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# INSIDE AND OUTSIDE LEGALITY:

## A pluralistic and social construction of law

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### **Abstract**

What is inside and what is outside the law?

A question that is not easy to answer and that forces legal theory to ask itself about which are today the forms of normative production and which are the boundaries of law.

Through the analysis of the deep transformations of the global legal order and of the issues related to the boundaries of law and to the forms of hybrid legality, the essay offers a pluralist and dynamic interpretation of the social genesis of law.

### **Keywords**

Boundaries, transnational law, normativity, pluralism

### **Resumen**

¿Qué es lo que está dentro y lo que está fuera del derecho? Es un dilema difícil de solucionar, que obliga a la teoría jurídica a interrogarse acerca de las actuales formas de producción normativa y de los mismos confines del derecho. A través del análisis de las profundas transformaciones del orden jurídico global y de las problemáticas que atañen a los confines del derecho y a las formas de juridicidad híbrida, este ensayo se presenta como una lectura pluralista y dinámica de la génesis social del derecho.

## Palabras clave

Confines, derecho transnacional, normatividad, pluralismo

### 1. Pluralistic and transnational dimension of law

In one of his famous article, John Griffith provokingly wrote that the term “law” should be totally deleted today, so to be able to develop a sociological theory using a legal pluralism approach.<sup>1</sup> This interpretation is tied to self-regulation processes and, according to Sally Moore’s ideas<sup>2</sup>, confines law to a social scope which is only partially autonomous but, before the decline of sovereignty of the legal device due to globalization processes, it forces legal theory to question itself about which are today the social control measures attributable to the legal world, and which are the situations and forms of law.

In his work published in 1986 and entitled “What is legal pluralism?”<sup>3</sup>, the biggest obstacle to a descriptive theory of law had been already identified in legal centralism, deeply compromised with the idea that the State factual power is able to guarantee the empirical condition for the existence of law: the illusion, the myth of sovereignty that follows the directive traced by Bodin-Hobbes-Austin, transposed into the obsession for hierarchy of the Grundnorm<sup>4</sup> and the rule of recognition of Hart<sup>5</sup>.

It is unquestionable that the term “pluralism” is used in many contexts which are deeply different from each other, and that it covers a multifaceted semantic area, so that is susceptible to many possible variations. In the same way, it is unquestionable that the answer to the question about what the law is absorbed ontologically the whole theoretical reflection, and that today, within an extremely non homogeneous and fragmented scenario, it appears incredibly complex as it reveals the asymmetry and ambivalence of what has been defined the *Soft Revolution*<sup>6</sup> of the global governance.

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1. J. Griffiths, “The Idea of Sociology of Law and its Relation to Law and to Sociology”, in M. Freeman (ed.), *Law and Sociology: Current Legal Issues*, 8, 2006, pp. 63-64.

2. Sally F. Moore, “Law and social change: the semi-autonomous social field as an appropriate subject of study”, in *Law and Society Review*, 7, 1973, 4, pp. 719-746.

3. J. Griffiths, “What is Legal Pluralism?”, in *Journal of Legal Pluralism*, 1984, 24, pp. 1-55.

4. H. Kelsen, *Reine Rechtslehre*. Verlag Franz Deuticke, Wien, 1960.

5. H. L. A. Hart, *The Concept of Law*, Oxford University Press, London, 1961.

6. The reference is to M. R. Ferrarese, “Soft Revolution with Hard Political and Legal Effects”, in *Soft Power. Revista de Teoría e historia de la política*, 1, 2014, pp. 35-56.

In fact, if the world of modern institutions, together with its legal-political logics oriented to coherence within the sovereign system, persists and coexists with the new logics of governance and governmentality, which are inspired to economy and which are both pragmatic and inclusive but perpetually evaluative and selective, the strength of weak links will spread over, lying outside the theoretical structures of legal science, involved inside an incessant process of modulation and readjustment among new languages and traditional archetypes<sup>7</sup>. Hence, we find ourselves before a horizon pregnant with questions rather than answers, ambivalences and difficult choices rather than anchorages and achievements, observing discontinuity of forms and porosity of legal edges so that the attempt to clearly draw a unique device-law becomes insidious.

It is actually unquestionable that within the global scene, besides unprecedented procedures of legal adjustment –as for example, soft law and *lex mercatoria*–, different types of procedures can be noted. Such procedures become more and more similar to the Anglo American types of judge made-law and are the reason why conflict in the world is becoming a common practice, in a prospect of a growing proceduralism of the legal system.

This aspect can be contextualized within the general theory of law, within the prospect of a deep reassessment of a pragmatic/argumentative rationality that is originated from the improvement of decisional power of courts that becomes crucial for the evolution of transnational law, and that shows a strong theoretical propensity to interpret the global nature of law as legal reasoning. The preponderance of the contractual and judicial law within the global governance reveals that it is impossible to focus only on aspects which are functional to the creation of a system made of proxies and authorizations within a sovereign system, implying a new modulation of the relationship between duty and power, as well as of the dichotomy order/conflict, main feature of the recomposing effort of modernity.

If legitimacy criteria of the decisions of transnational law tend to require a new interpretation of recognition issues, not only from a sources systematization point of view, but above all with respect to the recourse to moral reasoning, the dyad sovereignty-obedience, on which self representation of the modern philosophic-legal thought is founded, will weaken. And the long, hard democratic process during which representation and control have become legitimate, loses its meaning<sup>8</sup>.

7. As in L. Bazzicalupo, "Editorial", in *Soft Power. Revista de Teoría e historia de la política*, 1, 2014, p. 12 and ff.

8. As in L. Bazzicalupo, *Politica, identità, potere. Il lessico politico alla prova della globalizzazione*, Giappichelli, Torino, 2004, p. 103.

On one side, the fragmentation of the legal system, determined by the global governance in the way Griffith pointed out, seems to be hardly compatible with the ordering need expressed by modernity, so deeply involved with the creation of a formal, hierarchical structure of the power. On the other hand, a pluralistic interpretation seems traditionally to widen disproportionately the borders of legal system, up to the point of being unable to explain the systemic, functional differentiation that the whole Luhmann's<sup>9</sup> legacy asks to express.

Undoubtedly the contemporary theoretical scenario shows how the prestige of law authority has become weaken, and in some cases the way in which legal regulation has transfigured into a global net made by institutions and organizations, because of which, it is particularly hard to draw a line to distinguish the inside and outside of the notion of law. Hence, the dissolution of public/private dichotomy radicalizes, through the globalization processes, the normative techniques focused on the deploying of legal effects originated by power conferring rules, deflating those that are attributable to the command theory of law or kelsenian coercive model of the XX century. It seems, then, to support Hart's theory according to which the normative pluralism that deconstructs the strong deontic language *à la* Kelsen develops within the paths of social practices, identifying several different itineraries of the normative game.

Sovereignty myth, its obsession, which leads the law back to a single rule system, unified and hierarchical, deeply binded to the features of the national political organization, which, as we have seen, in Griffith's concept is attributable to the same XX century positivistic methodology, actually in Hart's concept develops in a normative relationship between practices and recognition of law. Such a relationship gives rise to a categorial transformation of effectiveness, a factuality actualized in the wittgensteinian direction into legal normativity. The categorial transformation of a mere fact – a convergence of behaviors – into a reason to act, a rule of recognition that, generating legitimate expectations, creates a framework of mutual entrustment and presumptions of conformity.

The legacy of linguistic analytic philosophy that identify the essence of linguistic games in a number of critic-reflective attitudes related to the idea of *following rule*, in

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9. In the footsteps of the interpretation in terms of systemic differentiation, see N. Luhmann, *Ausdifferenzierung des Rechts – Beiträge zur Rechtssoziologie und Rechtslehre*, Suhrkamp Verlag, Berlin 1981; N. Luhmann, R. De Giorgi, *Teoria della società*, Franco Angeli, Milano, 1992; R. De Giorgi, "Il mondo come sistema complesso", in P. Barcellona, R. De Giorgi, S. Natoli (eds.), *Fine della storia e mondo come sistema: tesi sulla post-modernità*, Dedalo, Bari, 2004, p. 50; A. Febbrajo, *Funzionalismo strutturale e sociologia del diritto nell'opera di Niklas Luhmann*, Milano, Giuffrè, 1975; Id., *Il diritto frammentato*, (with F. Gambino), Milano, Giuffrè, 2014.

Hart's social rule theory is expressed by conventionalism that explains on one side the dependence of law on social behavior, and on the other side its normativity, its ability to offer reasons to act. The acceptance explains why these reasons are generated, since those who accept a norm are also offering it, publicly, as a foundation to guide and criticize both their own and others behavior: in this scenario, it is possible to generate a mutual and stable pattern which is the heart of the very idea of convention.

Undoubtedly, the pluralism of normative production sources and the progressive weakness of the public/private dichotomy cause a new semantic analysis of the legal lexicon, just as the emerging of new structures of global power and the porosity of legal edges generate a problematization of social convention concept, as it is understood nowadays within the most fragmented legal scenarios ever existed.

The weakening of autoreferentiality of law and of the attempt of neutralization of conflicts traditionally attributable to the modern paradigm, and as consequence of the myth, the illusion of sovereignty, seems to cause a better fluidity of the concept of "la" in relation to areas that, until a short time ago, were subject exclusively to legal authority, so noticing an osmosis between legal and economic-financial fields identified by processes of local and institutional encapsulation of economic globalization. Such osmosis on one side is generative of a new cartography of global law, according to the variable geometry<sup>10</sup> in which the constitutive elements of the political dimension are re-written according to the weak version –territory, authority, rights– and produce new *assemblages*<sup>11</sup> of national and global features, within the new systemic global fragmentation.

The assembly metaphor has been used by Sassen to generate a new profile of contingency and dynamism of the global scenario in which new geometries of power, which are generating the denationalization phenomenon illustrated by Sassen, are constantly trying to conform to the space-time dimension and to the interconnection generated time by time between national and global, within a polycentric but never conclusive net.

It is undoubted that several and unknown power configurations can be noticed on the global scene characterized by a structural flexibility, so as it is certain that the never conclusive process of transition from hierarchy to the net evokes a reconsideration of some fundamental issues, for example the problematization of the dyad obligation/power starting from the participation demands so often expressed by pluralistic ideas

10. See M.R. Ferrarese, *La governance fra politica e diritto*, Il Mulino, Bologna, 2010.

11. S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton University Press, Princeton, 2006, especially I, *Assembling the National*, and part 2 *Disassembling the National*.

or starting from an active<sup>12</sup> use of law, that has to be protected, inevitably through a methodological-cognitive demand.

It is the cognitive demand of positivistic methodology that, contrary to what Griffith thought, with Kelsen overtakes the sovereignty dogma refusing the extreme subjectivism of the State in the name of an objectivistic idea of law based on the supremacy of international law and on the anti-ideological tendency of Legal Science, or recomposes it, in Hart, inside the empiric-normative dimension of recognition acts by the officials in charge of the application/identification of law –in this interpretation, considered a social practice.

Today, we assist to a softening of the dichotomy convention/cooperation developed by the legal philosophic thought, as well as to a interpretation of legal positivism, depending on its autoreferentiality and practical authority in regard to moral values, into the forms of *soft* and *hard positivism*<sup>13</sup>: an osmosis between law and morality inside the same criteria of legal validity, that in some cases seems to tone down the category of recognition to a moral acceptance, an adhesion to values, to the practice of rights, presented as basically homogeneous, rooted inside the processes of judge made-law of the global systems.

To which extent, today, within a context ruled by multiple power vectors, it is really appropriate to turn down the need for anti-ideological disclosure by a jurisprudence that from an assessment point of view is not engaged?

Tension between the powers that are acted into a social pattern, between antithetical views of the world, between rights and economic interests, between irreconcilable *moral points of view*, should not encourage us not to loosen the dialectic, the one that belongs to the whole modern tradition, between recognition and consensus?

12. Such participation demands from all partners, connected to logic-formal recognition, represents the core of A. Catania's works, "Che cos'è il diritto?"; "Che cos'è la decisione", both published in V. Giordano (ed.), *Effettività e modelli normativi. Studi di Filosofia del diritto*, Giappichelli, Torino, 2013, respectively pp. 3-12 and pp.71-80.

13. The debate about soft and hard positivism is very wide and is related to the way in which separability thesis is meant. In fact, the idea that exists a not necessary connection between law and morals, so as it is expressed by H. L. A Hart, "Positivism and the Separation of Law and Morals", in *Harvard Law Review*, 71, 593-626, is reinterpreted in a weak version by soft positivism as separableness between law and morals, where the idea of contingency becomes central. About this interpretation, see, J. Coleman, "Negative and Positive Positivism" (1982), in J. Coleman, *Markets, Morals and the Law*, Cambridge University Press, Cambridge, 1988, pp. 3-27; J. Coleman (ed.), *Hart's Poscript, Essay on the Poscript to the Concept of Law*, Oxford University Press, Oxford, 2001; J. Coleman, *The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory*, Oxford University Press, Oxford, 2001.

W. J. Waluchow, *Inclusive Legal Positivism*, Clarendon Press, Oxford, 1994; J. J. Moreso, "In Defence of Inclusive Legal Positivism", in P. Chiassoni (ed.), in *The Legal Ought*, Giappichelli, Torino, 2001, pp. 37- 63. From the hard positivism perspective, where the separability thesis is re-read as a necessary separation between legal and moral areas, see J. Raz, *The Authority of Law. Essays on Law and Morality*, Oxford University Press, Oxford, 1979.

## 2. Softness in global governance

*Soft* seems thus to be the adjective that might represent the global language. *Soft power*<sup>14</sup>, *soft law*<sup>15</sup>, *soft positivism* reshape the cartography of the global scenario remodeling the forms of modern rationality, even if without totally cancelling the preexisting logics, getting nourished exactly from unstable, heterogeneous balances, which are inevitably precarious but suitable for the incessant change of the pluralistic structures of powers, within an incessant logic of compatibility and conflict, hybridization of categories traditionally represented from a dialectic point of view.

*Soft power* can be traditionally<sup>16</sup> described as the other side of the *hard power*,<sup>17</sup> thus, not fitting to coercive/repressive modalities: the attraction becomes dominant also within the net of legal relationships of a power weakened of its ability to impose itself and that uses, then, persuasive methods which are able to model people's preferences, orienting actions in an alternative way from the initial strategies.<sup>18</sup>

It is a soft, widespread power that reveals a scenario of unequal, intermittent, conditioned powers which have widespread –through the modern and postmodern political and economic socialization– through all the forces of society where mutually

14. The expression “Soft power” was first used by J. Nye, “The misleading metaphor of decline,” in *The Atlantic Monthly*, March 1, 1990, pp. 86-94. In that essay the author claims that if the United States were to follow policies that cut domestic consumption by the two percent of GNP by which it rose in the past decade, the richest country in the world could afford both better education at home and the international influence that comes from an effective aid and information program abroad. What is needed is increased investment in “soft power,” the complex machinery of interdependence, rather than in “hard power” –that is, expensive new weapons systems.

15. Literature about the soft law is immense. Just as an example, see A. Somma, *Soft law and hard law nelle società post-moderne*, Giappichelli, Torino, 2009.

16. The most important definition of soft power has been developed by J. Nye, “Soft Power: The Means to Success in World Politics”, in *Public Affairs*, New York, 2004, p. 6-7: “Soft power rests on the ability to shape the preferences of others. In the business world, smart executives know that leadership is not just a matter of issuing commands, but also involves leading by example and attracting others to do what you want. Similarly, contemporary practices of community-based policing rely on making the police sufficiently friendly and attractive that a community wants to help them achieve shared objectives. [...] Soft power is more than just persuasion or the ability to move people by argument, though that is an important part of it. It is also the ability to attract, and attraction often leads to acquiescence. Simply put, in behavioral terms, soft power is attractive power. Soft power resources are the assets that produce such attraction.

17. “Hard and soft power are related because they are both aspects of the ability to achieve one’s purpose by affecting the behavior of others. The distinction between them is one of degree, both in the nature of the behavior and in the tangibility of the resources”: J. Nye, “Soft Power”, p. 7.

18. “Soft co-optive power is just as important as hard command power. If a state can make its power legitimate in the eyes of others, it will encounter less resistance to its wishes. If its culture and ideology are attractive, others will more willingly follow. If it can establish international norms that are consistent with its society, it will be less likely to have to change. If it can help support institutions that encourage/other states to channel or limit their activities in ways the dominant state prefers, it may not need as many costly exercises of coercive or hard power in bargaining situations. In short, the Universalism of a country’s culture and its ability to establish a set of favorable rules and institutions that govern areas of international activity are critical sources of power”. J. Nye, *Bound to Lead: The Changing Nature of American Power*, Basic Books, New York, 1990, pp. 32-33.



conditioning relationships are composed, from high and from below, multiple and heterogeneous.<sup>19</sup>

A scenario overflowing with disparate, cross vectors of powers that fits inside the law structure in a variety of acting spaces. Acting spaces ruled by using the legal device through voluntary negotiation among partners, for example, in contract drafting, or through multiple and diverse forms of legal mediation, including also the alternative dispute resolution, and even the flexible and agile tools of soft law. A soft power, then, irregular in comparison to a hard one, that can fit within the power conferring rules structure which generates Hart's normative pluralism, incentivizing and disincentivizing the exercise of the subjective rights of individuals, their *facultas agendi*, manifesting, within the practical-political activity related to the use of the legal device, in multiple subjectivization processes<sup>20</sup>.

A legal universe, then, more and more characterized by forms of legal self-regulation very distant from traditional normative tools. This is the case of *soft law*, whose binding force is often controversial, even though characterized by an increasing efficacy and pervasiveness. It concerns, as it is well known, both the European governance regulation, which is influential within the community borders, and the one that comes from the "globalization factual institutions"<sup>21</sup> within the commercial and financial area (for example, city takeover code, corporated governance code), which show, regardless their ambiguous legal nature, a clear inclination towards increasing levels of enforcement.

It is not insignificant, according to this interpretation, the reception of some rules of soft law within the directives of the European Union, and their use, with no doubt controversial and disputed, in the indirect integration of criminal norms<sup>22</sup>.

It is a mostly technical rule, that refers to the recommendations, the opinions and all preparatory acts of European institutions, even outside the normative prevision of article 249 of the European Community Treaty, which has undoubtedly made more problematic and complex the whole system of the sources of the international regime, since it shows deviations from that same system that reveal the steps of decision processes

19. "It is a form of rationality that makes of the mechanism of interdependencies, of the co-existence of heterogeneous techniques and styles the vehicle for government processes that do not operate through the mechanism of coercion (although we will never grow tired of arguing that they co-exist with it), but rather aim to produce subjectivations appropriate for a unstable world, and power relations referred to individuals or free associations that remain active even when they find themselves in the weakest and subordinate position in an asymmetric power relationship": L. Bazzicalupo, "Editorial", p. 13.

20. About subjectivization processes, cfr. A. Tucci, "Crossing the borders of governance", in *Soft Power. Revista de Teoría e historia de la política*, 1, 2014, specially pp. 71 e ff.

21. The expression is by M.R. Ferrarese, *Le istituzioni della globalizzazione*, Il Mulino, Bologna, 2000.

22. For an in-depth analysis, see N. Boister, R. J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, Routledge, London, 2015.

of global governance. A multilevel system that falls outside the pyramidal structure of legal science, conferring importance to multiple, different subjects, especially within the commercial and financial area: as an example, we can mention the *best practices* of controlling systems on global scale considered as authentic referring patterns and guidelines, extremely binding for many national systems.

The question if it is a graduated normativity<sup>23</sup> is a theoretically complex one, and it is strictly dependent on the importance attributed to social practices, as well as to the pervasive use of this kind of forms and, thus, necessarily related to the available definition of the law. But it is out of doubt that we are dealing with legal procedures that sometimes are not easily distinguishable, through a binary logic, from hard law techniques<sup>24</sup> and that recall, for the legal self-regulation, those common customary practices that were typical of premodern law. This aspect is particularly clear in the current *lex mercatoria* that, being flexible and having formed from the lower levels, for many aspects has evoked new forms of medievalism<sup>25</sup>, the idea of a global law without a State<sup>26</sup>.

In this last interpretation, *lex mercatoria* is considered as the transnational law of economic transactions, that causes a decentralization of political juridification and the production of new forms of “heterarchy”: from hierarchy/to center-periphery. This last distinction on one side, reproduces the dichotomy internal/external to the law, without ignoring the legality of peripheral production of law in which are placed the political legislation and the forms of governance regulation; on the other side, rebuilds the dimension of law within a structural coupling with normativity processes that refer to different social system, characterized by distinctive and contradictory rationalities: “private” autonomous legal regimes explain the irrevocable crisis of modernity project, of legal fragmentation and, hence, of the “king’s many bodies”.<sup>27</sup>

That implies reconsideration and a complexification of the translation/betrayal processes between different languages, logics and systemic codes. Before the falling of

23. For a more detailed study, see B. Pastore, “Soft Law y la teoría de las fuentes del derecho”, in *Soft Power. Revista de Teoría e historia de la política*, 1, 2014, pp. 81 e ff. About the idea that soft law is in the penumbra of law, see A. Peters, “Soft Law as New Model of Governance”, in U. Diedrichs, W. Reiners and W. Wessels (eds.), *The Dynamics of Change in EU Governance. Studies in EU Reform and Enlargement series*, Edward Elgard Publishing, Northampton (Mass.), 2011, p. 23.

24. About the refusal of the binary logic, see K. W. Abbot, D. Snidal, “Hard and Soft Law in International Governance”, in *International Organization*, 54, 3, 2000, pp. 421-456; O. Perez, “Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics”, in *Theoretical Inquires in Law*, 12, 2, 2011, pp. 543-579.

25. P. Grossi, *Prima lezione di diritto*, Laterza, Roma-Bari, 2003.

26. G. Teubner, “Global Bukovina: Legal Pluralism in the World Society”, in G. Ten (ed.), *Global Law without a State*, Aldershot, Dartmouth, 1977, pp. 3-28.

27. G. Teubner, “The Kings many Bodies: The Self-Deconstruction of Law’s Hierarchy”, in *Law and Society Review*, 4, 1997, pp. 763-787.

hierarchies and the generation of normative expectations, Teubner's theory is that law de-constructed itself according to polycontextual key, through the intersection of society subsystems generated from heterogeneous spheres of interest and fields. Different normative codes, contradictory rationalities coming from economic and other social areas, as science, technology, mass media, health care, education etc., reproduce within the legal scenario those structural conflicts already existing among functional systems, generating each time new compatibilities and new disputes. What is changing, then, is the geometry of legal conflicts.

A possible interpretation of legal globalization processes that in rewriting the map of conflicts disjoins it from the dimension of space and territory, and entrenches it into the encounter/clash between heterogeneous normative codes and incompatible communicative matrix. Whose mediation is entrusted to the progressive institution-ization into a networking pattern of society fragments, that is to say to the processes of self-constitutionalization<sup>28</sup> and, thus, ultimately to the risk of metaphysical self-regulation of the market.

Undoubtedly, it is an interpretation of globalization that allows us to take the theme of law's borders seriously, with a new interpretation of legal decentralization within the perspective of a greater and greater systemic reflexivity, with a sociologically centered view on the characters of the global scenario. In this sense, Teubner's pluralism highlights how the participation moment and the role of subjects are inescapable. Nevertheless, it seems that entrusting in self-regulation forms means to underestimate the social and political conflict, even if Teubner's interpretation is not based in principle on a non-conflicting and pacified society.<sup>29</sup>

In the combination of functional differentiation what is still missing is the impartial third party, that is to say the identification of a third guarantor of the processes of institutionalization of conflicts that refer to the incessant processes of constitutionalization which are so confined inside the perimeter outlined by the rationality and autopoietic ability of the system.

Finally, if we downgrade the law to a social field that is only partially autonomous, we end unavoidably to reduce its demand of neutralization of conflicts, its ability to act as a "stabilizing" tool of pretensions rooted inside the society, to orient, at the end, social behaviors, practical choices, briefly the collective acting.

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28. G. Teubner, *Verfassungsfragmente: Gesellschaftlicher Konstitutionalismus in der Globalisierung*, Suhrkamp Verlag, Berlin, 2012.

29. On these themes, see A. Tucci, *Immagini del diritto. Tra fattualità istituzionalistica e agency*, Giappichelli, Torino, 2012, pp. 97-98.

Can a lucid acknowledgement of the polytheism of rationalities really combine with the recognition of a practical authority of law, with the possibility that still today law, its technique, is a tool of reasonable transactions?

### 3. Can Conventionalism be not essentialist?

Within the theoretical general debate, except the legal pluralism model called “monotypic”, that is to say based on a definition of law that includes the relationship with an enforcement of institutional rules, or with “many self-regulated semiautonomous social fields” *à la* Teubneir, has also been outlined a version that we can call non “essentialist”<sup>30</sup>, in which pluralism element does not rely on legal notions and there is no attempt to identify the functionalist side.

For this specific interpretation of legal pluralism, law has not to be built as a scientific category, inevitably ascribable to state system, nor as a single concept or single definition, but as a many-sided phenomenon that goes beyond the structural/functional dialectic and settles inside the processes of recognition by the members of a group. Hence, law cannot be represented as a totality of element that one can include into a “formulaic description”, neither it can be considered as something that has to guarantee order, coordinate expectations of social behaviors, resolve social conflicts through an institutional path. These definitions are vitiated by the obsession to identify the essence, the heart of law, that is nothing else than what the participants think it is.

A non “essentialist” perspective that identifies the legal pluralism in the multiplicity of forms with which the legal system reveals itself and is identified –state law, habits, *lex mercatoria*–, but inherits the conceptual cornerstone of Herbert Hart’s conventionalism, the idea of the law as a social practice, even if the interpretation proposed is not, somehow, disengaged from the psychological moment and is tied to the critic/reflective attitude of those who take part to the system.

Undoubtedly, the ambivalence of Hart’s notion of convention, in which Searle’s dialectic between regulative rules and constitutive rules<sup>31</sup> has been transposed, is clearly

30. B. Z. Tamanaha, “A non Essentialist Version of Legal Pluralism”, in *Journal of Law and Society*, 27, 2, 200, pp. 296-321.

31. “Regulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules. Constitutive rules constitute (and also regulate) an activity the existence of which is logically dependent on the rules: J. R. Searle, *Speech Acts. An Essay in the Philosophy of Language*, Cambridge University Press, Cambridge 1969, p. 34. About recognition rule as a regulative rule, see J. Coleman, “Incorporationism, Conventionality, and Practical Difference thesis”, in J. Coleman (ed.), *Hart’s Poscript*, pp.1232-147; in the same volume, about the recognition rule as a constitutive rule, A. Marmor, *Legal Conventionalism*, pp. 193-217.

expressed by the global processes of *judge made-law*, reflecting the complex nature of the empiric-constitutive root that binds actualized practices and normativity game.

If preserving a logic-cognitive demand for the operations of recognition before the proliferation of source of normative production and the unprecedented flexibility of legal forms seems inescapable, it is also true that the constitutive root of effectiveness is claimed by those who are part of the system with the use of the game rules within a form of normativity that is compulsorily legal. But, in this case it is necessary to know the game rules, the goal set of players, the penalties to ascribe for the violations to required behavior: briefly, the definition of the game.

Such an aspect proves to be impossible if we have to adhere to a form of non-essentialist conventionalism.

Within this context, in fact, the attempt to reject the central objection posed to legal pluralism, concerning the possibility to distinguish law from any other form of social life, proves to dissolve into an idea of *convention* that is deprived of any normative element and as such is incapable to discriminate in regards to the configuration of psychological aspects and attitudes of internalization. Hence, it is not able to delimit the edges of the normativity game.

Undoubtedly, the heart of this interpretation is Hart's social rule idea that identifies, according to the artificialism, the existence of a legal obligation with the normativity generated by a shared practice; nevertheless, the exclusively sociological view, "moderate external", adopted in this approach does not allow to identify in which manners law can orient social behavior, offering reasons why one should adhere to the practice itself. The attention to the belief of actors of global arena and never on their demands for conformity and expectations of normativity seems to break the short circuit of empiric-normative origin generated by the attitude of participants, in the same way that the refusal of any form of functionalism related to the role of the law does not allow to identify the specificity of legal normativity, the exclusivity of its notion.

In other words, what is missing in the concept of "non-essentialist legal pluralism" is the internal point of view. The view of the participant. The view of someone who not only has a belief about what the law is inside the society, but also of anyone who demands the adoption of the legal practice because external conformity is part of the reason to follow a rule, so as the expectation of legal implementation represents a key element for the social construction of the law. In this perspective, what is missing then is the construction, in terms of collective intentions and shared expectations, of the

social convention concept, what determines the categorial transformation of the factual moment that is immanent to Praxis into a normative phenomenon, into a dimension of legal binding force.

For some aspects, this concept allows to extend law identification to the immanence of social practice, going beyond the risk of a statist reductionism thanks to the recognition of multiple forms with which global legal normativity is covered. On the other hand, because of the decline of normative elements and the choice not to define the differential concepts of law in comparison to other social phenomenon, it seems to generate a vicious circle, unable to grasp a concept, even in its minimal form, of practical authority of law. It is clear that, in comparison to hard positivism perspectives in which the separation thesis is reinterpreted according to the strong version –in the definition of rules as exclusionary reasons<sup>32</sup>– the importance of legal tool to neutralize the practical conflict, the position of non-essentialist pluralism disengages the legitimacy of global systems from any structural and functional element of law. But, it does not manage, through this distancing, to confer it any practical difference within decisional context, in any form of deliberative process.

Undoubtedly then, the risk of a too deformed image is very high. If, as Tamanaha claims<sup>33</sup>, the current tendency of legal theory is a sociologic approach, it is necessary not to forget that social practice is not just a mere empiric device. It is the critic-reflective attitude of the participants of the system, in that vital twist, the constitutive and pluralist twist of the normative puzzle, transforms a mere empiric convergence into a pretense of binding force that ends up building the practice itself as a tool to control/orient but also to exclude/include legal normativity.

#### **4. The social construction of law: conventional games**

It would be possible, then, from this perspective, to import from Griffith, the theoretical assumption that pluralism is a fact, a social fact, whose construction in legal terms is a duty of the general theory of law. An undoubtedly complex task that includes the description of legal reality, today within an enigmatic context which demands to give a voice to claim of normativity not always externally covered with a legal form, but

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32. B. Z. Tamanaha, "A non Essentialist Version of Legal Pluralism", p. 313.

33. B. Z. Tamanaha, "The Internal/External Distinction and the Notion of a 'Practice' in Legal Theory and Sociolegal Studies", in *Law & Society Review*, 30, 1 (1996), p. 201.

in which the need to describe does not prove to be, as in the non essentialist conventionalism, tainted by a definitional gap. And, in this perspective, to reinterpret the normativity of transnational law as a question of degree, in which the concept of social pressure that innervates Hart's perspective and founds the dialectic between social habits/social and legal rules will give back new compatibilities and new conflicts of the social business that necessarily proves the irreducibility of the political/decisional character and the partiality of legal synthesis.

Then, an inter-institutional interpretation that could read again the legal aspects of global law as a dynamic process, of social construction, between practices and normativity probably would be able to avoid the transfiguration of the legal normativity and at the same time, not to darken those aspects of contingency, intermittence, that highlight a current paradoxical disequilibrium of effectiveness over the normative dimension of law.<sup>34</sup>

The inter-institutional normativity is contingent, intermittent and can blur within the global governance those fundamental theoretical assumptions—objectivity and permanence of organizations—that characterized the positions of traditional legal institutionalism, *à la Romano*. Nevertheless, it enables to inflect in the plural, according to a multilevel version, those legal decisions that emerge from practices, if they can provide a certain degree of intensity and interaction<sup>35</sup>, giving back each time areas of normative inclusion/exclusion, unstable balances and forms of legal representation.

An interpretation, thus, in terms of compatibility between *soft power* and *hard power*, but also necessarily in conflict; the type of conflict that generates the same social construction as the law does, within an irregular path where legal system can be active or inactive, where you can have battles, claims and defeats.

In this perspective, then, we should not disregard the essence of law, the fact that law is a tool for social regulation. And it is just in relation to social regulation that it has to make a difference, offering—with its capacity to neutralize conflict—tools for normative orientation, reasons to act.

If the convention is not simply an actualized practice, but a constitutive rule or a coordinative rule that provides for an absent agreement<sup>36</sup>, counterbalancing the choice between divergent options, the categorial transformation of a mere convergence of

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34. In this interpretation of global normativity, see K. Culver, M. Giudice, *Legality Borders: An Essay in General Jurisprudence*, Oxford University Press, Oxford, 2010.

35. For an in-depth analysis, see K. Culver, M. Giudice, *Legality Borders*, p. 99.

36. The idea that conventions do not give for granted an agreement but that they are an alternative way to obviate to an absent agreement is by D. Lewis, *Convention: A Philosophy Study*, Harvard University Press, Mass., 1969.

behaviors into a conventional practice cannot neglect to identify the game rules and the function of the game. A construction of legal reality that starts, then, from the definitional elements through which social practices are established and from the purpose of the convention itself, starting from which it is impossible not to characterize the essence of law, the nature of legal normativity.

Of course, weakening the project for the conditioning and controlling of modern representation requires a new semanticization of legal lexicon, a decline of the deontic linguistic structure, so as it is undoubted that together with the persistence of statist root of law come up a more and more binding factuality, actualized practices characterized by a strong social interaction that go beyond the monolithic limit of systems and get placed inside the transnational net of global institutions.

Undoubtedly, a possible way to account for transnational legality could be eluding the dichotomy of validity/applicability of law<sup>37</sup>, in which the essential aspects of law end up being inflated in a process of endless abstraction and separation between national systems and sources of heterogeneous kind, and a revaluation of the pluralist demands coming from global area, looking at the levels of institutionalization of social pressure through which Hart discerned between legal and social normativity.

But, we have to assume that law is a tool for social stabilization. And that, filtering, it juridicates expectations of legal implementations that depend on the circle of recognition originated from the belief/claim of normativity<sup>38</sup>, that represents the conceptual cornerstone, the heart, of any normative game. So, it is not a tacit approval of the law system towards forms of graduated normativity coming from the organizational net on the global scene, but an active, explicit approval, actualized in social practices, in the encounter/clash that generates the social construction of law.

A social construction made by numerous, not always identifiable, often changing actors, characterized by irregular paths and arduous itinerary, by forms of intermittent and discontinuous normativity: but that will not help to deliver us –on the edges of law– the dynamic, pluralist genesis of legal practices.

Translation by Stefania Rega

37. This strategy is adopted by J. Raz, *The Authority of Law*, pp. 101-102.

38. On this conceptual couple, Catania based his interpretation of normativity in A. Catania, *Metamorfosi del diritto. Decisione e norma nell'età globale*, Laterza, Roma-Bari, 2008.