chairs the First Panel (which does not rule on criminal matters) seems to have changed position: in a case judged in November 2008, he argued in favor of the indetermination of a maximum duration of civil commitment, but in two other judgments after October 2009, he understood that the limit should be the maximum penalty indicated for the criminal offense. In his vote on Especial Appeal *1.103.071/RS*, Justice Arnaldo Esteves Lima informs that Justice Maria Thereza de Assis Moura, of the Sixth Panel, also adopts this position.

[21] Internal justification is that which correlates the normative and factual premises of the decision, taken as well-founded, producing the conclusion which is then expressed in the actual decision. It is the opposite of the external justification, qualified as that which dissertates on the establishment of both or of one of the premises — normative and factual — and which requires the use of a variety of argumentative techniques. See ATIENZA, 2002, p. 50-51.

[22] In this context, the "easy cases" are those which do not require external justification of the premises of the decision and would, therefore, have a simplified argumentative path, in which it would be sufficient to mention the normative premise, the factual premise and draw the conclusion from the relationship between both. The classification of a case as "easy" or "difficult" is, therefore, a decision previously taken by the hermeneut/judge, who operates in an argumentative context given and harmonized by the constitutional, legal and jurisprudential norms. Therefore, cases are not "easy" or "difficult", but should be framed as such in the argumentative tradition in a given moment.

[23] ROESLER; LAGE, 2013.

[24] Take as an example the indicators of dangerousness adopted by the Institute of Forensics Medicine (IML) of the Federal District: "– On the life curve: emotional instability at work, integration with groups with no constructive activities, early episode of criminal behavior, high number of legal and police incidents, quick recidivism, early development of the disease. – On the morphology of the crime: crime with aggravating factors, crime without plausible psychological motif, crime with multiplicity of blows, crime executed without feelings or emotions, crime practiced against helpless victims. – On psychiatric complications: psychomotor agitations, psychotic outbreaks or episodes, anger-fueled crimes, necessity of high doses of medicaments. – On the yearly psychological examination: explosive disorder, lack of criticism on the offense committed, lack of plans for the future, hallucinations, delirium, lack of remorse, lack of positive feelings, egocentrism of feelings. It is also important to evaluate the bonds of the patient with the family and the desire and interest to live with them." *Apud* BRAVO, 2004, p. 129.

[25] A historical predicament, made by José Murilo de Carvalho could be useful here: our "rhetoric behavior" did not start with the 1988 Constitution, with a larger dissemination of the knowledge on foreign legislations, doctrine and jurisprudence, or with the birth of the official TV channel of the Judiciary. In this respect, let us take a look at the text: "In any case, this trace of the Portuguese style, or its rhetoric, was transferred to Brazil and might still be present today. By changing the names of poets Marcial and Juvenal for other names, Vemey's observation continues to be valid. What is being suggested here is that the omnipresent phenomenon of the citation of foreign authors and of the concomitant importation of ideas should not be seen only as an indicator of intellectual dependence, or as a correct or incorrect expression of ideas. What is being suggested is that a useful key for the reading could be given by the style of argumentation. Within the Brazilian tradition, the argument of authority was an indispensable requisite, it was a resource of the argumentation, a rhetoric *per se*. In principle, therefore, quoting a foreign author did not necessarily mean an adhesion to their ideas, although it could also mean that." CARVALHO, 2000, p. 143.

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THE BRAZILIAN SUPREME COURT NEEDS IOLAUS: A REPLY TO MARCELO NEVES' OBJECTIONS TO BALANCING AND OPTIMIZATION

// O SUPREMO TRIBUNAL FEDERAL PRECISA DE IOLAU: RESPOSTA ÀS OBJEÇÕES DE MARCELO NEVES AO SOPESAMENTO E À OTIMIZAÇÃO

VIRGÍLIO AFONSO DA SILVA

>> ABSTRACT // RESUMO

In current Brazilian constitutional debate there may be no subject that has generated so many publications as that of constitutional principles. Many of these publications, however, are a mere repetition of what has been written before. The publication of Marcelo Neves' book "Entre Hídra e Hércules: princípios e regras constitucionais como diferença paradoxal do sistema jurídico" is certainly an exception in this scenario. Marcelo Neves' book brings new light to the debate and proposes a change of course. In this short article, I intend to defend my views against the objections Neves raises in his book in order to show that, on the one hand, his objections are unsound and on the other, that he does not in fact offer an alternative to what he calls "still dominant models". // Talvez não exista, no direito constitucional brasileiro atual, um debate que tenha gerado uma produção tão intensa quanto aquele sobre princípios constitucionais. Muito dessa produção, contudo, é mera reprodução do que já foi escrito antes. O recente livro de Marcelo Neves, Entre Hidra e Hércules, é com certeza uma exceção nesse cenário. Ele traz novas luzes ao debate e propõe mudanças de rumos. Neste breve artigo, pretendo defender minhas ideias em face das objeções que o autor suscita, para mostrar que ele, de um lado, não tem razão nessas objeções e, de outro, não oferece de fato uma alternativa àquilo que ele chama de "modelos ainda dominantes".

>> KEYWORDS // PALAVRAS-CHAVE

Marcelo Neves; Legal Principles; Legal Rules; Constitutional Law; Brazilian Supreme Court. // Marcelo Neves; Princípios Jurídicos; Regras Jurídicas; Direito Constitucional; Supremo Tribunal Federal.

>> ABOUT THE AUTHOR // SOBRE O AUTOR

Full Professor of Constitutional Law of the University of São Paulo (USP). // Professor Titular de Direito Constitucional da Universidade de São Paulo (USP).

>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

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INTRODUCTION

In current Brazilian constitutional debate there may be no subject that has generated as many publications as that of constitutional principles. Many of these publications, however, are a mere repetition of what has been written before. The publication of Marcelo Neves' book *Entre Hídra e Hércules: princípios e regras constitucionais como diferença paradoxal do sistema jurídico* is certainly an exception in this scenario. Considering the academic career of the author, this is no surprise.

Marcelo Neves' book brings new light to the debate and proposes a change of course. Although I agree with some of his views, our theses on the issue are partially incompatible. In this short article I defend my views against the objections Neves raises to some of my ideas in his book to show that his objections are unsound and that he does not in fact offer an alternative to what he calls "still dominant models".

To achieve these goals, this paper is organized as follows. Initially, I address some of the criticisms that Neves makes of my works that have no direct connection with the concepts of principles and balancing (section 1). From the second section onwards, the article is dedicated exclusively to the debate on principles. I begin with a brief comment on the metaphor used in the title of Neves' book (section 2), and then analyse the strategy he uses to reject traditional forms of distinguishing between principles and rules (section 3). I then discuss what Neves calls hybrid norms (section 4) and shortly thereafter his own concept of principles and rules (section 5). Next, I analyse what Neves calls intraprinciple collisions (section 6) to show that this is a less important phenomenon than he deems it to be. I then argue that Neves often does not clearly distinguish which issues are theoretical and which are institutional (section 7). This paves the way to the next section, in which I discuss the "misuse of principles" to show that he does not clearly distinguish theoretical from practical issues (section 8). The next section (section 9) analyses the alternative Neves proposes to the theory of principles, especially in light of what he calls "comparative balancing". As Neves does in his book, the conclusion of this article (section 10) refers to Judge Iolaus, to demonstrate that, except perhaps for mythological judges, there may be a difference (sometimes a huge one) between what a theory proposes and what judges (and other legal practitioners) do when they say they are applying this theory. I shall try to demonstrate that Neves' objections to balancing and optimization, even though they may be sound in relation to a particular legal practice that uses principles, does not hit the theory itself.

1. A FEW ANSWERS TO SCATTERED CRITICISMS

In several parts of Neves' book, my work is used as a counterpoint to what he intends to defend. Although many of the objections he raises are not directly connected to the central issue of his book, I do not want to leave these objections unanswered. This preliminary section is dedicated to these objections.

The first of these objections is related to the so-called interpretation in conformity with the constitution (verfassungskonforme Auslegung). In an article on principles of constitutional interpretation and methodological syncretism, I argued that it is odd that Brazilian constitutional scholars usually consider interpretation in conformity with the constitution a principle of constitutional interpretation, "since it is easy to see that when it comes to interpretation in conformity with the constitution, one is *not talking about constitutional interpretation*, since it is not the *constitution* that must be interpreted in conformity with itself, but the *ordinary laws*. Thus, the interpretation in conformity with the constitution may be useful, but as a criterion for the *interpretation of ordinary laws*, not for constitutional interpretation".[1] In passing, I argued that the interpretation in conformity with the constitution is not part of the list of principles of constitutional interpretation developed by Konrad Hesse in Germany, which often served as the basis for Brazilian works on the subject.[2]

Neves' objection, based on Hesse's work, has two arguments: (1) when one uses the interpretation in conformity with the constitution, it is not only the ordinary law that is being interpreted, but the constitution as well; and (2) the reception of Hesse's work in Brazil was not inaccurate, since he himself included the interpretation in conformity with the constitution among the principles of constitutional interpretation.[3]

I have already rebutted the first objection elsewhere,[4] where I made it clear that while the interpretation according to the constitution is surely a method of interpretation of ordinary legislation, it is evident that the parameter for this is the constitution and, thus, "if the constitution is the parameter that guides the interpretation of ordinary legislation, the constitution itself must also be interpreted".[5] Nevertheless, I concluded: "in the interpretation in conformity with the constitution, the main goal is not to interpret the constitution itself, but the ordinary legislation, which is why it cannot be considered a principle of constitutional interpretation". My conclusion, therefore, absolutely does not stem from the assumption that when one interprets in conformity with the constitution only the ordinary law, and not the constitution, is interpreted. My reasoning is based on the simple fact that, contrary to the case of other so-called principles of constitutional interpretation, in the case of interpretation in conformity with the constitution the constitution is a parameter for the interpretation of ordinary legislation, not for the interpretation of itself. Therefore, this is not a principle of constitutional interpretation.

In relation to the question whether the reception of Hesse's ideas was inaccurate or not, although this seems to me to be less relevant, I must stress that Hesse did not include the interpretation in conformity with the constitution among his principles of constitutional interpretation, at least not directly. Although he did include it in a very indirect way, through the so-called "interpretation of the constitution in conformity with the law" (gesetzeskonforme Auslegung der Verfassung),[6] I do not believe that Brazilian constitutional scholars had this in mind when they included the interpretation according to the constitution among the list of principles of constitutional interpretation.

Further, Neves raises objections to some examples of what I called "methodological syncretism". The most important is related to the incompatibility between Robert Alexy's and Friedrich Müller's theories, especially with regard to balancing. According to Neves, since for Müller the legal norm arises only at the end of the interpretation process, it would naturally not be subject to balancing, in the same fashion that Alexy's definitive rule obtained after balancing. Therefore Neves concludes that there is nothing incompatible between the two theories.[7]

These arguments are not convincing. It is Neves himself who argues that "for Müller, during the concretization process, balancing appears as a potentially irrational factor in the process of establishing legal norms".[8] Therefore, if Müller argues that during the concretization process balancing is an irrational factor and that, after concretization, there is no longer any room for balancing, how can this be compatible with Alexy's theory in which balancing is one of the most prominent features? The answer to this simple and straightforward question cannot be found in Neves book.[9]

Neves' final objection to my thesis against a methodological syncretism asserts that the objections that I raised towards several commentators may also be raised towards my own work, at least "in relation to the distinction between the local and the universal".[10] Neves argues that, through the reception of Alexy's theory of principles, I do exactly what I criticise, i.e. I import a theory conceived for the reality of a given country and, above all, a theory that is not unanimously accepted, and try to make people believe it is a universal theory. To support this objection, Neves maintains that (1) Alexy did not intend to develop a universal theory, but a theory of the fundamental rights of the German constitution; (2) that even in the case of Germany, the jurisprudence on which Alexy's theoretical reconstruction is based is being gradually abandoned; and (3) that this jurisprudence cannot be found in other countries with a strong legal tradition.[11]

The response to these arguments is quite straightforward. Firstly, Alexy's warning in his Theory of Constitutional Rights, that his theory is a theory of the fundamental rights of the current German constitution, is well-known:

> *"A theory of constitutional rights of the [German] Basic Law is a theory of certain specific enacted constitutional rights. This distinguishes it from theories of constitutional rights which were valid in the past (legal-historical theories), and also from theories about constitutional rights per se (philosophical theories). It also distinguishes it from theories of constitutional rights not part of the [German] Basic Law, such as the constitutional rights of other states or of the German Regions".*[12]

Nevertheless, this local aspect is not enough to control the reach that the theory may have beyond the limits established by its author. And it is Alexy himself who points this out when he argues that "comparative accounts have an important role to play in the interpretation of the constitutional rights of the [German] Basic Law"[13] which clearly implies that theories about fundamental rights of specific countries, such as his theory,

may through a comparative approach, play a significant role in the interpretation of fundamental rights in the Brazilian or other constitutions.

Moreover, Neves' objection seems to assume that, when I argued there was no evidence that Hesse wanted to create a general theory of constitutional interpretation and that his work focused on German constitutional law, I was trying to argue that this national focus would prevent an international reception. But it would be naive to suppose this and a careful reading of my text would show that I argued something different. I explicitly stated: "To be sure, the fact that Hesse limits the scope of his work to German law does not prevent it from being relevant to other legal systems".[14]

Finally, Neves argument that the jurisprudence on which Alexy's theoretical reconstruction is based is being abandoned, is also not relevant. My preference for this or that theory has no relation to the courts that apply it. I am aware that Alexy's theory of fundamental rights, especially his idea of optimization requirements, is very controversial in Germany. And I am also aware that the jurisprudence of the German Constitutional Court on which Alexy's reconstruction is based is also being challenged. And Neves certainly also knows that I am aware of this, since he resorts to the very same debate — between Kahl and Hoffmann-Riem — which I analysed in a previous work.[15]

But knowing whether this or that theory is accepted or not by this or that court, in this or that country, has never been the core of my critique of methodological syncretism. I quite explicitly stated in the aforementioned work, that the low impact that that list of principles of interpretation had in his own country would not in itself be a problem, were it not also for the limited practical importance that these principles have for constitutional interpretation".[16] In other words, what matters is not the amount of people or institutions that follow a given theory, but how relevant it is for constitutional interpretation. What I questioned at the time was an often dilettantish and rhetorical reception, without any concern for consistency, compatibility and practical applicability of these theories.

Having made these considerations about the objections Neves raises against some of my ideas, which have no specific relationship to the main subject of his book, I shall, from the next topic onwards, examine more specifically his discussion of constitutional principles.

2. THE METAPHOR THAT GIVES TITLE TO THE BOOK

Marcelo Neves opens his book by explaining the metaphor of the book title. The reference to Hercules is clearly associated with the figure of Judge Hercules proposed by Dworkin.[17] According to Neves', Judge Hercules is "able to identify the appropriate principles for deciding a case, providing the only correct answer or at least the best judgement". Based on this, Neves claims that "one can say that principles are Herculean".[18] From there, Neves proposes an inversion: for him, rules should be considered Herculean, whereas principles have the character of the Hydra.[19] This is

because, like the Hydra, a multi-headed mythological figure, principles also have a multi-headed character, due to their plural nature, which enriches the argumentative process, "opening it up to a variety of starting points".[20]

In contrast, rules are Herculean, since, as Hercules cut off the Hydra's heads, rules serve to decrease plurality, limiting the argumentation process by absorbing uncertainty.[21]

Even though the metaphor is not central to the book, the fact that it is used as its title deserves some comments. There is clearly an unjustified step in Neves' reasoning, when, after establishing a connection between Judge Hercules (Dworkin) and constitutional principles, he concludes that principles are Herculean. The fact that Judge Hercules must identify all the legal principles relevant to the decision of a given case does not allow us to classify principles as Herculean. Perhaps Hercules' task is, as it should be, Herculean, but the principles themselves are not Herculean. Especially because Hercules task is not only to identify and manage principles, but also rules, precedents and legislation. This does not make rules, precedents and legislation Herculean. The labour of Judge Hercules is Herculean, and principles are just one among many "legal materials" that he must work with.

Neves apparently defines principles as Herculean to justify a novel endeavour: switching the roles of principles and rules. There certainly is a parallel between Hercules cutting off the Hydra's heads and the rules restricting the scope of principles. But the role of a judge is Herculean, whether the judge is Hercules or not.

3. THE REJECTION OF A GRADUAL DISTINCTION BETWEEN RULES AND PRINCIPLES

Like Alexy[22] and other supporters of his theory of principles,[23] Neves rejects the traditional distinction between principles and rules based on degrees of precision, discretion, generality and others. Alexy calls these weak distinctions.[24]

However, it seems that the strategy Neves used to reject the gradual distinction between rules and principles errs by adopting a certain circularity. To illustrate this, I will use the example of distinction based on the degree of generality. According to this criterion, principles are more general than rules. To reject this criterion, Neves uses as an example legality in criminal law (Brazilian Constitution, article 5, XXXIX): although it has a high degree of generality, this norm is a rule, not a principle, because it "serves as a definitive criteria for deciding a case".[25] For him this demonstrates that the level of generality cannot be used as a criteria for distinguishing between rules and principles.[26]

But this reasoning confuses two criteria. It is not possible to claim that legality in criminal law, although general, is not a principle, but a rule, because it "serves as the definitive criterion for deciding a case", since this concept of a rule simply does not apply for those who classify legality in criminal law as a principle. For them, if a norm has a high degree of generality, this is enough for it to be regarded as a principle.

A more exaggerated example may make this clearer. Let us assume that someone set the following criteria for the distinction between rules and principles (within the fundamental rights of the Brazilian Constitution): if the number of the section of article 5 in which a given right is enshrined is an even number, then it is a principle; if it is an odd number, it is a rule. Thus, equality between men and women (article 5, I) and freedom of profession (article 5, XIII) would be rights guaranteed by rules, while freedom of expression (article 5, IV) and the prohibition of ex post facto criminal law (article 5, XL) would be rights guaranteed by principles. No matter how nonsensical this criterion is, the fact is that one cannot refute it by claiming that the prohibition of ex post facto criminal law is guaranteed by a rule, and not by a principle, since it does not admit balancing or because it "serves as the definitive criterion for deciding a case"; unless these concepts of rules were universally accepted, which is not the case. In other words, I cannot use my own concept of a rule (or a principle) to reject a classification based on different criteria.[27]

To be sure, this does not mean that one cannot raise objections to the criteria used to establish a given classification. For instance, one can point to some methodological weaknesses or lack of utility of certain classifications. In this sense, in a work published some time ago, I argued:

> *"Classifications are either consistent and* methodologically *sound, or contradictory — when, for example, several distinguishing criteria are unduly combined — and therefore barely useful or not at all. If one defines a 'principle' by its fundamentality,* it makes sense to speak of a principle of legality or a principle of nulla poena sine lege. *These are undoubtedly two fundamental norms in any constitutional democracy. However, if one prefers to use the criteria established by Alexy, [...] one must leave out of her typology some norms traditionally called principles — legality etc. — since, despite their fundamentality, they could no longer be considered principles and should be included in the category of rules".*[28]

4. ALMOST RULE, ALMOST PRINCIPLE: THE HYBRID FORMS

Within the debate on rules and principles, a recurring issue is the existence of intermediate categories, or of norms that are sometimes principles and sometimes rules. In this context, Marcelo Neves refers to the concept of hybrid, as follows: "norms that are in an intermediate position between principles and rules".[29] To justify his conclusion, Neves refers to the Weberian concept of ideal types. For Weber, ideal types are constructed from a one-sided accentuation of one or a few variables of the object being examined.[30] It is thus an abstraction, an intellectual construction that functions as a method for sociological analysis.

Even if one accepts that the concept of ideal type has some relevance to understanding the normative distinction between rules and principles,[31] it would certainly not be relevant to classifying some norms as hybrids.

If it is true, as stated by Weber, that ideal types are utopian and that "in their conceptual purity, this mental construction cannot be found anywhere",[32] then the obvious conclusion would be that in the real world *everything is hybrid*. But would it make sense to say, for example, that the Swedish monarchy is not a monarchy, but a hybrid, because eventually some characteristics of the ideal type of monarchy are not present? Or, for the same reasons, that the German parliamentary system is not a parliamentary system, but a hybrid? Or that Beethoven's Ninth Symphony, because it contains a choir, is not a symphony but a hybrid?

In the case of rules and principles, even if one assumes that there are cases in which it is not clear whether a norm is a rule or a principle, this has no relation to the concept of ideal type. If one accepts that principles are norms that establish a *prima facie* right and that rules are norms that establish a definitive right, there seems to be no room for hybrids. In other words, there may be difficulties, in many cases, in defining whether one is dealing with a rule or a principle, but this difficulty does not stem from the existence of hybrid figures. It is just a classificatory difficulty.

Still, leaning on Aarnio's ideas,[33] Neves speaks of "principle-like rules" and "rule-like principles"[34] as examples of what he calls hybrids. A concrete example, also borrowed from Aarnio, would be the principle of freedom of expression, which if applied in isolation, without colliding with another principle, behaves as a rule, because it can be used directly to the solution of a case.[35]

The impression that this is a hybrid stems from the fact that Neves — in my view, without any sound justification — argues that only rules are "applied directly to the solution of a case". Moreover: when he combines two criteria to distinguish rules from principles, he automatically creates a hybrid figure. If one defines principles as norms subject to balancing and, at the same time, as norms that cannot be used directly in the solution of a case, one creates, through this very definition, the possibility of hybrids: when a norm is subject to balancing and, at the same time, is used for the solution of a case, it does not fit neatly into the category of principles (precisely because it directly addresses the case) or into the category of rules (since it is subject to balancing). However, the emergence of hybrid norms here has nothing to do with the concept of ideal types, but with the improper combination of distinctive criteria. This will be analysed in the next section.

5. THE CONCEPTS OF RULES AND PRINCIPLES

For Marcelo Neves, principles are norms that are at the reflexive level of the legal order, and are designed to guide the interpretation of other norms, without being, however, definite reasons for a decision-norm. Rules, in turn, are "norms that are able to function as definitive reasons for legal issues, but do not act as reflexive mechanisms".[36]

In this passage quoted here and in many others,[37] the main distinguishing criterion advanced by Neves is the ability or inability of a norm

to serve as a definitive reason for a decision. This is why, whenever a norm is applied to directly decide a specific case, it is readily classified by Neves as a rule or as a hybrid (a rule-like principle). It seems to me that this is the source of many misunderstandings.

The example borrowed from Aarnio — a case in which the freedom of expression (a principle) does not conflict with any other principle and therefore serves directly to decide a case — may be useful to illustrate my point. To do so, I will quote something that I wrote some time ago:

> *"It is incorrect to say that whenever a norm does not collide with another norm and is therefore directly subsumed, it is thus a rule. [...] The fact that a norm has been applied to its full extent means neither that it is a rule, nor that no optimization took place. [...] The fact that the application of principles* does not always *require balancing does not alter the fact that the application of principles* may require *balancing. This is the decisive point:* only norms that may be subject to balancing can be optimized and therefore classified as principles*".* [38]

In Aarnio's example, the fact that the freedom of expression does not clash, in some cases, with any other principle and may therefore be applied without balancing, in no way changes its classification as a principle, since this norm — freedom of expression — can be subject to balancing if the situation so requires. It does not turn it into a hybrid, or into a "rule-like principle" simply because in certain situations it may be directly applied to a case and decide it definitively. The possibility of being applied directly to decide cases has never been a criterion to distinguish between rules and principles, at least not in the version supported by Alexy. Thus, one cannot criticize his theory for not accepting hybrids, if in fact the hybrids only emerged when Neves introduced a new criterion, alien to Alexy's model. Neves' new criterion may even be useful for other analytical purposes, but not to raise objections to a classification that, good or not, was based on other criteria.

6. INTRAPRINCIPLE COLLISION

Neves argues that the idea that principles are *prima facie* unlimited cannot be accepted. In his view, the existence of what he calls "intraprinciple collisions" is incompatible with this unlimited character. An intraprinciple collision occurs for instance when "the same principle is simultaneously invoked as the foundation of the reasoning of both parties in a constitutional controversy".[39] Therefore, according to Neves, it would be possible to say that even *prima facie* "every right grounded on a principle, when invoked by one party, will always be intrinsically limited by the same right invoked by the other".[40]

I do not think that there is a difference between a collision between two distinct principles and a collision involving the same principle. Especially for the definition whether principles are *prima facie* unlimited or not, this

distinction seems to be irrelevant. And the examples Neves uses are not convincing for demonstrating that it is. Especially those examples related to cultural clashes — like the different values attributed to the right to life in Western culture and in some indigenous cultures — seem to have no direct connection with the theoretical distinction between principles and rules. These clashes — and all their implications — take place irrespective of the underlying theory of norms.

7. THE NORMATIVE AND THE INSTITUTIONAL LEVEL

Some of the usual objections raised to the distinction between principles and rules as well as to balancing and optimization often seem to unduly combine the normative and the institutional realms. One of the objections raised by Neves also fails to distinguish these two levels.

In his analysis of the relation between the European Court of Human Rights and national courts, Neves argues, considering in particular the German Constitutional Court, that in the current stage of European integration, "the narcissistic denial of the decisions of the European Court of Human Rights by national courts, based on an optimizing balancing of their domestic constitutional principles, does not seem acceptable".[41]

The background of this criticism was the stance of the German Constitutional Court to mitigate the effects of the decision of European Court in the Caroline of Monaco (or Caroline of Hanover) case. Instead of accepting a binding and direct effect of the decisions of the European court, the German court ascribed to them merely an argumentative value. The German court also affirmed that it is the duty of national courts to take into account, as far as methodologically sustainable, the standards of the European Convention on Human Rights, as interpreted by the European Court.[42]

There is no doubt that in this and other cases, there is a tension between domestic and supranational jurisdiction. But what this tension has to do with the optimization idea is something that is not clear in Neves' analysis. The fact that the German court — supposedly — has an "optimizing stance"[43] is not a sufficient argument. Similarly to what occurs in the example of so-called intraprinciple conflicts, the tension between different levels of jurisdiction is independent from the underlying theory of norms. It seems to be possible — and necessary — to address institutional and normative tensions independently, except in those cases in which the institutional tension is caused — or at least enhanced — by the underlying theory of norms. But Marcelo Neves does not raise any arguments to demonstrate that this is the case in the example he uses. The fact that the German Constitutional Court — supposedly — adopts an "optimizing stance" is an insufficient argument. It would be necessary to demonstrate the link between this stance and the institutional tension he describes. But this link simply does not exist.

8. MISUSE OF PRINCIPLES: THE BRAZIL OF TODAY AND THE BRAZIL OF YESTERYEAR

One of the most frequent arguments of those who intend to criticize the theory of principles and the use of optimization and balancing is the one that points to a misuse of these methods. The argument usually has the following structure: judges throughout Brazil, at every level, have taken the most odd decisions claiming that they are balancing principles, therefore the theory of principles must be rejected.[44]

Neves, even though from a different theoretical framework than those underlying the most common criticisms, also raises a similar objection. First, Neves argues that the model of principles is superadequate to Brazilian social and political reality, due to the lack of law's autonomy vis-à-vis other social variables.[45] This lack of autonomy subordinates the law "to private interests and other social factors", undermining the relevance of rules and principles.[46] Assuming that legal consistency is guaranteed only if there is a reciprocal relationship between theory and practice, and assuming also that this reciprocal relationship does not exist in Brazil, due to the subordination of the law to other interests, Neves concludes that the theoretical reasoning is weakened.[47]

According to Neves, rules, with their definitive character, would make the mentioned deviations more difficult, whereas principles could help to conceal private interests behind an apparently legal guise. In Neves' own, sharp words: "principles are more prone to misuse in the interpretation process".[48]

Thus, Neves supposes that the lack of autonomy of law, if not caused by, is at least strongly bolstered by the use of principles. The theory of principles would therefore be at least partially responsible, if not entirely, for contaminating the law with private interests and for other deviations. Resorting to principles would then largely serve the accommodation of concrete and particularistic interests.[49]

Even though I also recognize that there is a certain infatuation with principles in Brazil, which tends to create an environment prone to undue balancing and bad decisions, it does not seem to make sense to blame principles (and balancing itself) for the questionable effects that several commentators, including Marcelo Neves, appear to bestow them. Just as the criticism that points to an alleged irrationality in balancing, especially in Brazil, seems to assume that before the "discovery" of the theory of principles Brazilian jurisprudence had been an example of consistency, coherence, objectivity and rationality, features that would have been undermined by the fascination with principles, Neves' critique, according to which principles are the gate through which private interests enter the law and undermine its autonomy, seems to assume that before the theory of principles, such autonomy actually existed and that legal rules were given their due value and prevented economic, political, relational, and familial interests from blocking the realization of the constitutional provisions.

But it is Neves himself who points out that: "Brazilian constitutional history is marked by the problem of a poor capacity to reproduce the law

in a constitutionally consistent manner. Both the past and the present [...] point to this problem".[50] However, in light of this, if the theory of principles is superadequate to the Brazilian case, the same conclusion would apply to everything that came before.[51] But — as much for the past as for the present — this is an *empirical question*, not merely a theoretical one. In this sense, it requires demonstration, not just supposition, however plausible it may be.

Still, even if we set aside the requirement for empirical demonstration and limit ourselves to the theoretical issue, it seems naive to assume that a model composed only by strict and absolute rules would make deviations more difficult because these would supposedly become more explicit.[52] It is thus no surprise that the model proposed by Neves does not entail a system composed only of rules and it does not reject balancing as an interpretative tool. Therefore, it is necessary to ask whether and why the alternative offered by Neves could increase the reciprocal relationship between constitutional theory and constitutional practice in Brazil.

9. THE CRITIQUE OF OPTIMIZATION

Marcelo Neves' main criticism of the theory of principles, as developed by Alexy, is directed to the concept of optimization. Since Neves assumes that balancing is unavoidable, it could be argued that, despite the objections analysed so far in this article, his model largely coincides with that of Alexy, in which balancing is also a central element. The attempt to move away from Alexy is then based on a strategy that accepts balancing, without accepting optimization.

9.1. OPTIMIZATION AND THE SINGLE CORRECT ANSWER

One of the main reasons for the preceding affirmation is the link that Neves establishes between optimization, in Alexy's sense, and the idea of single correct answer, as found in Dworkin.[53] It is not the case here to analyse in depth the debate on the Dworkinian idea of single correct answer.[54] It suffices: (1) to refer to the objection that Alexy himself raised to the thesis of a single answer, which, as he said, is "destined for failure"[55] and (2) to note that, if optimizing were "seeking a single correct answer", then the legislator would never be free to legislate, since this freedom is intrinsically based on the existence of different (correct) answers to the same problem.[56]

9.2. AN ALTERNATIVE TO OPTIMIZATION?

Since Neves accepts balancing as unavoidable and, at the same time, rejects the idea of optimization (although, in my view, for the wrong reasons, because he does so based on an unjustified association between optimization and single correct answer), one hopes to be presented with an alternative model. In other words, the reader of Marcelo Neves' book who accepts

the objections raised to what he calls "optimizing balancing" surely expects Neves to present his own model. As a matter of fact, this should be the main expectation of any reader. At this point, however, it seems to me that this expectation is not fulfilled.

Neves uses the Brazilian Supreme Court decision in the ADI 3510 case, on the use of embryonic stem cells for research and therapy, as an example of why an optimizing balancing would be inadequate. At this point, Neves adds something to his criticism of optimization, something that goes beyond the (mistaken) association with the idea of a single correct answer. According to Neves, the inadequacy of the optimization thesis is due to the fact that the optimizing balancing is unsuitable for considering variables that go beyond the rights at stake and incorporating the impact of a decision "on the various social spheres involved".[57]

However, Neves does not justify why the balancing based on the idea of optimization would be unable to take into account other variables that go beyond the constitutional rights at stake. The second example he uses also does not clarify his argument. According to Neves, in the decision of the ADPF 101 case, on the importation of second-hand tires:

> *"one should not speak of an optimization of principles, but of a reaction to the danger and to the trend of economic dedifferentiation of society at the expense of an order based on fundamental rights. [...] the issue was not limited to the individual interests of the parties to the case (free enterprise versus the right to health), but also the impact on the relation among social spheres: the health system, necessarily associated to a healthy environment, vis-à-vis the economy".*[58]

He concludes, partly based on Ladeur, that:

> *"the optimizing balancing paradigm is strongly linked to the position of groups and therefore 'is both cognitively and normatively focused especially on the short-term effects, neglecting the long-term ones'"*[59]

It is easy to notice that there is no justification for Neves' objections. He simply states that the so-called "optimizing balancing" has this or that weakness, using this or that decision as an illustration, even if it is not clear that some form of balancing was used at all in these decisions. He quotes a number of authors who are critical of balancing, but in the end it is hard to know what in the concept of optimization justifies Neves' conclusions.

9.3. THE VALUE OF PRECEDENTS

Moreover, Neves' insists on ignoring the value of precedents within the theory of principles. As already mentioned, Neves often argues that balancing is connected to an ad hoc rationality "without a long-term perspective",[60] and that the reasoning tends to be limited to the case to be decided and "does not offer any criteria for reducing the 'surprise effect' in future cases".[61]

However, there is nothing within the theory of principles that limits the reasoning to the case currently being decided, nor any feature hostile to the use of judicial precedents. The recurring reference to precedents throughout Alexy's works, as well as in the works of other supporters of his theory of principles, is clear evidence of this.[62] As I have stressed elsewhere, legal uncertainty is closely associated to the idea of *ad hoc* decisions, which tend to occur where no social control is present, irrespective of method of legal interpretation and of the theory that underlies this method.[63]

9.4. COMPARATIVE WEIGHING

As stated above, the reader of Marcelo Neves' book certainly expects him to provide his own model as an alternative to the model based on the idea of optimization. Despite the several objections that Neves raises to Alexy's theory, one of his central ideas — the need to balance principles — is not rejected. As already mentioned more than once above, Neves himself says: "There is no doubt that the requirement of weighing or balancing, when constitutional principles (and norms in general) conflict, is tout court unavoidable".[64]

Thus, in spite of some marginal disagreements, which, as I tried to argue throughout this article, are not convincing, the central dispute is Neves' rejection of the idea of optimization, which is central to Alexy's theory. As seen above, this rejection is based on a misapprehension of the idea of optimization within the theory of principles. Contrary to what Neves argues, optimization does not imply the existence of a single correct answer, nor is it unable to account for variables that go beyond the rights at stake. Moreover, its effects are not limited to the case currently being decided and, therefore, it is not synonymous with *ad hoc* reasoning.

Nevertheless, even exempting optimization from these criticisms, it could still be possible that Neves provides a model of balancing that could be *even better* than that based on the idea of optimization. But what is his model? What kind of balancing does his model embrace (since, in his own words, balancing is unavoidable after all)?

Marcelo Neves proposes a model that features what he calls "comparative balancing".[65] It is not easy, however, to understand the characteristics that differentiate this kind of balancing from that which Neves calls "optimizing balancing". At first, Neves only states that "[t]o speak of optimization requires assuming not only comparability but also commensurability".[66] This assumption, however, is not justified. It serves merely as a bridge for Neves' conclusion that: since fundamental rights are incommensurable, then optimizing balancing is inadequate. But this is a fallacy, because it is not correct to assume that balancing — whatever it may be — depends on commensurability. Precisely the opposite is true: balancing is only required when there is incommensurability, since when there is a common metric between two things, there is no balancing, but simple measurement. In our everyday lives, we are constantly faced with

incommensurable options for actions and decisions. This, however, does not prevent us from taking decisions nor make them irrational ones.[67]

The difficulty in understanding what Neves calls "comparative balancing" derives therefore from his strategy to define it mainly through a contrast to the negative characteristics that Neves sees in the idea of optimization. Thus, what characterizes his comparative balancing would be the fact that it does not have any of the supposed weaknesses of optimizing balancing. But if, as I attempted to demonstrate above, the weaknesses of the "optimizing balancing" seem to stem from Neves' own interpretation (in my view a mistaken one) and not from the concept of optimization itself, then the differences between both forms of balancing simply crumble. Furthermore, it is symptomatic that, unlike in works based on the theory of principles, Neves does not strive to show how his "comparative balancing" could work in practice, by means of (real or hypothetical) examples. It is insufficient to say that comparative balancing has this or that strength or that it does not have this or that weakness that the "optimizing balancing" supposedly has. This must be demonstrated. This demonstration, however, is not found in Neves' book.[68]

10. CONCLUSION: JUDGE IOLAUS

A last attempt to try to understand Neves' model and what distinguishes it from the theory of principles would be through the figure of Judge Iolaus. But this last attempt is also unsuccessful.

In Greek mythology, Iolaus was Hercules' nephew and helped him in the fight against Hydra. Just as Dworkin used the figure of Judge Hercules, as mentioned above, Neves uses Judge Iolaus. To become familiar with him, a longer quotation seems necessary:

> *"Judge Iolaus [...] is not erratically subordinated to the power of principles [...]. He does not change his position ad hoc to satisfy every new strategy in which principles are invoked. He is not impressed by principle-based rhetoric. [...]. He does not recast a new principle in every case in order to cover up his actions in favour of private interests associated to power, money, religion, kinship, friendship, good relations etc. In other words, he does not use principle-based rhetoric to impress the parties to the legal disputes and hence conceal his inconsistent legal practice".*[69]

But moreover, according to Neves, Iolaus "does not put himself in a position of intellectual superiority" and "does not isolate law from its social context". Sometimes, he even resorts to balancing, but does so sparingly. Not surprisingly, Iolaus, like Neves, rejects the "optimizing balancing", but accepts a comparative weighing. He considers all points of view, "from the social systems as well as from individuals and groups". Iolaus rejects ad hoc balancing, takes judicial precedents into account and knows that his decision should serve as guidance for future cases. He is not naive and knows that the legal world does not begin again at every case![70]

As it is easy to notice, like his uncle Hercules, Iolaus is a great judge and an exceptional being. Therefore, we can only hope that after further careful consideration he will realize that, unlike what Marcelo Neves claims, there is no difference between "optimizing balancing" and "comparative balancing". I am sure that if Iolaus read Alexy and other advocates of the theory of principles unhurriedly, he would realize that optimization not only does not reject, but rather, requires consideration of all the variables that Marcelo Neves argues it despises.

In the end, Iolaus will realize that the problems Neves sees in the theory of principles are actually the result of an unsound equalisation between this theory and an undiscerning principle-based reasoning not unusual among Brazilian legal practitioners. This undiscerning practice may suffer from many of the weaknesses that Neves identifies, often resorting to the terminology of the theory of principles in an attempt to enhance its legitimacy and rationality. Still, it seems imperative to make some clear distinctions: when a theory falls prey to amateurish and undue appropriation, one cannot blame the theory. In other words, a theory is not invalid just because it is improperly used by some Brazilian legal scholars and practitioners. Deep down Neves knows this, but refuses to admit it. At one point, when criticizing a decision of the Brazilian Supreme Court that made rhetorical use of principles, Neves, mentions that the vote of the judge rapporteur "cites [...] Ronald Dworkin, Robert Alexy and Virgílio Afonso da Silva". But the same Neves surprisingly argues that "it is not relevant [...] to discuss the compatibility of the reasoning underlying the opinion of the court with the views of the mentioned authors".[71]

I am sure that Iolaus would never argue like this. Iolaus would probably say that if there is something truly important to discuss when using a given practice to reject a given theory, it is to determine whether the practice really follows the theory. Therefore, all of Neves' objections that are based on the "use and misuse of principles" fall apart. Were it not so, if one day a judge uses Neves' book in a completely distorted fashion to justify a decision whose purpose is simply to conceal private, economic, political, relational or familial interests, Neves could only come to one conclusion: his own model is wrong. After all, as he argues, it is irrelevant to know if what a judge says is really compatible with the theory he claims to use.

>> ENDNOTES

[1] Virgílio Afonso da Silva, "Interpretação constitucional e sincretismo metodológico", in Virgílio Afonso da Silva (org.), *Interpretação constitucional*, São Paulo: Malheiros, 2005, 132-133.

[2] Ibid, at 120.

[3] See Marcelo Neves, *Entre Hidra e Hércules: princípios e regras constitucionais como diferença paradoxal do sistema jurídico*, São Paulo: Martins Fontes, 2013, at 185.

[4] See Virgílio Afonso da Silva, "La interpretación conforme a la constitución: entre la trivialidad y la centralización judicial", Cuestiones Constitucionales 12 (2005): 3-28; a Brazilian translation was published in the following year: Virgílio Afonso da Silva, "Interpretação conforme a constituição: entre a trivialidade e a centralização judicial", Revista Direito GV 3 (2006): 191-210.

[5] Virgílio Afonso da Silva, "La interpretación conforme a la constitución", at 4; Virgílio Afonso da Silva, "Interpretação conforme a constituição: entre a trivialidade e a centralização judicial", at 192.

[6] Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 19a. ed., Heidelberg: C. F. Müller, 1993, at 32 (n. 85).

[7] See Marcelo Neves, *Entre Hidra e Hércules*, p. 186.

[8] Ibid.

[9] An in-depth analysis of this issue would go beyond the scope of this article. For a more detailed analysis of the incompatibility between both theories, see Virgílio Afonso da Silva, "Interpretação constitucional e sincretismo metodológico", at 136.

[10] Marcelo Neves, *Entre Hidra e Hércules*, at 187.

[11] See Ibid., 187-188.

[12] Robert Alexy, *Theorie der Grundrechte*, 2nd. ed., Frankfurt am Main: Suhrkamp, 1994, 21-22 (English translation: Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, Oxford: Oxford University Press, 2002, at 5.

[13] Robert Alexy, *Theorie der Grundrechte*, at 22 [English translation, at 5-6].

[14] Virgílio Afonso da Silva, "*Interpretação constitucional e sincretismo metodológico*", at 118, note 6.

[15] See Virgílio Afonso da Silva, *Direitos fundamentais: conteúdo essencial, restrições e eficácia,* 2nd. ed., São Paulo: Malheiros, 2010, at 162.

[16] Virgílio Afonso da Silva, "Interpretação constitucional e sincretismo metodológico", at 121.

[17] First found in , Ronald Dworkin, "Hard Cases", *Harvard Law Review* 88:6 (1975), at 1083, later published in Ronald Dworkin, *Taking Rights Seriously*, Cambridge, Mass.: Harvard University Press, 1977, 81-130.

[18] Marcelo Neves, Entre Hidra e Hércules, at XVI.

[19] Ibid., at XVII.

[20] Ibid.

[21] Ibid., at XVIII.

[22] See Robert Alexy, *Theorie der Grundrechte*, at 72 ss; [English translation at 45-47].

[23] See Jan-Reinard Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems*, Baden-Baden: Nomos, 1990, at 53; Martin Borowski, *Grundrechte als Prinzipien*, Baden-Baden: Nomos, 1998, at 61; Virgílio Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume*, Baden-Baden: Nomos, 2003, at 38.

[24] See Robert Alexy, "Zum Begriff des Rechtsprinzips", in Robert Alexy, *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie,* Frankfurt am Main: Suhrkamp, 1995, at 184.

[25] Marcelo Neves, *Entre Hidra e Hércules*, at 23.

[26] Ibid.

[27] Marcelo Neves seems to be aware of this problem when he states that one could simply say that his example is misleading, because legality in criminal law would be considered a

principle simply because it is a general norm. Still, he insists that the norm could be considered a rule, "given its ability to serve as definitive and immediate criterion for deciding a case" (Ibid, at 23, note 61).

[28] Virgílio Afonso da Silva, "Princípios e regras: mitos e equívocos acerca de uma distinção", *Revista Latino- Americana de Estudos Constitucionais 1* (2003), at 614 (emphasis added).

[29] Marcelo Neves, *Entre Hidra e Hércules*, at 104.

[30] See Max Weber, "Die 'Objektivität' sozialwissenschaftlicher und sozialpolitischer Erkenntnis", *Gesammelte Aufsätze zur Wissenschaftslehre*, 3rd. ed., Tübingen: J.C.B. Mohr, 1968, at 191.

[31] For a critique on the usefullness of ideal types in the legal realm, see, for example, Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung*, Berlin: Springer, 2006, at 12.

[32] Max Weber, "Die 'Objektivität' sozialwissenschaftlicher und sozialpolitischer Erkenntnis", at 191.

[33] Aulis Aarnio, "Taking Rules Seriously", *Archiv für Rechts- und Sozialphilosophie Beiheft 42* (1989): 180-192.

[34] Marcelo Neves, *Entre Hidra e Hércules*, at 105.

[35] Ibid.

[36] Ibid., at 109.

[37] See for example page 84: "principles cannot be direct reasons for concrete decisions".

[38] Virgílio Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume*, 65-66

[39] Marcelo Neves, *Entre Hidra e Hércules*, at 162.

[40] Ibid.

[41] Ibid., at 158.

[42] See BVerfGE 111, 307 (323).

[43] Marcelo Neves, *Entre Hidra e Hércules*, at 159.

[44] See, for example, Carlos Ari Sundfeld, "Princípio é preguiça?", in Carlos Ari Sundfeld, *Direito administrativo para céticos*, 2a. ed., São Paulo: Malheiros, 2014, 205-229.

[45] See Marcelo Neves, *Entre Hidra e Hércules*, at 189.

[46] Ibid.

[47] Ibid., at 190.

[48] Ibid.

[49] Ibid., at 191.

[50] Ibid., at 190. The usual references here — which are also made by Neves — are Sérgio Buarque de Hollanda and Raymundo Faoro (see Sérgio Buarque de Hollanda, Raízes do Brasil, 26th. ed., São Paulo: Companhia das Letras, 1995; Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro*, 2nd. ed., Porto Alegre/São Paulo: Globo/Edusp, 1975).

[51] This is one of the conclusions of Marcelo Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne: eine theoretische Betrachtung und Interpretation des Falls Brasilien*, Berlin: Duncker & Humblot, 1992.

[52] See Marcelo Neves, *Entre Hidra e Hércules*, at 190.

[53] Ibid., at 141.

[54] See, for exemple, Ronald Dworkin, *A Matter of Principle*, Cambridge (Mass.): Harvard University Press, 1985, at 119 ss.

[55] See Robert Alexy, *Theorie der Grundrechte*, at 519 [English translation, at 385].

[56] I cannot develop this argument in detail here. For an analysis of the relation between optimization and legislative freedom, see Virgílio Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume*, at 113-209. See also Virgílio Afonso da Silva, "Direitos fundamentais e liberdades legislativas: o papel dos princípios formais", in Fernando Alves Correia, Jónatas Machado & João Carlos Loureiro (orgs.), *Estudos em homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, vol. III, Coimbra: Coimbra Editora, 2012: 915-937.

[57] Marcelo Neves, *Entre Hidra e Hércules*, at 146.

[58] Ibid., at 147.

[59] Ibid., at 148. Ladeur's aforementioned work is Karl-Heinz. Ladeur, Der Staat gegen die Gesellschaft: zur Verteidigung der Rationalität der "Privatrechtsgesellschaft", Tübingen: Mohr Siebeck, 2006, p. 367.

[60] Marcelo Neves, *Entre Hidra e Hércules*, at 196.

[61] Ibid., at 199.

[62] For a more evident example, see Robert Alexy, *Theorie der Grundrechte*, 504-508 [English translation, 373-377].

[63] See Virgílio Afonso da Silva, *Direitos fundamentais*, at 150.

[64] Marcelo Neves, *Entre Hidra e Hércules*, at 141.

[65] Ibid., at 151.

[66] Ibid.

[67] For a further development of this argument, and others related to incommensurability, see Virgílio Afonso da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision", *Oxford Journal of Legal Studies 31:2* (2011): 273-301.

[68] The examples Neves uses, as mentioned above (ADI 3510, ADPF 101, Caroline of Monaco), do not serve to demonstrate how his "comparative balancing" should be applied. They serve to show a supposed inadequacy of the "optimizing balancing". As I argued above, in all cases, this inadequacy is not really shown.

[69] Marcelo Neves, *Entre Hidra e Hércules*, 221-222.

[70] Ibid., at 222.

[71] Ibid., at 211.

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