

## **INDIVIDUAL DECISIONS IN A COMPARISON BETWEEN LEGAL UNITY AND LEGAL PLURALISM**

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**Abstract.** The theory of autonomous legal regimes obliges jurists to unhesitatingly rid themselves, without falling prey to after-thoughts, of the rigid schemes and categories of the past that still partially underlie modern legal reasoning. In a State's unitary law-making process, the relationship between norms and human actions is grounded on a schematic projection of future human actions, thus building trust in the individual and expectations as to what might occur. It is the very essence of legal norms, whether generic and abstract, objective or hierarchically imposed, that enables men to confide in what will come. A plurality of private legal regimes creating substantive law of their own (consider autonomous national or international sources of law in the fields of economics, science, technology, education and medicine) breaks these legal and psychological dynamics insofar as it presupposes a plurality of codes of conduct and classifications in a colliding tangle of sub-systems and a multitude of favourable or unfavourable consequences. The system's stability does not appear to depend on the rigidity of legal forms but on the law's capacity to bend according to changing social needs. Therefore not a strict and distant law that, by wielding the weapon of coercion expects univocal obedience, but a yielding law that opens up to new phenomena by conforming to the behavioural models that autonomously take root in the social fabric. A comparison between the two legal models, the one rigidly hierarchical and the other flexibly dynamic, can but raise a number of questions: with such a fragmentation of sources of law, how can one evaluate one's own or someone else's actions? How can one plan one's actions and offset the risk of someone else's behaviour? What facts should be qualified as legally relevant and mandatory? On the basis of what criteria? In what way may active and operative inter-legality succeed in solving the problem of effectiveness, thereby satisfying the need to make the chosen subsystem stable and persistent over time?

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## **1. Introduction: the Nation-State's Law-Making Processes and Private Legal Regimes**

The theory of autonomous legal regimes obliges jurists to unhesitatingly rid themselves, without falling prey to after-thoughts, of the rigid schemes and categories of the past that still partially underlie modern legal reasoning. The unity of global law no longer corresponds to "the secured normative consistency" founded on a Nation-State's law-making processes but, in the hypertrophic fragmentation of society, is instead oriented towards an active and effective "operative inter-legality"<sup>1</sup>, envisaging as many potential regimes as there are social sub-systems, each one of which is self-contained and on the same level as the others. Each independent social fragment, insofar as it is endowed with a constitutional self-consciousness, takes on a political character and is empowered to posit its own conditions for self-endorsement<sup>2</sup>. Conflicts between private legal regimes are not settled by a superseding and super-ordained authority: in the light of the decline of a hierarchical system, nothing is definitive and irrevocable because conflicts appear like a never-ending phenomenon in which the sub-systems, through a force of persuasion and a regulating logic of their own, sooner or later find points of compatibility in which single rationalities merge and give way to albeit weak heterarchical forms of compatibility<sup>3</sup>.

According to an old-dated definition, legal unity enables individuals to situate their actions within a broader context of State guarantees, thus enabling them to forecast results, calculate other people's behaviours and predict what should or should not happen in case human behaviours fail to comply with legal regulation. Legal certainty implies the awareness of the legal quality of the facts and their consequences, thus instilling a latent general sense of confidence among market dealers and individuals at large, in a single model of reference on which they can rely in pursuing the expected effects of their actions and in controlling other people's behaviours. A plurality of private legal regimes creating substantive law of their own (consider autonomous national or international sources of law in the fields of economics, science,

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<sup>1</sup> G. TEUBNER, *Regime Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 1007-1008, 2004, together with Andreas Fischer-Lescano.

<sup>2</sup> A. FISCHER-LESCANO, G. TEUBNER, *supra* note 1, at p. 1015.

<sup>3</sup> See A. Fischer-Lescano & G. Teubner, *supra* note 1, at p. 1017 ("*Following the collapse of legal hierarchies, the only realistic option is to develop heterarchical forms of law that limit themselves to creating loose relationships between the fragments of law*").

technology, education and medicine<sup>4</sup>) breaks these legal and psychological dynamics insofar as it presupposes a plurality of codes of conduct and classifications in a colliding tangle of sub-systems and a multitude of favourable or unfavourable consequences. A comparison between the two legal models, the one rigidly hierarchical and the other flexibly dynamic, can but raise a number of questions: with such a fragmentation of sources of law, how can one evaluate one's own or someone else's actions? How can one plan one's actions and offset the risk of someone else's behaviour? What facts should be qualified as legally relevant and mandatory? On the basis of what criteria? In what way may active and operative inter-legality succeed in solving the problem of effectiveness, thereby satisfying the need to make the chosen subsystem stable and persistent over time? Is it perhaps necessary to disassociate the term "effectiveness" from the notion of the stability of a single order and reconnect it to the power that each subsystem has to turn into a *regime* and gradually impose itself on other subsystems, bending them to its auto-constitutional legality?

## **2. Institutional Conceptions of the Law and Normative Theories**

### **A. Legal Certainty and Stability of the Institutional Order**

The questions on concrete individual actions, which are imponderable precisely because they are embedded in a fragmentation of legal orders, are here intended to express the sense of unease arising from the ambiguous and evasive relationship that exists between the traditional idea of legal certainty (and of the stability of the legal order) and the issue of the plurality of private legal regimes<sup>5</sup>. Let us start with the two

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<sup>4</sup> These regimes tend to increasingly rely on their own sources of law, "which lie outside spheres of national the law-making and international treaties". A. Fischer-Lescano, G. Teubner, *supra* note 1, at p. 1010. On the legal pluralism, see: C. WEISBROD, *Emblems of Pluralism: Cultural Differences and the State*, 2002; P. SCHIFF BERMAN, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. pp. 325-371, 2002; H. BERMAN, *World Law*, 18 FORDHAM INT'L L.J. 1617, 1995; LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW, Hanne Petersen and Henrik Zahle, eds., 1995; S. ENGEL MERRY, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 1988.

<sup>5</sup> These two subjects of study, the plurality of private legal regimes and legal certainty, seem to find an ideal forum of debate at the University of Macerata. On the one hand, with the thought of Gunther Teubner, who was celebrated by the aforesaid University on the 30<sup>th</sup> of April 2009 by awarding him an honorary

terms, certainty and stability which, when referred to law and the legal order, disclose a combination of two different profiles: in the stratification of psychological motives and social mechanisms, the former (certainty) constitutes one of the reasons driving people to act; the latter (stability) is an essential element for any legal order and can be said to be effective insofar as it is generally complied with and lasts over time. Like any phenomenon described by the laws of physics, it is capable of resisting external forces and of keeping its equilibrium unchanged. On this point, the "should" plane intersects with the "is" plane, validity with effectiveness, the general theory of law with the findings of historical and sociological research.

According to theories on subjectivism and institutional conceptions of the law<sup>6</sup>, the compulsoriness of certain norms is not consequent to the existence of positive law but rather, in the intertwining of historical processes and social mechanisms, arises from the general awareness of the binding effectiveness of the "knot of relations of the organization, functions and values of which an institution consists"<sup>7</sup>. It could be claimed that, in these conceptions, stability is a concept inherent to history and tradition, to the irrefutable occurrence of facts and especially to a plurality of human behaviours that, insofar as they are characterized by a certain amount of regularity, succeed in expressing the effectiveness of a given social and legal system: whereas *stability* looks at the past, at things that occur *almost always* in a given way, *certainty* instead is forward-looking and raises within the individual the conviction that certain facts are likely to occur according to experience

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degree in Law and, on the other, the thought of the philosopher of law Flavio Lopez de Oñate, who was precisely teaching at the University of Macerata when he printed the first edition of his work *Legal Certainty* (1942), giving rise to an intense and fiery debate within the Italian academic community that still echoes in the pages of contemporary legal literature [see, in relation to the lecture by Piero Calamandrei, S. CALAMANDREI (ed.), *Fede nel diritto*, Rome-Bari, 2008, the papers by GUSTAVO ZAGREBESLSKY, PIETRO RESCIGNO, GUIDO ALPA.

<sup>6</sup> For the purpose of the design of this paper and in view of some of the elements they have in common, it is advisable that the two conceptions be considered jointly.

<sup>7</sup> See P. GROSSI, *PRIMA LEZIONE DI DIRITTO*, 30, Rome-Bari, 2003. In the different perspectives considering law-making and enforcement mechanisms as legitimising, see the seminal theories of NIKLAS LUHMANN on the cross-conditioning effect of the mandatoriness and the stabilization of the system (*Legitimation durch Verfahren*, pp. 19 ss. (It. translation, Alberto Febbrajo ed., 1995 (1983)).

and the habitual unfolding of events<sup>8</sup>. The certainty of the law and the stability of the institutional order are differently correlated in the normative conceptions of legal order. Whereas in the spontaneous establishment of institutions, legal certainty expresses a sound sense of confidence rooted in the stability of a univocal experience, in this case the relationship between the two terms turns out to be inverted: legal certainty is a logical and historical *prius* set by a system of objective laws established by and imposed on human will; and the stability of the system refers to the notion of the effectiveness of the legal order that indicates, within the context of reality, a “certain degree” of correspondence between the actual behaviour of men and the legal order regulating their behaviour<sup>9</sup>. Here, objective law is intended as a norm – which is imposed on those who are subjected to it – that is implemented in order to limit the discretion of individuals, thus “giving permanence to the performance of activities and their effects which would otherwise be extremely variable”<sup>10</sup>. This definition entails a sort of presumption of the intent to restrain individual wills which, in most cases, would surrender to being conditioned by the existence of a prevailing authority that, capable of unleashing its overwhelming and repressive force at any given point in time, performs a regulating function over a changing social reality.

### **B. Norms and Human Actions: the ‘Immobilizing’ Function of the Law**

The need for legal certainty, which becomes compelling during history’s major crises when the law loses its rightful way, has always been perceived as an unrenounceable prerequisite for an orderly social

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<sup>8</sup> Any research into the influence of time in a phenomenological perspective would lead one to say that a *forward-looking* perspective is necessarily based on a *backward-looking* perspective. On this, see G. HUSSERL, *Recht und Zeit*, 40 (It. translation by R. Cristin, Milan, 1998, (1955).

<sup>9</sup> H. Kelsen, *Introduction to the problems of legal theory*, pp. 59-61 (translation by B. L. Paulson & S. L. Paulson, Clarendon Press – Oxford, 1992 (1934), who says that in the impossibility of identifying the validity of a legal order through its effectiveness, the dependency that exists between a legal order’s validity and effectiveness, gives rise to the age-old problem of the relationship between law and force.

<sup>10</sup> This aspect of the phenomenon, referred to the theories whereby objective law is defined as a norm, is outlined by Santi Romano, under the heading DIRITTO (FUNZIONE DEL), in: *Frammenti di un dizionario giuridico*, 81, Giuffrè, Milan, 1983, (1947).

coexistence. In a State's unitary law-making process, the relationship between norms and human actions is grounded on a schematic projection of future human actions, thus building trust in the individual and expectations as to what might occur. It is the very essence of legal norms, whether generic and abstract, objective or hierarchically imposed, that enables men to "confide in what will come"<sup>11</sup>. The "immobilizing" function of the law constitutes the grounds and therefore the "relative certainty and predictability that the law introduces in social life"<sup>12</sup>: a "support" on which to base the expectations and hopes of individuals<sup>13</sup> who, being informed of the content of the norm<sup>14</sup>, are capable of knowing in advance "the consequences of their conduct, whether it be imposed or banned or allowed"<sup>15</sup>. Men of action "proceed to *forecast* what has yet to be through stable and certain expressions of the law" that safeguard their actions against randomness and discretion<sup>16</sup>. Qualifying and assessing behaviours entails the capacity to predict them: this is basis for the legislator's need to reason not on specific and present things but on generic and future ones. It is precisely this reasoning on generic and future things that, by qualifying all possible behaviours, introduces the notion of certainty in social and economic relations that instils confidence in the individual. The false problem of the *recipients* of legal norms, whereby the law addresses the people whose actions produce the legal consequences set forth therein, does not affect the issue of legal certainty insofar as individuals, by

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<sup>11</sup> F. LOPEZ DE OÑATE, *La certezza del diritto* 49 (revised edition, Giuffrè, Milan, 1968, (1942).

<sup>12</sup> S. ROMANO, *supra* note 10, at p. 81, develops these concepts in relation to the theory whereby objective law is considered to be a norm.

<sup>13</sup> T. Ascarelli, *Certezza del diritto e autonomia delle parti nella realtà giuridica*, in: *Il diritto dell'economia*, 1241, 1956.

<sup>14</sup> One of the tasks of legal science is to "enhance the degree of legal certainty through rational systematisations" therefore "making increasingly comprehensible the scope of the rules established by the law-maker with respect to human actions", thus enabling the single individual to "calculate in advance, with increasingly certain predictions, the legal consequences of his/her actions", P. CALAMANDREI, *La certezza del diritto e la responsabilità della dottrina* (1942), in: *La certezza del diritto*, 174, Giuffrè, Milan, 1968.

<sup>15</sup> P. RESCIGNO, *Manuale del diritto privato italiano*, 35, 11th ed., Naples, 1997.

<sup>16</sup> N. IRTI, *L'ordine giuridico del mercato*, 67, Roma-Bari, 2003.

drawing their own conclusions on what the law lays down, “infer from it orientations for their actions”<sup>17</sup>.

The *salus* (salvation) of classical legal thinking and the *securitas* in modern legal thinking postulate the logic of the fundamental need for certainty in experiencing the law<sup>18</sup>, which finds a persuasive guarantee in the legal notion of causation. Legal certainty presupposes a consequent succession between two facts, so that if compared to the first condition (“if A”), it then becomes consequent that the second condition (“then B”) must occur<sup>19</sup>. In this consequent expectation lies “justice and, with it, certainty; that for something to happen is right because it is certain and it is certain because it is right; in a word, justice and certainty are the same thing”<sup>20</sup>.

### **C. Risk and Uncertainty in a Polycentric Global Society**

In its most radical form, legal pluralism cannot meet the need of certainty inherent to legal formalism, insofar as it is apparently based on an unending struggle for rights, ranging from those of social needs to those of technical knowledge, expressing a single logic that succeeds in temporarily shaping a right of its own on a case-by-case basis, capable of imposing itself in a discontinuous and fragmented way. In this scenario, the most effective expression of stability is the “softness” of the *lex mercatoria* that, by being substantially ductile, turns out to be the most appropriate tool for the global unification of the law<sup>21</sup>. The

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<sup>17</sup> S. ROMANO, under the heading *Norme giuridiche (destinatari delle)*, in: *Frammenti di un dizionario giuridico*, *supra* note 10, at p. 144.

<sup>18</sup> F. LOPEZ DE OÑATE, *supra* note 11, at p. 49.

<sup>19</sup> F. CARNELUTTI, *La certezza del diritto* (1943), in: *La certezza del diritto*, pp. 199-200, Milan, 1968.

<sup>20</sup> These are the words used to outline the thought of Flavio Lopez de Oñate by F. Carnelutti, *supra* note 19, at p. 200, who, by refuting the phrase quoted, observes that the conflict between legal certainty and justice appears to be unsolvable and that the problem would be solved only by assuming the infallibility of the law-maker. (The insurmountable difficulty “of transposing the infinite in what is finite” raises the unrenounceable need for the legislator to strike the right balance between defining and not defining, following the model of criminal law: “neither surrender all to justice, thus falling in the uncertainty of unrestrained law, nor all to certainty, thus nailing ethics on the cross of the law”, *Id.*, *supra* note 19, at p. 205).

<sup>21</sup> G. TEUBNER, *Breaking Frames: la globalizzazione economica e l'emergere della lex mercatoria*, in: *La cultura del diritto nell'epoca della globalizzazione*.

system's stability does not appear to depend on the rigidity of legal forms but on the law's capacity to bend according to changing social needs. Therefore not a strict and distant law that, by wielding the weapon of coercion expects univocal obedience, but a yielding law that, along the lines indicated by Habermas, opens up to new phenomena by conforming to the behavioural models that autonomously take root in the social fabric<sup>22</sup>. In a polycentric global society, social subsystems are represented as closed social bodies striving to enhance their rationality in counter-opposition to that of other subsystems. Each subsystem is governed by autonomous systems dynamics and logics<sup>23</sup>: each social body is self-contained and counter-opposed to another body.

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*L'emergere delle costituzioni civili*, 36 (It. translation by R. Prandini, Rome, 2005).

On the *lex mercatoria*, see Lawrence M. FRIEDMAN, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347, 2001, pp. 356-59; P. J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA J. INT'L L. 427, 2001, pp. 471-77; ABUL F.M. MANIRUZZAMAN, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 1999, pp. 672-74.

<sup>22</sup> A symptom of this diversity of opinions is the lively debate among Italian and foreign civil law scholars on the legal instrument of the judicial review of contracts consequently to a change in the *status quo*. The debate concerns the need to unify on a European level laws that, on the one hand, express the needs and customs of the *lex mercatoria* and, on the other hand, deviate from the codified principles of the force of law of a contract (see Art. 1134 and 1372 of the Italian Civil Code) and of the termination of contract consequent to the occurrence of hardship (Art. 1467 of the Italian Civil Code). The issue of relying on adjusting remedies as an alternative to the termination of contract is addressed in the principles of *Unidroit* (Art. 6.2.3), the *Principles of European Contract Law* (Art. 6:111), the *Code Européen des Contrats* coordinated by G. Gandolfi (Art. 157) and, to a certain extent, also in the French draft reform of the law of obligations promoted by Pierre Catala (Art. 1135-2). This trend is also encouraged by the reform of the German *Schuldrecht* which introduces the new § 313 of the BGB providing for the adjustment of the contract in case of an unexpected change of circumstances by legally relying on recent legal thinking in respect of the issue of the *Geschäftsgrundlage* (on this, see G. CIAN, *Significato e lineamenti della riforma dello Schuldrecht Tedesco*, *Rivista di diritto civile*, 2006, pp. 9-12.

<sup>23</sup> A. FISCHER-LESCANO, G. TEUBNER, *supra* note 1, at p. 1007.

Under the threat of risk and uncertainty, individuals appear to be disoriented and become even more immersed in the angst of the times. The predictability and forecasting underpinning their sense of security seem to be forever lost. If legal causation – that, like a force of nature, causally links together two events – is traditionally managed to provide a reliable prediction model of human behaviour, the theory of private legal regimes postulates as many facts as there are subsystems as the possible consequence of one’s own or other people’s actions. For the same action, each regime provides its *own* consequence, represented according to its own categories of validity<sup>24</sup>. This gives rise to the notion of a law disconnected from hypothetical assumptions and from forecast-based judgments and embodied instead in the rational and irrational performance of concrete and specific facts in which “should” and “is” coincide. A private regime can claim to be “legal” to the extent that it is effective. This gives shape to a logic of disorder, to the idea of an intrinsic rationality of events, where what occurs is *right*, a notion to which fastidious modern legal thinking would express its reservations. In the absence of a hierarchically superseding authority guaranteeing stability to a changing society, the single social body, comprising “organizational or spontaneous, collective or individual subjects of law”<sup>25</sup>, in order to effectively become a “legal regime”, must acquire durability over time and consistently impose itself on other subsystems. It must also be capable of providing general conflict-settlement criteria, thus expressing the notion that social order can only be plausibly and realistically achieved through the existence of a unitary source of State legislation holding a legitimate monopoly over its power of coercion. So, from where can we draw the criterion of the legality of autonomous private regimes in a construction that marginalizes third-party legal orders as well as the hierarchy of coercive sources and structures in case of non-compliance and the application of sanctions?

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<sup>24</sup> The analysis of the Brazil-USA conflict between the economic and health care aspects of the patent protection of anti-AIDS medicines (A. FISCHER-LESCANO, G. TEUBNER, *supra* note 1, at pp. 1024-1032) well outlines the impact of the interests in play in the concatenation of actions and reactions to the Brazilian law against the abuse of economic power enabling the local production of patented medicines and the subsequent reaction of the US Government with its first request, at the beginning of bilateral negotiations, and its subsequent activation of a WTO panel on the 9<sup>th</sup> of January 2001 to mobilize civil society towards the achievement of Resolution 2001/33 by the UN Human Rights Commission.

<sup>25</sup> A. FISCHER-LESCANO, G. TEUBNER, *supra* note 1, at p. 1012.

### **3. The Legal Meaning of Facts in the Institutional Conceptions of the Law**

#### **A. The Issue of Uniformity and Predictability of Individual Behaviours**

This scenario, described on the basis of traditional categories, does not comprehensively depict Teubner's reflections on the legality of private legal regimes that, in my opinion, are necessarily linked to the creation of legal phenomena and a physiologically legal framework, as perceived by subjective conceptions and institutional theories<sup>26</sup>. The need to semantically extend the concept of law to also include norms not derived from legal sources of Nation-States or international law, arises from the observation not of the pathology of the legal phenomenon but its formation, not of non-compliance thereto and the consequences thereof but rather of the moment of its creation, according to a variety of forms and processes. In this perspective, just as there is a change in the meaning of the notion of third-party and sanction, of compulsoriness and of law, the notions of the legal certainty and stability of the legal order acquire a different position in subjective conceptions and institutional theories of the law that gradually fades into the plurality of private legal regimes in which the notion of law, in an unrelenting conflict between private and public players, is presented as an unending work in progress.

Subjective and institutional conceptions of the law and political and legal orientations alike seem to converge onto a common denominator: the objectification of individual behaviours as being instrumental to the stability of the system. However in the first case, the continuity of human behaviour is a factual prerequisite while, in the second case, it is a sort of condition for survival. According to political and legal conceptions, stability is the fruit of an expected artificial event created by a State norm aimed at imposing a univocal direction to human

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<sup>26</sup> The subjective reconstruction of the legal phenomenon reveals that *"in the life of a law, the law-making moment originates from the onset of the legal relationship, from the joining of two wills in compliance with a given characteristic relationship that sometimes subsequently requires, in order to enforce the terms expressed thereby, the intervention of a power extraneous to the two wills that formed the relationship, is something that is logically distinct from, and materially subsequent to, the law-making process"*. See: W. CESARINI SFORZA, *Il diritto dei privati*, p. 16 (with an introduction by Salvatore Romano, Milan, 1963, (1929).

actions through the law of causation. Conversely, according to institutional conceptions, stability – intended as the condition for the existence of a legal order – appears to be an empirical fact, the achievement of a social body that, precisely thanks to its permanent nature, becomes an institution or, to use Teubner’s terminology, an autonomous and auto-constitutional “regime”. In this case, the legal meaning of facts does not derive from its belonging to a given normative system but from a given social regularity<sup>27</sup> that liberalistic thinkers would refer to a spontaneous order or *cosmos* and to an endogenously self-regulated system<sup>28</sup>. Social order would thereby come about spontaneously, thus creating the *institution*: an intertwining of organizational relationships acquiring an autonomous and stable nature<sup>29</sup> and considered to be effective insofar as it is complied with. The issue of regularly compliant behaviours does not differ from the establishment of a legal order but is a founding element thereof. Uniformity and predictability do not depend on a set of laws guaranteed through force but on the regular frequency of given behaviours, to the extent of being reduced to a statistical rule according to liberalistic theories empirically applying the law of probability<sup>30</sup>.

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<sup>27</sup> W. CESARINI SFORZA, *supra* note 26, at p. 13. See the section on the transition from institution to organization in which the mere regularity of behaviours turns into an “organizing regularity”, thereby converting a custom into a legal custom, in: W. CESARINI SFORZA, *Filosofia del diritto*, 57, Rome, 1954.

<sup>28</sup> F. A. VON HAYEK, *The Confusion of Language in Political Thought*, in: *Nuovi studi di filosofia, politica, economia e storia delle idee*, p. 86 (It. translation, Rome, 1988, (1968). See: G. TEUBNER, *Global private regimes: Neo-Spontaneous law and dual constitution of autonomous sectors in world society?*, in: *Public Governance in the Age of Globalization*, pp. 71-87 (KARL-HEINZ LADEUR, ed., Ashgate, Aldershot, 2004), available at:

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=894423](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894423), 4, 2006. (“Unlike in Hayek’s spontaneous order, “the specificity of the neo-spontaneous law lies only in the fact that it is based not on governmental decision but on more or less thoroughly organized social processes that each bring about a very specific selectivity of the norm-making”).

<sup>29</sup> P. GROSSI, *supra* note 7, at p. 30.

<sup>30</sup> “Objective law” is said to arise from the frequency with which certain claims are put forth and met within a given context and at a given point in time (see: B. LEONI, *Lezioni di filosofia del diritto*, p. 68 (with the preface by Carlo Lottieri, Rubbettino ed., 2003). The field is dominated by the spontaneous exchange of subjective claims, in which only those claims that “are statistically shared by society and therefore predictable” acquire a nature of legality, B.

In this perspective, the reference made in institutional theories to the stabilizing “function” of the law, thereby separating the notion of legal order from the concept of stability, in my opinion risks raising an essential misunderstanding by overshadowing the fact that stability is born along with the institution, which is such because it lasts over time. If, in the normative conception of the law, stability constitutes the result expected from known and objective forms embedded in a context of legality that is held separate from the actual behaviour of men (in which case it would make sense to talk about the “immobilizing” function of the law), in institutional theories, it would be postulated as a seminal element of the legal phenomenon or as a prerequisite for the very existence (and functioning) of an organized social body. Commonly compliant behaviours, precisely because they are repeated over time, express stability in and of themselves. This explains why, according to subjective reasoning and institutional theories, the risk of non-compliance and of sanctions is extraneous to the structure and physiology of the law. Forecasting, which underpins private enterprise and placing one’s stakes on the future, rests on a confident presumption of continuity in human vicissitudes, as it relies on objective evidence drawn from experience. Attention is focused onto the moment in which the legal phenomenon is created: widespread spontaneous compliance is a symptom of the legal phenomenon’s effectiveness and therefore an empirical sign of its formation. In those theories on legal order that are subjectively integrated into theories on legal norms, the compulsoriness of the norm arises from the fear of sanctions and of the intervention of judicial authorities<sup>31</sup>: thence the consequences of an action that is non-compliant with the legislative framework and its enforcement come to form part of the phenomena’s legality. According to institutional theories, the *opinio iuris ac necessitatis* arises from the regularity of a typical social practice, sometimes underpinned by a consolidated tradition<sup>32</sup>, in which the possible consequences of an action that does

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LEONI, *Obbligo e pretesa nella dogmatica, nella teoria generale e nella filosofia del diritto*, in: *Scritti di scienza politica e teoria del diritto*, pp. 235 ss. (with introduction by M. Stoppino, Milan, 1980, (1962).

<sup>31</sup> N. BOBBIO, *Teoria generale del diritto*, Turin, 1993, p. 165.

<sup>32</sup> The phenomenon of customs described by RODOLFO SACCO (*La Parte Generale del Diritto Civile. 1. Il Fatto, L’Atto, Il Negozio*, in: *Trattato di Diritto Civile* (R. Sacco ed., Torino, 2005), at p. 27, highlights the problematic aspects of the relationship between facts and the law [“It is understood that a custom implies a conduct by the members and this conduct is a fact; however, this conduct or fact are precisely the legal source. When focus is placed on the

not comply with the normal occurrence of events (presumed and remote consequences, in this case) remain hanging on the edge of the law without however falling within its scope.

### **B. The Collision between Social Systems and the Compelling Need for Statal Emergency Measures**

This scenario gives rise to the issue of the coexistence of a plurality of legal regimes highlighted by the phenomenological observation of the impotence of State-produced legislation that, being self-referential, is incapable of communicating with the external world and more specifically with the other systems<sup>33</sup>. If, in the institutional conception, the problem of stability is actually solved by the very structure of an organization whose different components are long-lived, in the theory postulating a plurality of private legal regimes, the concept of stability appears to be destined to be overshadowed by the persisting conflict between social subsystems. This depicts a picture characterized by the absence of both traditional legal certainty and of the stability of a legal order instilling individuals with confidence and the power to make predictions. In a context in which the production of legal norms is parcelled out among a plurality of players (both public and private) and specialized organizations, it becomes difficult to single out the effective decision-making structure. Just like it is equally difficult to establish the validity of a given norm in a process in which the "reiterated claims" of private regimes to have "a global validity" at times ultimately prevail and determine the coming into force of new laws<sup>34</sup>. In my opinion, in this perspective it makes sense to talk about stability as an indicator of the "constitutionalization" of the single subsystem that, being fully autonomous, pits itself against the other subsystems while remaining cohesive in its internal rationality. This stability is inherent to the single social system and is instrumental to a type of opening towards the other systems that enables it to remain what it is<sup>35</sup>. At this point the problem

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*factual nature of the custom, counter-opposing the custom to the law, the intention is simply to counter-oppose a material "fact" (custom) to an "act" of will (the law)"]*.

<sup>33</sup> This aspect was highlighted in Alberto Febbrajo's *Laudatio* when Gunther Teubner was awarded an honorary degree in Law on the 30<sup>th</sup> of April 2009 at the University of Macerata (*supra* note 5).

<sup>34</sup> G. TEUBNER, *Global private regimes: Neo-Spontaneous law and dual constitution of autonomous sectors in world society?*, *supra* note 28, at p. 8.

<sup>35</sup> It is precisely the "translation of the rumours from other systems into the language of each system" that makes it possible to avoid "a sort of

arises as to the more or less provisional outcomes of the violent collision between two social systems that, according to the theory of legal pluralism, may well turn out to be in favour of social and “political” bodies capable of imposing socially harmful rationalities and aberrant logics. During major crises of the economic and financial system or in contexts dominated by criminal groups, emerges the widespread and compelling need for statal emergency measures thereby almost indicating that, in exceptional circumstances, the return to stability and the re-establishment of order can only derive from the regulatory organization and the coercive apparatus of the single Nation-State. Faced with these temporal and territorial restrictions and the temporary opting out of other legal fragments, “the secured normative consistency” seems to re-acquire its age-old centrality in intervening on a state of exception that the measures passed by antagonist subsystems did not succeed to prevent. However, in a global society now “without an apex or a centre”, a return to an organizational and doctrinal unity of the law appears to be far-fetched<sup>36</sup>: the temporary effects produced by a rebalancing and stabilizing intervention of the system is soon destined to constitute the object of a new dispute and an even harsher conflict.

### **C. Individuals as Part of a Broader Reconstruction Process of Legal Phenomena**

In the light of the unbridgeable distance between different legal forms and of the nature of conflicts and their contingent, moral, economic and social causes, the laws of a Nation-State seem to be incapable of performing a stabilizing function: on the one hand, there is a fragmented social environment and the collision between technical expertises and

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*condemnation to total incommunicability*”: these are the words uttered by Alberto Febbrajo in the *Laudatio* delivered during the ceremony awarding Gunther Teubner an honorary degree in Law (*supra* note 5).

<sup>36</sup> A. FISCHER-LESCANO, G. TEUBNER, *supra* note 1, at p. 1017. On the legal unity, Andreas L. Paulus observes that the “*law in general, and international law in particular, does not only follow slavishly the needs of other systems such as religion or cyberspace, but is based on normative assumptions and values of its own. It is a system of its own and thus maintains a basic unity. The rules on law-making by State consensus provide, for the time being, for a certain formal unity of International law*”. A. L. PAULUS, *Commentary to Andreas Fischer Lescano & Gunther Teubner The Legitimacy of International Law and the Role of the State*, 25 MICH. J. INT’L L. 1057, 2004. See: A. FISCHER-LESCANO, G. TEUBNER, *Reply to Andreas L. Paulus Consensus as Fiction of Global Law*, 25 MICH. J. INT’L L. 1059-1073, 2004.

single rationalities<sup>37</sup>; on the other hand, within the framework of jurisdictional processes, there emerges the need to juridify the “external irritations” arising from the regimes produced by social subsystems<sup>38</sup>. According to the theory of the plurality of private legal regimes, expectations in the law are filled with speculative tensions that, arising from the realm of phenomenology, call for the need to extend the concept of law to also embrace the enforcement of statal norms, just as it would occur in the dynamics of an ongoing phenomenon.

The enforcement of State-produced laws can in fact express a phase in the conflict between private legal regimes that, in the arguing and counter-arguing of the contenders, penetrates the process: the ruling of the Court does not speak the final word that, by adjudicating in favour of one or the other party, closes the case, but merely constitutes a fragment of law that, in a chain of actions and reactions taking shape in a wide variety of contexts, can engender yet another equally forceful and authoritative fragment. The image of the “exploiting justice” restores the sense of a dialectic game in which the claimant not only claims justice for himself but also takes part (one could say in a “war of words”<sup>39</sup>) in deciding a binding ruling and a new law<sup>40</sup>. In other words, the collision between private legal regimes does not abide by a firm settlement criterion definitively separating the claims of the losing party from those of the winner, but rather by a flexible and changing criterion of compatibility between antithetical rationalities<sup>41</sup> intertwining the

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<sup>37</sup> A. RUFINO, G. TEUBNER, *Il diritto possibile*, 29, Milan, 2005.

<sup>38</sup> G. TEUBNER, *Alienating Justice: On the Social Surplus Value of the Twelfth Camel*, in: A. RUFINO & G. TEUBNER, *Il diritto possibile*, pp. 108-109 (It. translation by S. Fariello, Milan, 2005).

<sup>39</sup> J. HUIZINGA, *Homo ludens*, 92, 1939, (It. translation, Turin, 2002) where the analogies between law and game-playing, despite the semantic difference between the two terms, emerge precisely in the trial “*which is utterly competitive in nature, whatever the ideal legal grounds may be*” (at p. 90).

<sup>40</sup> See G. Teubner, *supra* note 38, at p. 111: “*Exploiting justice: the law exploits people’s quarrelsomeness to fuel the production of future norms*”.

<sup>41</sup> The concept is clarified by KARL-HEINZ LADEUR, *Postmoderne Rechtstheorie: Selbstreferenz – Selbstorganisation – Prozeduralisierung*, Berlin, Duncker & Humboldt, 199, pp. 159-160, according to who contradictions “*cannot be avoided, rather a new form of self-observation and self-description within the legal system must, in fact, take on the task of maintaining compatibility and lines of communication between differing legal arenas*” (see: A. FISCHER-LESCANO, G. TEUBNER, *supra* note 1, at p. 1045).

reasons of both subsystems in an “endless interplay of cross-referencing from one rationality to another”<sup>42</sup>.

From this perspective, where the ontology of the law intertwines with a transcendental idea of justice, legal uncertainty, in the absence of supporting points reference, is not synonymous to dismay or indecision but expresses the possibility of establishing a contact or relation with other social systems which, by relying on the law for their validation, end up changing the original meaning thereof through the implacable deconstruction and internal fragmentation of law into a plurality of sources (and differing rationalities). No longer supported by the stability and unity of Nation-State law-making, individuals are almost driven to become part of a broader reconstruction process of legal phenomena, in which their expectations for a more vigilant and effective protection of essential social needs can only mature along a rugged horizon of colliding social systems<sup>43</sup>.

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<sup>42</sup> R. PRANDINI, *La “costituzione” del diritto nell’epoca della globalizzazione. Struttura della società-mondo nell’opera di Gunther Teubner*, in: *LA CULTURA DEL DIRITTO NELL’EPOCA DELLA GLOBALIZZAZIONE. L’EMERGERE DELLE COSTITUZIONI CIVILI*, *supra* note 21, at p. 208.

<sup>43</sup> This is a core issue in the horizontal legal effects of essential rights demanding protection, not only vis-à-vis the Nation-State, in which case the problem is scarcely relevant, but principally vis-à-vis all the other subsystems, thus raising the issue of the possibility that human rights might impose direct constraints on private players.