

## Mind the gap between the new portfolio and the so-called old systems

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*Some men, like bats or owls, have better eyes for the darkness than for the light. We, who have no such optical powers, are better pleased to take our last parting look at the visionary companions of many solitary hours, when the brief sunshine of the world is blazing full upon them.*

Charles DICKENS, *The Pickwick Papers* \*\*

SUMMARY: Acknowledgments; 1. Introduction: The *Zeitgeist*; 2. Embracing New Challenges; 2.1. Switching the Classical Standard Off; 2.2. Catering for Safety Grounds?; 3. Some Explanations: Leaving the Comfort Zone; 3.1. More than Ajar; 3.2 Settling Differences; 3.3. Controversy and Conflict; 3.4. Whining and Whining is Not Enough; 4. Underpinning the Symptoms; 4.1. Non-Stop Law and Historical-Cultural Diversity; 4.2 State and Law: Begging not to be Numb; 4.3. No More *See-Me-Nots*; 5. *The Big Issue*: The Intersubjective Human Dignity; 5.1. A Journey Without *Turning a Blind Eye*; 5.2. An Estuary of New Law Texts: Born and Bred in Constitutional Law; 5.3. Overcoming Difficulties: It Must Be Effective; 6. Liberty and Autonomy Under the Principles; 6.1 The Abyss Between Theory and Practice; 6.2. The Point of Solidarity; 7. Conclusions: the Challenges Posed by Impermanence; 7.1. "Open Up!"; 7.2. The Jeopardy: Not Happy Just to Take a Seat; 7.3. No-Go Areas; 7.4. The Struggle to Keep Faith; Basic bibliography.

ABSTRACT: This essay aims to give a concise reflection on some of the historical and multicultural vicissitudes nowadays faced by certain Western legal systems; this is especially in regards to the desired effectiveness of normative legal systems in certain Western regions. The essay is based on experiences of systems in power blocks (like the European Union), analysing the intersection between Private Law and Public Law (for example Civil Law and Constitutional Law) by using comparison to the factual dynamics that structure contemporary Society. The paramount concern is to problematize the cultural dialogue between systems, including an internal and systematic review, in light of the constitutional principles (specifically human dignity and solidarity) of the asymmetry between the existing legal system and the solution of actual problems in inter-private relations. In order to prevent bureaucratized Law, the respect between different systems is proposed.

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*RESUMO: Este ensaio visa a proporcionar uma reflexão concisa sobre algumas das vicissitudes históricas e multiculturais enfrentadas atualmente por alguns sistemas jurídicos do Ocidente; isso especialmente com relação à desejada efetividade de sistemas jurídicos normativos em certas regiões do Ocidente. O artigo é baseado nas experiências de sistemas em blocos supranacionais (como a União Europeia), analisando a interseção entre o direito privado e o direito público (por exemplo o direito civil e o direito constitucional) usando a comparação da dinâmica factual que estrutura a sociedade contemporânea. A preocupação máxima está em problematizar o diálogo cultural entre sistemas, incluindo uma revisão interna e sistemática, à luz dos princípios constitucionais (especialmente a dignidade humana e a solidariedade) da assimetria entre o sistema jurídico existente e a solução de reais problemas nas relações interprivadas. Para evitar um direito burocratizado, propõe-se o respeito entre diferentes sistemas.*

*PALAVRAS-CHAVE: 1. Sociedade. 2. Estado. 3. Direito. 4. Regulação. 5. Direito civil. 6. Direito constitucional. 7. Princípios. 8. Dignidade humana. 9. Efetividade. 10. Multiculturalismo. 11. Direito burocratizado.*

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## **1. Introduction: The *Zeitgeist***

We will begin with a simple narrative. Visitors to London hear a warning in the underground or subway that has become well-known since the end of the 1960s: *Mind the gap between the train and the platform*. This expression makes sense, as it warns passengers that there is often a space or uneven level between the underground or subway carriage door and the platform. By warning passengers to be careful when they get off the train, so when they cross over from the train onto the platform, the voice that permeates the London Underground, with its unmistakable red and blue logo, helps passengers and prevents liability in their transportation. At the same time, it also metaphorically makes us recognize that (as also in life, generally speaking) there are almost always two edges or margins, with a certain distance between them.

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\*\* In: CALLOW, Simon. *Charles Dickens*. London: Harper Press, 2012. Page 61.

In the situation of the subway the issue of distance has real importance. Without it, everything and everyone could be in danger. Distance ensures safety and at the same time it can be an apparent problem for safety itself. This is a paradox: what is comforting can be precisely that which may cause discomfort.

We borrow this everyday fact as a figure of language to apply it to new challenges and to the classic modern Western legal systems, which oscillate between Civil Law and Common Law. Here there is also at least one gap, on a variety of horizons, from the perspective of the desire for effectiveness.<sup>1</sup> On the one hand, externally, there are problems of effectiveness that result from the controversial hierarchy of rules between social and legal systems with an ever increasing complexity,<sup>2</sup> under a new portfolio. On the other hand, internally, there are questions of effectiveness that arise from both the application of constitutional rules in a strict sense, and from the application of principles in legal relations in general, especially among private parties.

Between the traditional political power, arising from the 19th century systems and still permeating the systems by the middle of the 20th century, and the new political power, which appeared in recent decades and became stronger in the 21st century, the political power expressed in the power of the Law increasingly challenges the birth of this quality that transforms normative discourse into substantial discourse.

It seems that this political power makes everything appear in the form of Law to depict reality, frame it and paint it with the colors flowing from normative discursive rules and principles.

This goal of effectiveness<sup>3</sup> projects outwards in at least two directions; they are not mutually exclusive directions but rather supplementary. On the one side, it projects towards a formal sense of efficacy, that is, of production of regular effects of the respective act, to totally preserve the original authority. On the other side, it projects towards a substantial sense of effectiveness that can concretely lead to the values contained in the respective act, in both the legal relations and in the projection

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<sup>1</sup> The desire for effectiveness is certainly a challenge to the legal systems; in regards to this see: CREMONA, Marise, ed. *Compliance and the Enforcement of EU Law*. Oxford: Oxford University Press, 2012. The book presents the difficulties in ensuring compliance with EU legal provisions, and as a result has developed enforcement techniques that penetrate deep into the law and politics of member states.

<sup>2</sup> "Modern societies are complex, differentiated, and multicultural". In: FINLAYSON, James Gordon. *Habermas, A Very Short Introduction*. Oxford: Oxford University Press, 2005. Page 106.

<sup>3</sup> Effectiveness here does not have a quantitative meaning or the meaning of an extension of the effects, and much less the meaning of efficiency, that is, of the amount of resources used.

towards social relations. This double possibility (which does not exclude others)<sup>4</sup> also opens up a healthy crisis, not only in the parameters of efficiency but also in qualitative criteria.

The situation mentioned is due to the fact that the current social and legal systems<sup>5</sup> are fragmenting at the same time as they seek to move closer; this is not a new occurrence, but it is happening at a higher intensity than has been experienced in the past. Hence, legal systems as we know them suffer from the syndrome of incomplete performance, since they are taken over by paradoxes. This could be an indicator of our current times. In other words, at the same time as legal systems provide comfort through their rules they also generate the discomfort caused by excessive regulations; this is a very evident contradiction in societies marked by the division of classes. This cause and the respective effect can be seen in European Law as well as in the roots of English Law, and not only recently.<sup>6</sup>

This diversity suggests the problematization of the acknowledgement of differences. This is at the same time as it praises this very same diversity and the respect it deserves. Acknowledging the difference and promoting effectiveness under this assumption corresponds to the appearance of a phenomenon that has become consolidated: Law (for this purpose, understood to be the legal-normative system governing social relations) is simultaneously plural and unitary, complex and singular.

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<sup>4</sup> See, e.g.: SZYSZCZAK, Erika M. *The Regulation of the State in Competitive Markets in the EU*. Oxford: Hart, 2007; *Europe's 21st century challenge: delivering liberty*, edited by Didier BIGO, Sergio CARRERA, Elspeth GUILD and R.B.J. WALKER. Farnham: Ashgate Publishing, 2010; DRUZIN, Bryan H. *A network effect theory of law and normative order*. Thesis. Maughan Library, King's College, London. We are dealing here with a double standard and a kind of paradox. On one hand, the idea of regulation which capitalized itself from EU Law; on the other hand, the national traditional Law systems, such as English Law. All legal system want to be (or must be) consistent. I think that this is something new from a system which is known as having extraordinary flexibility and practical sense.

<sup>5</sup> Habermas, when studying the public sphere and private autonomy, in light of the formulation of civil codes in Europe, had already called attention to similar phenomena, even when faced with different cultural realities: "With the great codifications of civil law a system of norms was developed securing a private sphere in the strict sense, a sphere in which people pursued their affairs with one another free from impositions by state (...) These codifications guaranteed the institution of private property and, in connection with it, the basic freedoms of contract, of trade, and of inheritance. Admittedly the developmental phases were more clearly demarcated on the continent, precisely because of their codifications, than in Britain, where the same process occurred within the framework of Common Law". HABERMAS, Jürgen. *The Structural Transformation of the Public Sphere; An Inquiry into a Category of Bourgeois Society*. Cambridge: Polity, 2011. Page 75.

<sup>6</sup> For more information about this historical profile see: RADBRUCH, Gustav. *Der Geist des englischen Rechts. 2. veränderte und erw. Aufl.* Heidelberg: Adolf Rausch, 1947. The classic content of the work and the time at which it was written do not take away from this extraordinary study, and its findings continue to be applicable today. Just to give an example, note the distance between the systems under examination. These refer to past elements in the normative field of application of the law, as can be seen in: MULHOLLAND, Maureen aut. *Judicial tribunals in England and Europe, 1200-1700: The trial in history*, vol. I. Manchester: Manchester University Press, 2003.

This configuration can be expressed in the contemporary peculiarities with regards to the concepts of sovereignty and authority. These topics are not covered by this study, which nevertheless considers that the different discussions on the formulation and exercise of competence <sup>7</sup> through the legislative process <sup>8</sup> must be viewed as relevant.

On the one hand, the legal system seems to have a sense of entitlement, and thus seeks to encompass all social relations in every way possible; on the other hand, it is full of loopholes, gaps and incomplete areas that can undermine its foundations. This seems to give birth to paradoxes that encourage the analysis and the outlines of this characteristic. This is what this work will cover.

## **2. Embracing new challenges**

We will now use a compound word to describe this phenomenon: multiculturalawllism. This new word, created by combining the words “multiculturalism” and “Law”, is a linguistic creation based on the fact that Law is the product of culture. Since, by definition, culture is plural and impregnated with diversity, we can take multiculturalawllism to represent, as a linguistic sign, the picture frame of some dramatic events in current Law. These are the new challenges that this century is laying out for the legal systems governing Society.

Diversity, difference, acknowledgement, tolerance and respect are the elements composing this view, both between systems and within the systems themselves. The challenge has a name: effectiveness. This means the desire to make and actually implement rules, as well as individual or collective rights. The issue is how to finally understand that the distance that is vital for autonomous functioning of Society and the State can also be, at the same time, a danger.

In this portrait captured by the signs of present times, there is a point at the center core of this work: the inevitable idea of a gap. This gap is a distance between Society and the State; that is, between the complex social relations and the legal relations. This is not new in terms of history, but the novelty resides in the intensity of this aspect.

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<sup>7</sup> On the matter of jurisdiction, see: OBRADOVIC, D., ed. *Interface between EU Law and National Law*. Groningen: Europe Law Publishing, 2007. This is especially in regards to jurisdiction between the EU and its member states.

<sup>8</sup> One of these points deserves its own study of Comparative Constitutional Law. This point refers to the *Kompetenz-kompetenz* principle. Related to this topic is the list of jurisdictions in Title I of the Treaty of Functioning of The European Union and, more specifically, the second part of paragraph three of article four.

However, Law systems in the past did not face this type of problem, as we will see in the following section.

## 2.1 Switching the classical standard off

Since the Law we have inherited from the modern era was centered on a linear style of reasoning, it usually separated the reality that it sought to regulate in a binary way, as it considered Society and Law a single concept. It was easy to maintain the integrity of the system as well as the identity of Society. Nevertheless, there are now zones of tension in the traditional dichotomies of legal families.

Today, with the growing complexity in the organization of societies and the State, we can see an example in International Law: “a plethora of interlocking legal rules, those principles, structures, and mechanisms”,<sup>9</sup> not only in all of the European Union<sup>10</sup> but also in MERCOSUL.<sup>11</sup>

There is even more unevenness in the dichotomy between National Law and Supranational Law,<sup>12</sup> where there is an array of demands for full effectiveness, the so-called *effet utile*, one of the strands of effectiveness, and which reveals important debates and paradoxes, including with regards to the concrete application of

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<sup>9</sup> Words from presentation by Professor Dr. Koen Lenaersth, Judge at the Court of Justice of the European Union. In HOFMANN, Herwig C. H.; ROWE, Gerard C.; TURK, Alexander. *Administrative Law and Policy of the European Union*. Oxford University Press, 2011, page VI.

<sup>10</sup> From the beginning, it should be noted that a minute examination of these new centers of power and the means of legislative and regulatory production are excluded from the purpose of this study. Here, we are only interested in problematizing the unevenness created by these structures and dichotomies. With regards to this topic, which is outside the scope of this study, and in reference to the new hierarchy of norms between legislative and non-legislative acts see: TURK, Alexander H. “Law- making after Lisbon”. In: *EU Law after Lisbon*. Edited by BIONDI, Andrea; EECKHOUT, Piet; RIPLEY, Stefanie. Oxford: Oxford Press, 2012. Pages 62-84. Turk says that, “The formal introduction of legislative acts and the new regime of delegated acts demonstrate the willingness of the drafters to pursue a more state-oriented model of law-making. This approach is not without problems. On the one hand, the constitutional reform of Union legislation remains incomplete as can be seen from the notion of „special“ legislative acts, which are really regulatory acts in all but name. On the other hand, certain state-oriented aspects of the constitutional reform of the Lisbon Treaty, such as the new category of delegated acts, undermine traditional constitutional features of the Union, such as comitology, which have developed over time providing a crucial link between the Union and its Member states”.

<sup>11</sup> The mention of MERCOSUL is intended to be a superficial example, since this topic will not be developed here due to the limitations of this study.

<sup>12</sup> This essay takes some grounds from Comparative Law, not only as Method but also as a Science; the intention here is just to obtain a better understanding of plurality legal systems; on this matter (Comparative Law), see: BOGDAN, Michael. *Comparative law*. Deventer, Netherlands; Cambridge, MA, USA: Kluwer; Sweden: Norstedts juridik; Norway: TANO, 1994. The objectives and aims, in the comparative field, are far from the modest goal that we have here; in that level, there is classical as: ANCEL, *Utilité et méthodes du droit comparé* (Neuchâtel, 1971); CONSTANTINESCO, *La comparabilité des ordres juridiques ayant une idéologie et une structure politico-économique différente et la théorie des éléments déterminants*, Rev. intr. dr. comp., 1073, pages 5-16, and RHEINSTEIN, *Einführung in die Rechtsvergleichung* (München, 1974). Just to emphasize, among numerous scientific institutions, I

Conventions and Treaties in the field of human rights.

The legal challenges are not small. And the cultural complexities that underlie this question are not any smaller; it would quite right added to this that it has the multilingual context<sup>13</sup> in this type of trans-territorial body of rules.

Hierarchy and subordination or coordination is topics that are present in this frontier. A host of exogenous problems arose from this path of pluralist models<sup>14</sup> concerning this type of legal order. The study now started will examine this exogenous dimension only as needed, limiting its focus to the internal dimension of the systems.

## **2.2 Catering for safety grounds?**

There are countless examples of unevenness in the domestic legal systems of countries. Nowadays we see an endogenous standpoint, the crisis of the traditional concept of Law as a product of rules that were, in a strict sense, able to previously solve all the practical and actual problems of a plural and multifaceted Society. Constitution, democracy and the application of principles, such as the principle of human dignity, have become the central focus of discussions and debates. Questions arise: should (or shouldn't) the application of principles in relations between private parties be mediated by infra-constitutional Law? Does this gap between the principle and the social fact still exist, or has this discussion been settled?

These interrogative problems show a more serious question, given the multicultural scenario, both social and legal, characterized by gaps, inputs and outputs in the respective systems; the question, whether internal or external, is the lack of effectiveness of the legal system in the central matters of Society, and that means the lack of public policies.

This will now be presented and problematized.

## **3. Some explanations: leaving the comfort zone**

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expressly nominated in that field the Max Planck Institute for Comparative and International Private Law, Hamburg, DE.

<sup>13</sup> The topics and problems in this field are quite varied; for an overview see: *Multilingual discourse production: diachronic and synchronic perspectives*, edited by Svenja Kranich [et al.]. Amsterdam; Philadelphia: John Benjamin's Pub. Co., 2011. Also: *Language and culture: reflective narratives and the emergence of identity*, edited by David Nunan and Julie Choi. New York: Routledge, 2010.

Some preliminary clarifications are useful for the development of this work. These aspects provide the exact meaning of the interpretation presented below, in order to well demarcate its borders and propositions.

### 3.1 More than ajar

We will begin by noting that the concept of the gap, which for the purposes of this study is treated as synonymous with the distance between the legal system (which emanates from the State) and Society (broadly understood as multicultural social relations) is not new, since it has been used in studies in a wide variety of areas of knowledge,<sup>15</sup> especially when the intent is to show these problematizing distances.

The case here also reflects a notion of distancing that will be useful in developing the central idea of the following examination. This unevenness can be seen to be more than a door that is ajar between Society and the State and, within the legal systems themselves, between the theoretical formulation and the practical verification of rights and respective protections.

The idea that permeates the reflections now under development explicitly assumes that this distance is an integral part of the very identity of systems, and that it is a mixture of the legacy of the classic systems with the repository of the new horizons (internal and external) that these systems face nowadays, like the search for effectiveness itself.

### 3.2 Settling differences

Two other initial warnings are necessary. The first draws attention to the fact that the purpose of this study is not to examine interculturality or multiculturalism. It recognizes and applauds these phenomena, and it does so based on a well-known work

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<sup>14</sup> HOFMANN, Herwig C. H.; ROWE, Gerard C.; TURK, Alexander. *Administrative Law and Policy of the European Union*. Oxford University Press, 2011, page 927.

<sup>15</sup> It can be cited the following examples: MARCHANT, Gary E.; *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight: The Pacing Problem*. Edited by Gary E. Marchant, Braden R. Allenby and Joseph R. Herkert. Dordrecht: Springer Science Business Media B.V., 2011; *Rights and duties of dual nationals: evolution and prospects*. Edited by David A. Martin and Kay Hailbronner. The Hague; London: Kluwer Law International, 2003.

that developed the topic of multiculturalism.<sup>16</sup> More than that, it has embedded into it the idea of the acknowledgement of diversity.<sup>17</sup> This kind of respect has also included the proper reflection in other areas of knowledge.<sup>18</sup>

Not only does it reject an individualized atomistic concept of humans, but also of the legal systems.<sup>19</sup> This is the first warning, since this study will not encompass this field. It will only examine the meaning of the plural, complex, and thus diverse formation of the phenomenon of Law.

In summary, this study is based on the premise that democratic legal systems necessarily require an identity that is based on respect for differences and on the promotion of substantive equality.

### 3.3 Controversy and conflict

The second warning refers to the fact that the matter will not be examined here from the perspective of the controversial process of globalization.<sup>20</sup> Without a doubt, we recognize that this process has significantly influenced the process of world integration (or disintegration, depending on the point of view).

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<sup>16</sup> Respect is one of the multiculturalism faces. Homophobia, xenophobia and the bullying racist are examples of the bad side, far from respect and recognition under diversity which is one of the other faces of multiculturalism.

<sup>17</sup> In relation to identity, diversity and pluralism, the Universal Declaration on Cultural Diversity states: “Article 1 – Cultural diversity: the common heritage of humanity – Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations”.

“Article 2 – From cultural diversity to cultural pluralism – In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life” (date of adoption: 2001). See: SCHORLEMER, Sabine; STOLL, Peter-Tobias. *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes*. Berlin, Heidelberg: Springer Berlin Heidelberg, 2012.

<sup>18</sup> With regards to this perspective, but in another context and under a different methodology, and due to the shared interests we should mention the following: HABERMAS, Jürgen. *The Inclusion of the Other: Studies in Political Theory*. Edited by Ciaran Cronin and Pablo De Greiff. Cambridge: Polity, 2002. Originally published in German: Frankfurt am Main: Suhrkamp, 1996.

<sup>19</sup> Amy Gutman wrote: “The unique, self-creating, and creative conception of human beings is not to be confused with a picture of “atomistic” individuals creating their identities *de novo* and pursuing their ends independently of each other. Part of the uniqueness of individuals results from the ways in which they integrate, reflect upon, and modify their own cultural heritage and that of other people with whom they come into contact “. In: TAYLOR, Charles. *Multiculturalism: examining the Politics of Recognition*. Princeton: Princeton University Press, 1994. Page 7.

<sup>20</sup> Regarding this point, a vertical analysis was done from the perspective of political economy. See: RODRIK, Dani. *Has globalization gone too far?* Washington, D.C.: Institute for International Economics, 1997.

We also recognize the presence of aspects at different levels like the economic, technological, cultural and legal questions that were considerably reshaped since the world became truly interconnected and interdependent. Nevertheless, this study will not delve into the world of affairs. They are known to have profound impacts on International Law, but this would require a specific examination.

Here we will only take them as implicit assumptions of the legal system, which often show two levels of structures in the relationship between Law and economics. However, this study will not examine the field of political economy nor will it review these aspects, although it does acknowledge that the gap indicated results from both market problems<sup>21</sup> and problems coming from the monopoly of power (both governmental or otherwise). For this same reason, this is not a study of democracy<sup>22</sup> or social theory.<sup>23</sup>

Nonetheless, a variety of discussions from other areas of knowledge are implicit, including some elements of the various traditions in dialectics (including in regards to multiculturalism),<sup>24</sup> as well as the traditional theories on State and Society. In addition, this study captures, but does not deal with, the following topics: the rights of immigrants, displaced persons, or matters related to Law in general, as applicable to intercultural problems; it includes, *inter alia*, family Law questions resulting from marriage and successions.<sup>25</sup> In terms of the specific topic, we note that regarding the Law applicable to successions, a European Union regulation<sup>26</sup> governs the matter and

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<sup>21</sup> Regulation, market and efficiency (and their meaning) merit another examination. In this regard, we mention a thesis that examines the concept of efficiency, the theory of welfare standards, and other topics: GURSOY, Ece. *The role of efficiencies under EU Competition Law*. King's College, London. School of Law. [The Maughan Library], PhD Thesis, 2012.

<sup>22</sup> There is a deficit of democracy in at least some of the institutions that operate under the EU Treaty (European Parliament, European Council, Council of Ministers, European Commission, Court of Justice, European Central Bank and Court of Auditors). This matter is, however, outside the scope of the objectives of this text. See: LENARD, Patti Tamara. *Trust, democracy, and multicultural challenges*. University Park, Pa.: Pennsylvania State University Press, 2012.

<sup>23</sup> In regards to this see: DOMINGUES, José Maurício. *Global Modernity, Development, and Contemporary Civilization: Towards a Renewal of Critical Theory*. New York; London: Routledge, 2012. Of course, the juridical debate is not a mere appendix to the democracy debate, as we can see about the *lex mercatoria*.

<sup>24</sup> More specifically see Habermas in the text "Multiculturalism and the Liberal State". *Stanford Law Review*: [Stanford, Calif.,] School of Law, Stanford University, vol. 47, no. 5, May 1995, pages 849-853.

<sup>25</sup> In regards to this see: NICHOLS, Joel A., ed. *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*. New York: Cambridge University Press, 2012.

<sup>26</sup> Regulation 650 was published on 27 July 2012 under the justification of preserving "space for freedom, security and justice and to ensure the free circulation of people," as well as under the foundation of "effectively guaranteeing the rights of heirs and legatees, of other persons close to the deceased, as well as the creditors to the succession ". Two horizons are visible here: the vicissitudes of an exogenous power structure, in light of national law, and the question of the effectiveness of norms.

creates a certificate that is useful for hereditary succession, which in and of itself demonstrates an attempt to give a concrete effect to a uniform regulation.

Nevertheless, the study does not ignore those conflicts that are significant as a reflection of the basic line of thinking presented herein.

### **3.4 Whining and whining is not enough**

This essay really seeks to shed, in a limited manner, a little more light, under certain circumstances to be described, on the description of this distance between Society, the State and the Law, indicating the nature that this gap may have. It does so by conducting an interdisciplinary reading of Private Law and Public Law; that is, of Civil Law and Constitutional Law.

It seems to be common to clamor for effectiveness. Nowadays, however, it is not enough to complain and whine about the courts, legislators and governments. We must go further.

Therefore, the paramount question of this paper is how to present some symptoms of these asymmetries and to propose discussions about them within the context of the relationship between Society and the State based on the principle of human dignity. From there, the need emerges to build bridges between the dynamism that social convoys carry and the structures based on the platforms of the State (and their traditional instituted powers, or through new centers of power).<sup>27</sup>

Constitutionalization of the Law, specifically in the intensity in which it occurred in the second half of the past century, emphasizes this gap of crossings which clamors for urgent responses, whether through the legal system or through public policies.

In the legal system, one of these ways was paved by the normative presence of constitutional principles, especially that of human dignity. Its functions were exponentially strengthened by the growing complexity of human relations. The government platform of responses was called upon, through the legal system, to quickly and efficiently offer rules and solutions. Desires and demands that arose from freedom and autonomy sought a contradictory goal: security and achievement. The paradoxes took over the systems and created a space for reflection on the

temperaments that this sphere of social and private relations suggests.

#### 4. Underpinning the symptoms

Thus, based on the introduction presented and the preliminary warnings made, we can move forward. It is now time to list the symptoms and respective grounds that we find to expose the core of our concerns. There are some clear symptoms that can demonstrate the outline of this question, with an impact on legal regulations and social goals. We will begin by examining some general aspects.

This is what we will do below.

##### 4.1 Non-stop law and historical-cultural diversity

One of the most expressive symptoms nowadays could be a movement that may be described as “non-stop Law “. In this regard, “over the last 30 years we have seen a number of uniform Law projects” and “now we have in the EU the Draft Common Frame of Reference (DCFR) and the sales Law carved out in the 2011 draft regulation for a Common European Sales Law (CESL). That the effort is becoming more European Union centered has to do with some idea whose time is then deemed to have come – that there should now be one private Law in the EU as a whole”.<sup>28</sup>

There is no doubt about the central role of the Law, especially if we bear in mind the notable contribution of Comparative Constitutional Law in order to understand how and why legal regulation of contemporary Society takes place. The migration of this regulation to the Constitution is seen as a phenomenon present in countries like Brazil; in other countries in Europe, this topic focuses on regulatory decentralization. But, the intent to produce legislation at all times and at any cost can be a symptom of a cultural emptiness.

In the EU the debate about the opportunity of a common code for ruling contracts,

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<sup>27</sup> See: *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*. Edited by Catherine Barnard. Oxford: Oxford University Press, 2007.

<sup>28</sup> DALHUISEN, Jan H. *Some Realism about a Common European Sales Law*. Paper copy, text dated of Sept. 28, 2012. The critique at the end of the text (in the page 30) is resounding: “The conclusion must be that we are far from a rounded view in the matter of private law formation at EU level and that concerns also CESL. The efforts so far are amateurish and devoid of serious analysis. We do not appear to have the knowledge and insights to bring such a project to a propitious end. In the absence of sufficient guidance, it is far better to desist or confine the project to consumer dealings if we really think that consumers could only be properly protected at the EU level”.

assets and interests is even more important. In this field, several reasons are put forward for the recourse to a new Law, especially as a codification of private legal relations. But no legal system would have the capacity to shed sufficient light on all shadow places of modern societies just by itself. Under both Common Law and Roman Law, as well as in territories ruled by mixed systems,<sup>29</sup> there is always room for disconnection between Society, the Law, and the State. Histories and cultures cannot be pasteurized by legislative hypertrophy nor can the role of judges be forgotten.<sup>30</sup> The existence of more and more statutes and regulations is part of the attempt to put clothes on an emperor who is shown to be naked. This nakedness is related to the increased interest in the study of history as the basis of legal research; without a doubt this shows, among other positive elements, a form of cultural dialogue between the different legal and social systems, but it also leaves signs of breaches and open doors. The answers that societies and States offer are different and varied.<sup>31</sup>

Looking at the history of Modern Law<sup>32</sup> is a way to reveal these roots, limits and possibilities. Thus, the purpose of ignoring historical and cultural diversity is to effectively solve actual problems that lead to an anxious search for new Laws or new decisions. To some degree it is individuals, whether collectively or not, who abdicate their power in exchange for apparent security as they are moved by the desire for effectiveness. This effectiveness does not only result from the words of the Law. In light of the ineffectiveness new rules are desired, and so on. A non-stop Law cycle is formed. This portends a bureaucratized Law. This is the first symptom.

#### **4.2 State and law: begging not to be numb**

Another door that opens in this perspective refers to the limits and possibilities of approaches between Public Law and Private Law in the different systems. After all, does the liability for effectiveness refer only to actions or inactions by the State (in a

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<sup>29</sup> The intention here is to highlight the tensions between systems and not to refer to legal systems considered to be mixed; in this regard, there is an excellent analysis, see: ZIMMERMANN, Reinhard. *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa*. Edited by Reinhard Zimmermann, Daniel Visser and Kenneth Reid. Oxford: Oxford University Press, 2004.

<sup>30</sup> In this field see: *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times*. Edited by Paul Brand and Joshua Getzler. Cambridge: Cambridge University Press, 2012.

<sup>31</sup> An example of these different responses, based on freedom as a principle, can be seen in Inheritance Law, and expression of the right to property or the right to dispose of goods. In relation to this see: *Testamentary formalities*. Edited by Kenneth G. C. Reid, Marius J. de Waal and Reinhard Zimmermann. Oxford: Oxford University Press, 2011. The understandable lack of cultural and social uniformity is projected on to the diversity of legal forms.

<sup>32</sup> See: SCHIAVONE, Aldo. *The Invention of Law in the West*. Translated by Jeremy Carden and Antony Shugaar. Cambridge, Mass.; London: Harvard University Press, 2012.

broad sense of the word) or do institutions, entities and people also contribute to the lack of it? In other words, a question remains about the demands often made for action from the State and its formal branches (Legislative, Judiciary and Administrative).

This question is about the real power of Society and its responsibility in regards to the effectiveness of rules and principles of a constitutional nature. In terms of the composition of conflicts, the private scope for the search for effectiveness can be seen in the development of arbitration. This possibility includes judicial support<sup>33</sup> to arbitration under the New York Convention.

Another question is about the role of the judge regarding the functions of the legislators and administrative executors of public policies. The limit of their powers and the responsibility that results from the exercise of these same powers is at the forefront of contemporary Constitutional Law.

There are no identical responses, as expected. Law does not appear under a single definition, since the socio-cultural base has changed profoundly. For this very reason Law has been challenged to avoid anesthetizing itself, and rather to respond to the democratic changes in contemporary Society. It is therefore worth asking if it is able to constructively engage with a fair and democratic legal order.

There are several signs of dissatisfaction with the effects in the main legal systems regarding property, contracts and family. This increase with the rule of the dichotomy between National and Supranational Law nowadays and there are even a lot of supranational principles in contemporary Law.

Nonetheless, the question is whether the possibilities of International Law will contribute to the effectiveness of constitutional principles and fundamental rights in countries like Brazil. To face this should be, took as a premise in Private Law the person's self-ability to regulate the development of their personality and a minimum living condition capable of providing the appropriate means for handling self-determination. The *soi-disant* invisibility condition of the principles' value just gone.

A new order of problems came.

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<sup>33</sup> In Brazil, in that field, the judgment of the Superior Court Appeal 1.203.430-PR, Rapporteur Justice

### 4.3 No more *see-me-nots*

This brings us to the gap between Society and the State,<sup>34</sup> and how constitutional principles have been used to try to bridge it. The principles have moved out of the invisible zone (reflected in the programmatic enunciation) to show their existing face. We will soon see how this topic appears before two principles: human dignity and solidarity.

Now, at this point it should be noted that the visibility of these principles is in a way independent of the performance by the State of its essential duties in the areas of health and education, for example. And in the absence of total effectiveness of the principles, it was immediately seen that none of this would be possible without effective public policies. It was a passenger travelling in an imaginary car.

In the absence of a State that uses effective public policies to meet the basic demands of Society, the remedy ends up being the adoption of new Laws. Thus, the EU rekindles the debate on the opportunity of a common code for ruling contracts, assets and interests. Again, the outline is drawn for bureaucratized Law.

The real problem: to solve matters in Society a legislative solution is always sought and this path only leads to formal Law, which is not committed to effectiveness. As an example, we can mention the circumstances present in the relations between human rights and their application to legal relationships among individuals. Here it is possible to examine the matter in great depth, starting by demonstrating the undeniable importance of the principle of the protection of dignity, as a right and a guarantee, and at the same time, the difficulties of actually implementing it.

## 5. *The big issue: the intersubjective human dignity*

There is no doubt that the principle of human dignity is prevailing in the international legal system. We see here a safe platform, at least in formal terms. The very theory of Society gives its blessing to a close and deep relationship between the principle of

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Paulo de Tarso Sanseverino was exemplary. This decision was published on 1 October 2012.

<sup>34</sup> Even internally, so within Nation-States (especially in the European Union), the separation between the Government (Executive Branch) and Parliament (Legislative Branch) is a topic that has a similar gap, whether in the case of England or in Germany, as shown in the following study: "Delegated Legislation in

human dignity and human rights. In a recent work, Jurgen Habermas<sup>35</sup> acknowledges the principle of human dignity as the “moral source from which fundamental rights extract their contents”, thus identifying a “genealogical” relation between the principle and fundamental rights.

However, there is not a single and exclusive concept, since the multiculturalism is also present here. The principle of human dignity emerged as a common substance of all human rights, since the purpose of these rights is precisely the protection and prevention of human suffering. But dignity does not have one single definition, and it does not retain the same meaning in time and space, not even as protection and assurance of fundamental rights. It is this diversity that further outlines the features of the problem. Precisely due to this fact, dignity has been molded not just as a function of each individual, but also in the relations of the individual with others (thus generating an intersubjective dignity).

Solidarity births as justifications for extension of the deriving duties also to private parties. Therefore, the dignity of a person is based on the premise of protection of the other person, whose diversity must be respected. This was the path that revealed the extraordinary legal standing acquired by the principle of human dignity in the domestic and supranational constitutional levels.

Nevertheless, we can see two gaps. On the one side, the lack of material effectiveness of the principle, unable by itself in the legal system to leverage the transforming effects carried by the definition; on the other side, the elasticity of the principle demands balance, since not everything can be reduced to its incidence, and it is not possible to previously imagine the exclusion of any interest, property or status with the same incidence. This temperament is the challenge between social relations and the legal system.

Even so, there has been a large distance between the aspirations moved by the dynamism of Society, and the effectiveness of the principle through public policies. To that end, there is an attempt to reject the contents of human dignity, usually through the intervention of a judge, as a purely abstract concept, by arguing that human dignity is a notion built along history and thus deserves concrete answers. The

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German Constitutional Law”, by professor Alexander Türk, in the work *Delegate Legislation and the Role of Committees in the EC*. Usually you put the publisher and year in here.

<sup>35</sup> HABERMAS, Jurgen. *The Crisis of the European Union: A Response*. Cambridge: Polity, 2012. Page 71.

concrete achievement requires more than that, since the State and Society cannot pretend that they do not see the lack of effectiveness of the principle.

### 5.1 A journey without *turning a blind eye*

In the history of societies, we actually see human dignity treated as a recent concept in legal systems. It was after the end of the Second World War that the concept of human dignity as something intangible lost its invisibility. Nevertheless, its importance has not decreased and its lack of effectiveness does not entail lesser evils.

The denial of protection, in face of the atrocities that marked the Second World War period, entailed the necessary outlining, after the war, of the minimum limits for the protection of human dignity. The contemporary concept of human rights that first appeared after the war is now a necessary consequence arising from human suffering and as a result of the atrocities committed. In a dialectical movement of possible advances and retreats in a non-linear history,<sup>36</sup> during the post-war period as opposed to what happened before and during the war, we saw the resulting reconstruction and reaffirmation of human rights, at national and international levels.

The post-war period demanded an answer from the international community, establishing the rebuilding of protection of the human person. In order to pave the way for the protection of human persons, The Universal Declaration of Human Rights was proclaimed unanimously by the voices of the General Assembly of the United Nations Organization; this happened in 1948. This declaration embodies the principle of human dignity: “Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

A new geography is born in the age of rights,<sup>37</sup> at least in the constitutional texts. Starting from that point, this principle originated a new agenda: the effectiveness of principles in full and real terms. The vehicle adopted meant the contemporary Constitutions, written or unwritten, conditional or non-conditional upon the State. People and territory triggered the desire for effectiveness.

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<sup>36</sup> For Hannah Arendt, “human rights are not a given, but a construct, a human invention that is constantly undergoing construction and reconstruction “. ARENDT, Hannah. *As Origens do Totalitarismo*. São Paulo: Cia das Letras, 1989.

## 5.2 An estuary of new law texts: born and bred in constitutional law

Open texts were developed by the Western constitutional systems, endowed with a high axiological charge. These dense changes provided for a fundamental rebuilding of the Constitution's shape and its impact over the legal and governmental systems. The best example is the fundamental character conferred on the principle of human dignity. As an illustration of this movement we can look at a German example in the initial wording of the Basic Law for the Federal Republic of Germany, promulgated on 23 May 1949 in Bonn: "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority". It is within this context that the principle of dignity reaches the constitutional orders, for example in the Brazilian Constitution of 1988.

It should be noted, albeit its late acknowledgement by legal rulings, that the initial reasoning about the inherent value of the human being dates back to classical thought. Human dignity becomes more noteworthy from the point of view of a rational and secular perspective, particularly through the thoughts of Immanuel Kant.<sup>38</sup> In contemporary times, this ordering of thoughts is reinterpreted on the basis of new differentials and paradigms.<sup>39</sup>

Nevertheless, we should bear in mind that human rights have a central core in the principle of human dignity, involving a discussion on the reach and precedence of fundamental rights of the human person. There is undoubtedly a process of increasing internationalization of human rights. And here we have the scenario under discussion: what has the measure of its achievement been?

## 5.3 Overcoming difficulties: it must be effective

There has been an attempt to bring the domestic and international expanses closer through the increased protection of the principle of human dignity, which operates as a premise for the notions of human rights and fundamental rights. However, it is

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<sup>37</sup> BOBBIO, Norberto. *A Era dos Direitos*. Nova edição. Rio de Janeiro: Elsevier, 2004. Page 50.

<sup>38</sup> KANT, Immanuel. "Fundamentação da Metafísica dos Costumes". In *Crítica da Razão Pura e outros Textos*. São Paulo: Abril Cultural, 1974, specially page 229. On this subject: SENSEN, Oliver. *Kant on Human Dignity*. Berlin: De Gruyter, 2011. The aim of this paper doesn't go into this field, about that perspective, see: STRATTON-LAKE, Philip. *Kant, Duty and Moral Worth*. London; New York: Routledge, 2000.

<sup>39</sup> Pérez Luño and Maihofer stress the *community aspect* of human dignity. The concept of human dignity thus changes its focus: it is not only a function of a single individual, but concerning the relations of one individual with the others (*intersubjective*). For further information see: PEREZ LUNO, António Enrique. *Los derechos fundamentales*. Madrid: Tecnos, 2004.

necessary to overcome difficulties so that the principle may bridge the gap between legal formulation and concrete observation, by means of government policies, and not just through actions of a judge in a concrete case. The States owe us that answer.

The Law endeavors nevertheless to do its part when viewing the human being as a concrete subject under an ethical conception and as a value entitled to protection. In this sense, the principle of human dignity thus challenges the effectiveness of the constitutional legal system right at its central feature. This awards priority to the standing of the concrete subject and his or her needs with a special and diverse incidence on the other constitutional principles. The question has a name: effectiveness.

In view of the above, discussions arise about the possibility of opening Private Law to the study of constitutional principles, as well as, consequently, to the perspective of the protection of human dignity.

It should thus be stressed that the structural perception of Private Law is subdivided for the conception of its functions; this adds to the individual and private legal relations the contents that are inherent to human and fundamental rights.

Since Private Law is subject to the Constitution, it becomes directly linked to human and fundamental rights, herein understood in their formal and material sense.

## **6. Liberty and autonomy under the principles**

The actions of the disposal of assets and interests through business, both inside and outside the traditional territorial borders, are also summoned to pay heed to this principle. Let us examine how this was formulated.

Simultaneously with the State commitment to respect and comply with the fundamental rights and the human dignity, those obligations are also starting to be claimed from private parties. Precisely for this reason, the State must also be in charge of the material protection of those rights. More than that: it is compelled to refrain from disrespecting those same rights. The State must also establish favorable conditions for respecting the dignity of the persons.

In addition is undeniable the clear responsibility of the various government bodies in

the fulfillment of different functions, aiming at the actual achievement of the principle of human dignity. Consequently private individuals and entities must also engage in the implementation of that principle and of fundamental rights.

The field of the so-called “horizontal effect of fundamental rights”<sup>40</sup> now opens, namely the one affecting the intersubjective relations that are summoned by the constitutional order to share those positive and negative covenants concerning the principle of human dignity.

It is to be noted that we are not dealing with the situations involving the so-called *private powers*. In the event of substantial disparity between parties there is no doubt that the form of incidence of fundamental rights in those special private relations is analogous to the form of incidence when public power is involved.

Private parties are also directly bound by fundamental rights. In Brazil, that general obligation derives from the literal wording of the Constitution itself, through a combined and systematic reading of its article first including the dignity of the human person as a fundamental premise. Basic rights and guarantees have immediate application.

The usual and fruitless discussion on the forms of incidence of fundamental rights in inter-private relations is deemed surpassed. The final effect of defending, in the name of the principle of legal security, the need for mediation is the denial of the irradiating efficiency of fundamental rights. There is therefore an indirect application of the fundamental rights to the inter-private sphere.

There is certainly an answer in the wording of the Constitution<sup>41</sup> concerning the form and intensity of commitment graduation on the part of certain private subjects for the achievement of human dignity, as well as for human and fundamental rights. The set

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<sup>40</sup> The debate on the terminology aspects involving the lien upon private parties is not relegated to an abstract plan; this is since it already shows through the selection of the *nomos* used how far and in which manner the private parties, in relationship to their peers, may resort to fundamental rights. The term *horizontal effect*, in opposition to the specific one in face of the State, is not exempt from criticism; since it starts with the premise of horizontal action and equality between subjects, it ignores the relations between private parties where one of the poles is a holder of social power. We then see expressions such as *private effectiveness* and *horizontal effect of fundamental rights in private law*, which are very ample and encompass not only the private parties but also the lawmaker and the law enforcer.

<sup>41</sup> On *constitutionalizing rights* see: NEDELSKY, Jennifer. *Law's Relations: a Relational Theory of Self, Autonomy, and Law*. New York: Oxford University Press, 2011. Nedelsky says: “My idea of constitutionalism is to make democracy accountable to basis values, to have mechanisms of ongoing

of problems arising from the *horizontal effect* must be regarded in face of the rights involved and within the context of protection.

### 6.1 The abyss between theory and practice

Deemed as a structure for the protection and fostering of human dignity, and taken in its contemporary and relational perspective, which encompasses an imperative awareness of alterity, it is evident that the fundamental rights must be directly and immediately applied to private relations.

The responses, however, are not duly coping with the dimensions of the challenges. The idea of trying to face those challenges permeates the international commitments on the matter, marked with the ethics of alterity and solidarity.

Still, within the domestic scope of countries like Brazil the seriousness suggested by alarming social indicators claims for the engagement of all people so that, alongside the State and not in replacement of the State, we may be able to envision the decrease in the abyss between theory and the practice of those rights.

Certain bridges have been conceived to achieve such a crossing. One of them is called solidarity.

### 6.2 The point of solidarity

One of the paths for the dialogue between social aspirations and the State has been built by solidarity.<sup>42</sup> It does not concern solely the sense conveyed by certain normalized areas, such as social rights.<sup>43</sup>

The basic principle of solidarity means shared responsibilities, as advocated by Andrew Hurrell: “The most ambitious alternative to this traditional conception is to

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dialogue about whether the collective choices people make through their democratic assemblies are consistent with deepest values” (page 253).

<sup>42</sup> The theme of solidarity emerges here as an indicator, among others, without limitation; for greater details on the topic (not the aims of this essay) please see: ROSS, Malcolm and BORGSMANN- PREBIL, Yuri. *Promoting Solidarity in the European Union*. Oxford: Oxford University Press, 2010; VEEN, Romke van der aut [et al.], ed. *The Transformation of Solidarity: Changing Risks and the Future of the Welfare State*. Amsterdam: Amsterdam University Press, 2011; also: *Social justice in the global age*. Edited by Olaf Cramme and Patrick Diamond. Cambridge: Polity, 2009.

<sup>43</sup> On this matter, several aspects come forth from Title IV, article 27, of the Charter of Fundamental Rights of the European Union.

strive towards a system in which human rights and democracy form part of the Law of a transnational civil Society, in which the state loses its place as an autonomous institution and instead becomes one of many actors and one participant in a broader and more complex social process”.<sup>44</sup> It should further be stressed that the solidarity, marking the fair and universal distribution of a minimum welfare, operates both at the intrastate field and in the international area. It must be revisited the international architecture of protection, summoning the responsibility of international entities and the private sector.

In view of the above, and regardless of the domestic or transnational protective context, the legal value emerging from solidarity ties private entities and individuals to also engage in the protection of the principle of human dignity. However, there is a gap between the words and the reality. This means that the private-public dividing line is changing, the framework is no longer a piece easy to understand: in the complex world, the Law itself is facing new portfolio but at same time try to keep the legal draw how it was in the past.

## **7. Conclusions: the challenges posed by impermanence**

Let us sum up what is being proposed and indicate the main ideas developed. As we saw, the purpose of this essay is limited to the problematization of the dilemmas experienced by contemporary families and legal systems. This was done in an attempt to demonstrate that the identity in the difference may impose the respect for the dignity of the ordering system (the respective culture and history) and solidarity between and among systems. A multiculturalawllism may arise thereof, in an affirmative sense.

The starting point was a list of some symptoms of the distance between Law and Society, with examples of the legal and economic status in present times, namely in Europe, projected to the outside scope of Law, i.e. the stress points between domestic legal systems and the supranational or extraterritorial rules.

We then took into consideration, within the internal scope of the gap, meaning the distance within the very system, the example derived from the importance of

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<sup>44</sup> HURREL, Andrew. “Power, principles and prudence: protecting human rights in a deeply divided world”. In DUNNE, Tim and WHEELER, Nicholas J., eds. *Human Rights in Global Politics*. Cambridge: Cambridge University Press, 1999. Page 289.

constitutional principles, and their relationship with the protection of fundamental rights. An attempt was also made in this field to evidence the difficulties existing for a useful and effective incidence of the principles in inter-private relations. The sense that the principle of solidarity may acquire in current days then emerged, as a result of human dignity.

The time for conclusion has now arrived. Instabilities are an intrinsic part of such a complex and contradictory system as the one reflected by contemporary Law. Those instabilities imply further transitorily and less legal security (in the formal sense of the term). Those challenges are the ones to be faced, as explained in our conclusion.

### **7.1 “Open up!”**

The Law, as a phenomenon that arises from culture and is a product of history, is vivified through the constant dialogue between Society and the State. It cannot be a conversation between parties unable or unwilling to communicate. If the State does not hear, it is incumbent upon us to pronounce the known order “*Ephphatha*” which means “Open up!”

In a plural and complex social system it is no longer desirable that the State, by means of excessive legal rulings, provides the light for all social relations. It is known that the achievement of a unitary model is impossible. Therefore, in a convoy of social relations in constant movement, a perfect coupling between Society and States, or between the legal system and the dynamic social relations, seems largely unattainable.

To understand these voids means to interpret the necessary legal security with the instability of social relations. But this does not mean that the system should be unstable. Mutable and stable are adjectives that can and must coexist.

### **7.2 The jeopardy: not happy just to take a seat**

The warning of *Mind the Gap*, as used every day on the London Underground, discloses one of its precise meanings: we should be careful when crossing the space between the train and the platform. If the distance is too large the passenger will have trouble disembarking and if there is no distance the train will have problems moving. Obtaining the right balance is the key. The lack of ready answers may be the challenge.

The communication between Society and the State and between subjects and institutions is part of this voyage undertaken by the Law in current days, even if each of the systems or each person is not often bound to struggle with crowded trains at peak hours. This convoy of history is summoning us to conduct the train, and we should not be happy just to take a seat. It is not enough to have a safe seat because this could send us back to the comfort zone and block important changes. New Laws, at all costs and all times, that are not the product of culture and do not have respect for differences are simple answers to complex situations. It is therefore mandatory to be careful with the reducers of social complexity.

It so happens that the supposed lack of legal security has been offset by the production of Laws in a strict sense. That is why Europe thinks of a Constitution or a Civil Code. However, the bridge between Society and the State cannot lead us to a bureaucratized Law. To have more respect for diversity in a substantial sense, would increase the dialogues among systems, institutions and persons. It is the multiculturalawllism in its positive sense, telling us its cultural and historical challenges.

### 7.3 No-go areas

Society and the State must not follow two different standards. A certain distance will always exist. What is imperative is that the gap does not increase; the Law should also benefit from the constructive energy of social facts.<sup>45</sup> In such an event, and if it happens with even more intensity, the warning of *Mind the Gap* may be replaced by a different, more serious warning: mind the pit, since you may fall in the abyss of the lack of rules.

However, a certain distance must remain between the State and Society, where we can see that the gaps are part of the permanent rebuilding of the Law. There is room for shadows in the Law, a kind of *no-go* area for the legal system. Too many Laws are trying to find the right balance and effectiveness.<sup>46</sup> We would thus avoid bureaucratized Law.

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<sup>45</sup> This discussion here does not include the concepts of facticity and validity; these concepts are covered in HABERMAS, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg. Cambridge, Mass.: MIT Press, 1996. This is from the original: *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*.

<sup>46</sup> Those problems, about the “duty to set up the appropriate public institutions for their implementation”, were partially examined by Professor George Pavlakos, in *Legal Obligation in the Global Context: Some*

## 7.4 The struggle to keep faith

The complexity and the multiple facets of our present times problematize the central status occupied by dignity, anchored on the principle of solidarity and shared responsibilities.

All these difficulties exist alongside the asymmetries problematizing and rebuilding the structures of the Law. The goal is to reach a permanent dialogue open and multicultural between Society and Law. If this essay contributes precisely to that objective, I will have succeeded in my aim.

In the words of Simon Callow used at the start of this essay, it is necessary “to struggle to maintain faith”. He was completely right when speaking of Dickens. Now, the future can be seen as even more challenging. The aggravation of the economic crisis in Europe<sup>47</sup> and the overcoming of some boundaries between Roman Law and Common Law turn that future into an even larger challenge. Multicultural, complex and contradictory will be words to describe the Law/Law in the future, especially in regards to the legal systems that regulate the relations between private parties in contracts, family and property.

We must maintain our hopes in the possibilities of the Law, giving due attention to its challenges. Permanence may no longer even be a mark of identity for the Law. The effectiveness will then coexist with ineffectiveness, i.e. with the distance between desire and reality. This difference is part of that identity. We must be prepared because this paradoxical future that is approaching will not be as ephemeral as the cherry blossom in the Spring, and it will certainly not be as beautiful.

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<sup>47</sup> The fragile economic recovery taking place in Europe invites several examinations, see: *Europe and China: Strategic Partners or Rivals?* Edited by Roland Vogt. Hong Kong: Hong Kong University Press, 2012.

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