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# LAW AND INTERCULTURALISM

Eds. **Elisabete Ferreira**  
**Catarina Santos Botelho**  
**Luís Heleno Terrinha**



PORTO



*LAW AND INTERCULTURALISM*

ELISABETE FERREIRA; CATARINA SANTOS BOTELHO; LUÍS HELENO  
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The Porto Faculty of Law of the Portuguese Catholic University had the honour of hosting the annual meeting of the Nanterre Network in 2017. It was a great opportunity to deepen academic connections among the participants and pave the way for future and interesting cooperative projects.

This year's Colloquium devoted itself to the important theme of "Law and Interculturalism". It is a discussion legal scholars cannot avoid having, given the social context of law. In fact, as demonstrated by recent history, our multicultural societies do pose difficult challenges. And it is also the task of the legal system to reconcile and harmonize different, if not opposing, worldviews, with the ultimate intent of promoting liberty and equality among all.

That serves to underline the pertinence of the papers delivered by a very significant number of scholars during the Colloquium, some of which we managed to gather and present in this publication. There is a vast array of topics covered, ranging from the impact of interculturalism in legal studies and curriculum to conflicts of fundamental rights.

The academic and lawyer of the future will surely have to be aware of the cultural ambience of legal norms, not only to better understand the social issues at hand, but also to be able to solve them in a fair and just way. It is our sincere hope that this volume represents a contribution to that endeavour.

The Editors,

Elisabete Ferreira

Catarina Santos Botelho

Luís Heleno Terrinha

**COLLOQUIUM**  
**LAW AND INTERCULTURALISM**  
**XXII ANNUAL MEETING**

9th June

9h30 – 10h00: Opening Speech

Otmar Seul

Representative from ED-UCP

*Coffee Break*

**Room 1 - 10h30-12h30: Interculturalism and Legal Studies – chair MARIA JOÃO TOMÉ**

Elzbieta Kuzelewska: *Internationalization of academia in times of migration crisis*

Otmar Seul: *Interculturality as specificity of the integrated french-german legal studies Paris-Nanterre/Potsdam*

Soazik Kerneis: *Cultural expertise and litigation. An historical and anthropological approach*

**Room 2 - 10h30-12h30: Interculturalism, Family and Religion – chair ELISABETE FERREIRA**

Omer Aloni: *Early Israeli Law and the question of Bigamy*

Rute Teixeira Pedro: *Freedom of Religion and Right to marry in a multicultural society – let`s talk about the Portuguese marriage legal system*

Benedita Mac Crorie (with Anabela Leão): *Intercultural societies and the ban of religious symbols: is State paternalism a legitimate aim?*

**Room 1 - 14h00-16h00: Interculturalism and Criminal Law – chair – DANIELA BATISTA**

Ewa Guzik-Makaruk: *Problematik der Organtransplantation in Polen aus kriminologischer und strafrechtlicher Perspektive*

Elisabete Ferreira: *Multiculturalism and the criminalization of domestic violence in Portugal*

Sandra Tavares: *Gipsy ethnicity and Portuguese criminal law. Some considerations*

**Room 2 - 14h00-16h00: Interculturalism, Law and Rights – chair LUÍS TERRINHA**

Elena Abrusci e Daniela Méndez Royo: *One right to property to fit them all? Acknowledging cultural differences in the judicial interpretation of the right to property by the Inter-American Court*

Maria Vitória Rocha: *Free uses in Anglo-American Copyright and in Continental Copyright: An intercultural approach*

Ulrike Brandl: *Is it still legitimate in a multicultural society to restrict the freedom of speech or assembly of aliens with regard to the control of their political activities?*

Izabela Skomerska-Muxhowska: *Law and interculturalismo: are there any general principles of law commonly recognized by civilized nations?*

*Coffee Break*

**Room 1 - 16h30-18h30: Interculturalism and Diversity – chair SANDRA TAVARES**

Anna Czaplinska: *The principle of respect for national identities of the Member States as reflection of interculturalism in EU law*

Atanas Semov: *L'Europe de deux vitesses ou de deux vérités - quelles vrais valeurs?*

Giorgio Gallizioli: *Language pitfalls in the EU legislation and how to deal with this challenge*

Ana Rodina: *Law and Language: example of Latvia*

**Room 2 - 16h30-18h30: Interculturalism, State and Society – chair CATARINA BOTELHO**

Daniela Baptista: *Harmonization of company law in Europe: the legal challenges of a “multicultural” European single market*

Rute Saraiva: *Quo Vadis: Cultural conflict between the public, private, social and cooperative sectors or on the way to a cultural and legal blurring of their autonomy?*

Anabela Leão: *Questioning the attitude of the State towards cultural diversity and cultural identities: a Constitutional Law approach*

Jing Geng: *The Maputo Protocol and the Reconciliation of Gender and Culture in Africa*

Duarte Abrunhosa e Sousa: *ILO Conventions and Recommendations on child labour – a comparative intercultural overview between Portugal and Mozambique*

**18h30-19h00: Closing ceremony**

## **OPENING SPEECH**

Dear Dean,

Dear colleagues,

(1) Following my colleague Stephanie Dijoux, I address my sincerest thanks to you, your Faculty and the Catholic University of Portugal for inviting the delegates of the Nanterre network to Oporto, this amazingly beautiful city whose historical center had been included by UNESCO into the world heritage list. Porto's history goes back further than many other European cities that hosted us during our Tour d'Europe: there are historical facts and archaeological findings that indicate that homo sapiens was present more than 20 thousand years ago in this area between the Alto Douro Wine Region and Vale do Côa.

Since 1995, the foundation year of our European network, Annual Meetings have taken place in Nanterre/Paris 1995, Siena 1996, Berlin 1997, Halle 1999, Pamplona 2000, Prague 2001, Vilnius 2002, Lodz 2003, Riga 2004, Nanterre 2005, Fribourg (Switzerland) 2006, Istanbul 2007, Florence 2008, Sevilla 2009, Barcelona/Andorra 2010, Berlin 2011, Lisbon 2012, Vienna 2013, Dresden 2014, Zurich 2015 and Białystok 2016.

Since the Declaration of Bologna (1999), during our annual meetings, the delegates from the partner universities address the issue of the adaptation of their national Higher Education system to the European standards. Coupled with a colloquium or a workshop, these meetings also devote a reflection to the great trends in the ongoing harmonization of law in EU countries.

Especially to inform the university delegates who are at our Annual Meeting for the first time today, please allow me to perform a flashback on the development of the Nanterre network.

(2) The creation at the University of Paris-Nanterre of a binational and bilingual curriculum in 1986 intertwining French Law and German Law studies implemented since the beginning an initiative to internationalize studies and research.

This Franco-German curriculum became "integrated" in 1994, when a cooperation agreement was signed with the University of Potsdam (Germany). Thus, a study-abroad period was added to the program, as well as the possibility for the students to be awarded a double diploma (Bachelor and Masters), from both the university of origin and the partner university.

Our double legal studies curricula rapidly evolved into cross-border activities, which became the center of the actual European network. Based on the Erasmus-Socrates agreements and encompassing more than 40 partner schools as of today, this informal Nanterre network was built in four stages:

1° In the nineties of the last century, after the German unification (1990), the Law Faculties of the Humboldt University of Berlin, of Halle-Wittenberg, of Potsdam, of Dresden (TU) and other Universities of the new Länder joined the network. Up until then, it consisted of only a few Western European Universities: especially Law Faculties from Switzerland and Austria, from the United Kingdom, Italy and Spain. It was only after the turn of the millennium that universities from other western EU countries (Belgium, Portugal) joined the network and regularly took part in its Annual Meetings.

2° After 2000, the most important step consisted in opening the network to universities of Central and Eastern Europe (especially Poland and the Baltic States), in some cases even before they officially joined the EU in 2004.

3° The next to join, in 2006, were the Turkish Universities (among them the Universities of Istanbul, Galatasaray, Yeditepe, and Bilgi), which belonged to a country that had already for a long time been preparing to enter the EU. Universities which – as we have already noticed – are not represented here in Porto for the first time: for political reasons that are alien to constitutional thinking, and which therefore should not be accepted unchallenged. Are we not the appropriate forum to make a solidarity statement for our Turkish colleagues who have become victims of state arbitrariness? This topic shall be discussed in the days to come.

4° The last geopolitically significant group of Universities to join us comes from the Balkan countries. The European perspective grants the Balkan States exposure to the irreversibility of political, economic and social reforms that these countries must carry out as well as peace and regional stability. Our cooperation with these countries, primarily the Western Balkan States, is less visible in Erasmus partnerships than in the organization of Itinerant Summer- and Autumn Universities. In 2015, the second event of this kind on the topic “Accession to the European Union and identity of the Balkans” was organized by the University of Paris Ouest Nanterre La Défense, the Westfälische Wilhelms-Universität Münster, the University of Ss. Cyril and Methodius Skopje (Macedonia), the University of Prishtina (Kosovo), the University of Tirana (Albania) and the University of Podgorica (Montenegro). Last year, the third edition dealt with the topic “Refugees, Migration and Rule of Law in Balkan Countries”, with two main sessions in Skopje and Sofia. Next year, the topic will be: “Which future for Europe? Differentiated Integration as a model for the European Union and the inclusion of the Balkans?” We want to discuss whether the EU should become significantly more flexible with regard to different steps of integration and whether such a model would open a way for the accession of the Balkan states that wish to join.

(3) As a matter of fact, French-German summer and autumn universities with partners from third countries focusing on the question of European identity, its assumptions and policies, in relation to European integration and globalization are certainly the most spectacular innovation in the history of the Nanterre network. A success story that began in 2004 with the foundation of a French-German-Lithuanian Summer University in Vilnius (which is why

we wish a particularly warm welcome to the Dean of the Law Faculty of the Vilnius University, and co-founder of the historic Summer University, Prof. Thomas Davulis).

But for us, Europe does not end at the borders of the European Union and its influence zone on East and South-East Europe. Our network is open to Universities of countries that are not EU candidates. This encourages reflection on the evolution of law within an enlarged European legal area, that shows Europe as a geographic area. Therefore, Paris-Nanterre, Potsdam, and the State of Belarus hold a special kind of Summer University in Minsk: organised since 2011, this Summer University is dedicated to topics of general European relevance, such as “alternative contribution to contentious issues”, “new information and communication technologies”, environmental issues or, this year, “consumer protection”. Just like in the EU, the regional integration tendency in the post-Soviet Commonwealth of Independent States (CIS) is accompanied by an attempted harmonisation of the national law systems. Belarus seems to be convenient in terms of law comparison, since Belarus is part of the Russian-Belarusian Union and member of the Eurasian Economic Community (agreement of 2014) and therefore belongs to the core States of these transnational structures.

Today, the “delocalization of the campus” via the creation of summer universities is no longer limited to the European area. Meanwhile, our model has been successfully implemented on other continents: for the first time in 2013 in South-America at the Pontificia Universidad Catolica del Peru in Lima, only two weeks ago in Africa at the University Félix-Houphouët-Boigny in Abidjan, in Ivory Coast.

(4) So five years after the Annual meeting in Lisbon, we’ve come back to Portugal today. A suggestion firstly made by our colleague and friend Professor Vasco Pereira da Silva, the organizer of our memorable 17th meeting at the University of Lisbon, who - in Zürich, two years ago - made us aware of the Catholic University of Portugal’s interest in the expansion of its international relations. An information which I was able to confirm last end of September here in Porto, at this exact same place: the faculty of Law of the Catholic University hosted the founding congress of the Communauté pour la recherche et les études sur le travail et le champ professionnel (CIELO), with participants from almost 100 European and Latin-American Universities. In the course of the colloquium and during my speech on the experience of implementing the EU-Directive establishing a general framework for informing and consulting employees in the European Community (2002), I referred to the successful model of our integrated German-French legal courses and their international network, that has turned the German-French Summer Universities in third countries in and outside of Europe into their trademark. Innovations, which particularly raised the interest of PhD students of the Oporto Law School and especially of Constitutional Law Professor Catarina Santos Botelho. She suggested to hold the next annual meeting of the Nanterre network in Porto, and to combine it with an international colloquium on the topic “Interculturalism /

law and cultural conflicts” and you, dear Dean, approved and thereby made this international event in your beautiful city possible: I would like to warmly thank you and the faculty once again.

(5) While trying to settle our curricula in Law studies in the Higher Education Area, to open international careers to our graduates and to promote our languages and legal cultures, our network progressively became a contact forum promoting comparative law discussions. Following the seminar Inter – or multidisciplinary legal education? Possible approaches and gained experience) last year in Białystok, the topic for this year’s colloquium, “Interculturalism / law and cultural conflicts” was suggested, and it seems to us that it breaks new ground for many jurists. In Nanterre, we have been dealing with these questions for over 20 years. What makes our integrated binational curriculum stand out is that it encourages a cross-cultural analysis of both countries, France and Germany, and - in the framework of the trilingual option – even involving a European or non-European third country.

The program does not just equip students with a double or triple “legal culture”, but it also trains them to take comparative approaches. Therefore, we want to prove during our colloquium here in Porto that in our modern world, it is advantageous - if not indispensable - for law professors, law students and legal professions to acquire intercultural competence. We suggest drawing the outlines of the conceptual relations between law on the one hand, and culture, inter-culturalism, multiculturalism and cross-culturalism on the other hand. The focus lies on the human compliance with (legal) rules, the differentiation between law as seen in theory and in practice, comparative law, and the legal challenges of a multicultural society. The program, approved by the Scientific Committee under the direction of Dean Manuel Fontaine Campos and Professor Catarina Santos Botelho and formed by the Executive Committee around Professor Elisabete Ferreira and Lecturer Luís Heleno Terrinha announces itself as a highlight, not only because of the originality of its topic, but especially given the high number of contributions planned.

Let’s hope this annual meeting is so dynamic as to guide the further development of our network.

OTMAR SEUL

## ***Interculturality as a specificity of the integrated French-German legal studies program between Paris-Nanterre/Potsdam***

*Otmar Seul*, University of Paris-Nanterre, France

The creation of a binational and bilingual curriculum at the University of Paris-Nanterre in 1986, intertwining French Law and German Law studies, implemented since the beginning an initiative to *internationalize studies and research*. This French-German curriculum became “integrated” in 1994, when a cooperation agreement was signed with the University of Potsdam (Germany). Thus, a study-abroad period was added to the program, as well as the possibility for the students to be awarded a double diploma (Bachelor and Masters), from both the university of origin and the partner university (1).

Our double legal studies curricula rapidly evolved into cross-border activities, which became the center of the actual European network. Based on the Erasmus-Socrates agreements and encompassing more than 40 partner schools as of today, this informal *Nanterre network* was built in four stages:

1° In the nineties of the last century, after the German unification (1990), the Law Faculties of the Humboldt University of Berlin, of Halle-Wittenberg, of Potsdam, of Dresden (TU) and other Universities of the new Länder joined the network. Up until then, it consisted of only a few Western European Universities: especially Law Faculties from Switzerland and Austria, from the United Kingdom, Italy and Spain. It was only after the turn of the millennium that universities from other western EU countries (Belgium, Portugal) joined the network and regularly took part in its Annual Meetings.

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unchallenged. Are we not the appropriate forum to make a solidarity statement for our Turkish colleagues who have become victims of state arbitrariness? This topic shall be discussed in the days to come.

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As a matter of fact, ***French-German Summer or Autumn Universities*** with partners from third countries focusing on the question of *European identity*, its assumptions and policies, in relation to European integration and globalization, are certainly the most spectacular innovation in the history of the *Nanterre network*. A success story that began in 2004 with the foundation of a French-German-Lithuanian *Summer University* in Vilnius – in the year the European Union was enlarged, in particular towards Central and Eastern European countries. These *Summer or Autumn Universities* aim to follow the evolution of the law within the framework of the European Union, by analyzing the outline of the current legislative and practices harmonization process. Mainly dealing with Comparative European Law, these events do not only contribute to mutual legal understanding, but they also allow the discovering of how each country’s society works. Building upon the constraints and obstacles which slow down the European integration process– after the French and Dutch refusal of the Treaty establishing a Constitution for Europe, expressed by ways of referendum in 2005– a reflection was much needed to better grasp the question of *European identity* and to better explain the “European project”– what it entails and its policies regarding globalization. The disciplinary diversity of panelists at these Summer or Autumn Universities – where historians, political scientists, economists and sociologists are the most welcome –

allows a *multidisciplinary approach* to the juridical questions brought forth by the main topic of a given session.

But for us, *Europe* does not end at the borders of the European Union. Our Nanterre network is open to universities of countries that are not EU candidates. This encourages reflection on the evolution of law within an enlarged *European legal area*, that shows Europe as a geographic area. Therefore, Paris-Nanterre, Potsdam, and the State University of Belarus hold a special kind of *Summer University* in Minsk: organised since 2011, it is dedicated to topics of general European relevance, such as “alternative contribution to contentious issues”, “new information and communication technologies”, “environmental issues” or, this year, “consumer protection”. Just like in the EU, the regional integration tendency in the *post-Soviet Commonwealth of Independent States* (CIS) is accompanied by an attempted harmonization of the national law systems. Belarus seems to be convenient in terms of law comparison, since it is part of the Russian-Belarusian Union and member of the Eurasian Economic Community (agreement of 2014) and therefore belongs to the core States of these transnational structures.

Today, the “delocalization of the campus” via the creation of summer or autumn universities is no longer limited to the European area. Meanwhile, our model has been successfully implemented on other continents: for the first time in 2013 in South-America at the *Pontificia Universidad Catolica del Peru* in Lima, or, recently, in Africa at the *University Félix-Houphouët-Boigny* in Abidjan, in Ivory Coast.

Are these initiatives, in studies and research, the guarantor or even the symbol of an expression of *interculturality*? Before answering this question, let's *define* this phenomenon, which is the object of numerous mono-disciplinary and interdisciplinary research studies, involving not only sociologists and psychologists, but also education, marketing or conflict resolution specialists.

1°

### *Interculturality as a principle of “openness” and processes of “acculturation”*

According to Claude Claret, the term *intercultural* brings forth the notions of “reciprocity” and “complexity” into cross-cultural exchanges (2). The study of intercultural relations hence pertains to the studying of *cultural contacts*: “when people from different cultures interact, in order to communicate, they put in common both their own cultural elements, as well as some which they share, but they will also resort to cultural elements other than their own. A sort of *cultural craftwork* will set itself, allowing for differences – obstacles to communication – to be overlooked, and even exploit them to create a new cultural space for interaction, with a new cultural code. It is not a bridge between cultures anymore, but rather a mix of different

cultural relations” (3). *Interculturalism*, as a principle of “openness”, is also a way to renounce ethnocentrism, which the *Trésor de la langue française informatisé* (a French language dictionary) defines as “a social behavior and attitude, unconsciously motivated, which leads to privileging and overestimating one’s racial, geographical or national group, while often holding preconceived ideas towards other peoples” (4). Some authors do compare such an evolution to a form of “ethnocide”: the fact of erasing or suppressing a community by willingly destroying its culture. The American anthropologists Melville Herskovits, Robert Redfield and Ralph Linton oppose against all forms of *deculturation*, to be understood as the loss of one’s culture, be it voluntarily or involuntarily. Their intercultural endeavour isn’t just about creating “bridges between legal cultures”. By offering a “new cultural space for interaction, with a new cultural code mixing different cultural relations”, they aim to contribute to the emergence of *acculturation* phenomena: “all the phenomena resulting from what happens when groups of individuals from different cultures begin direct and continuous contact, and the changes which occur in the original cultural models in either one of both groups” (5). *Deculturation* defines the lack of culture, whereas *acculturation* is a slower process carried out by populations who adapt themselves to new cultural situations.

Our French-German Summer and Autumn Universities with partners from third countries are seen as a chance to transmit, as much as possible, our **national legal cultures through our national languages**. Behind this lies the idea of a healthy emulation of a dynamic Europe, which, in an ever more global world, refuses any form of mono-cultural evolution and hence a uniformed tendency based on the Anglo-American “model”. English is used sometimes, but it remains however unusual for our comparative approach. Europe thus asserts its linguistic and cultural diversity. With this conception of *interculturality*, we are obviously in line with the *EU Charter of Fundamental Rights* (2000) logic. The Charter states that “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity”, and that [the Union] “contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels” (6). One of the most positive *collateral* effects of our sessions lies in the fact that they allow our bilingual double-degree students to discover the work of interprets and translators: French and German being the working languages, like in Vilnius, students get to try their hands on instant interpretation of the conferences.

But above all our Summer and Autumn Universities serve the purpose of a “complex” project, that of *European integration*, by explaining it, and making that *project* evolve. Most often tri-national, bilingual or trilingual and always open to participants from other European countries, these events aim to be essentially based on **communication** and **interaction**. Gathering research professors, PhD students and students (mainly Master students) in a

convivial and less formal setting than that of the typical university classes, these Summer and Autumn Universities allow for **innovative pedagogical approaches**. Meant as an open *forum for dialogue*, they can contribute to a better perception of the law, to the intellectual enrichment of students and PhD students, and then can even promote them as interlocutors for research professors and professionals. Through *workshops*, students can intensively engage in an interactive way: supervised by research professors, they take part in various group works, which they started prior to the session, and they present their results at the end. Due to the lack of time, we will not examine here the innovative aspects of the Summer and Autumn Universities but only the *intercultural value added* of the integrated French-German courses for law students. Regular evaluation of these courses by the Franco-German University require the French and German partners to repeatedly assess their teaching and research activities. They accordingly engage in an ongoing exchange, notably on adjusting curricula to satisfy the changing social-cultural and economic demands of the European integration process and global competition (7).

2°

The *intercultural added value* of integrated French-German curricula for law students. Experience in teaching practice.

Our integrated courses introduce students to two **different legal cultures**. Students become familiar with the university system of the neighbouring country and its specific teaching and working methods. Visiting academic staff are well aware that, in their person and conduct, they stand for a “certain image of university teaching in their country of origin” (Heinrich Dörner, University of Münster). In contrast to Germany, universities in France are “mass universities,” where admission to given courses is not restricted (*numerus clausus*) and where the university entrance certificate (*baccalauréat*) in principle guarantees direct access to university studies.

What is particularly striking in comparing **law teaching didactics** in the two countries is that *deductive* methods tend to be used in France while Germany prefers *inductive* methods. **In Germany**, university law teaching is very strongly practice-oriented and therefore problem-oriented. The focus is on examining difficult individual cases: “Students are expected to learn how to legally assess concrete facts of life. Essentially, it is a matter of recognising the conflicting interests of different parties and reaching a reasonable settlement in keeping with appraisal of the legal system” (Matthias Becker, University of Potsdam). The strong practical orientation of legal education is accompanied by a scholarly dimension. Different academic opinions and judicial positions are presented and examined in depth. This often makes it difficult for students to obtain an overall picture of the basic characteristics and fundamental principles of the legal system. Through study abroad in

France and through the courses provided at German universities, German students can gain a great deal of insight into French law. Even after completing the basic course and passing the intermediate examination, from about the third year of study, legal training is scarcely organized along school lines. Although advanced courses (the “major credits”) in civil law, public law, and criminal law must be obtained and the university provides a study plan, the latter is only advisory. The students themselves must decide when they attend an advanced course. And it is up to them to decide what other classes they wish to attend. In the end, what counts in the main body of the state examination on mandatory subjects is only the knowledge and ability demonstrated at the time of examination regardless of how, where, and when the knowledge and ability have been acquired.

**In France**, legal studies are more strongly structured than in Germany – even during the first year of master's degree courses. During undergraduate studies, the focus is primarily on the basics and principles of the legal system. Methods are more formal than in Germany and the scholarly discussion culture is less pronounced: “It's simply a matter of 'that's how it is, that's how it's done'. But that is what most students need during in the first years of study. Differentiation and problematization can come later” (Tilman Bezenberger, University of Potsdam). The transition between the still strongly regimented licence courses and the following more freely organized master's courses (especially in the second year) is a progressive one. For French students, the innovative aspect of postgraduate studies lies particularly in the better supervision they receive during their period abroad in preparing for their German degree, the *Magister legum* (LL.M). Students had hitherto mostly concentrated on a very specialized topic and were largely left to their own devices in writing their master's thesis. Now they can expect that the topics addressed will all have to do with Franco-German comparative law and that contacts between their German and French supervisors will provide the basis for and recourse to a bi-national discussion and working forum.

Without a doubt, the **comparative study of legal systems** fosters critical distance towards the students' home legal systems and therefore lends greater sovereignty to how they approach them. “Formal similarity can prove deceptive: it often leads to different results” (Marita Körner, University of Hamburg). Students learn both that comparable problems can be solved differently and that comparable results can be reached in different ways. In fact, the close dovetailing of studies in Potsdam and Nanterre allows the two partner universities to give their law teaching a stronger comparative orientation than before the turn of the century. It's a trend that is developing above all among younger members of the academic staff who have studied comparative law or even completed doctorates in the field.

Comparative law is thus freed from its narrow specialisation to be gradually integrated into classical fields of legal studies. Lecturers operate increasingly with examples, for instance

discussing decisions of the highest courts, which directly show students an important difference in style between German and French court rulings: “on the one side exhaustive deduction and reasoning, on the other succinct rulings” (Marita Körner). The trend towards coupling the imparting of positive knowledge about national law with more comparison between legal systems and more systematic reference to European law allows students “to better understand unfamiliar structures and legal institutions” (ibid.), which is reflected in examination results.

Naturally, comparing legal systems helps students realize that the legal situation in different member states of the European Union (EU) is harmonizing more and more. The foundation and development of our integrated courses takes place in the context of the European process of *integration* that, since the creation of a *European Single Market*, aims at the political system, and especially the domestic and justice politics, as well as the common foreign and security affairs (Maastricht Treaty of 1992 and finally Lisbon Treaty of 2007). Knowledge of the legal systems of other EU countries is indispensable for students and future European lawyers if they are to identify with a *European legal area*. In a 2002 plea for the Europeanisation of legal training, Werner Merle evoked the perspective: “The vision is one of legal teaching that from the very start treats law in Europe as a *unity* in which national legal systems are seen as *local* variants determined by cultural history of common fundamental European principles” (8). For the comprehension of curricular developments, the changing *historical context* is of fundamental importance: Paris-Nanterre and Potsdam are in constant dialogue concerning the adaptation of their curricula to the changing socio-cultural and economic requirements of the European process of integration and of the global competition.

However, decisions on the harmonization of law always require stock to be taken of the legal position in each country and these positions to be compared. So, integrated courses provide an eminently suited path to gaining *key intercultural qualifications* for a professional career. Without a doubt, the 'to and fro' between German and French legal thinking nurtures intellectual flexibility and facilitates intercultural communication. These are absolutely essential competencies in today's knowledge-based society, where positive expertise alone no longer suffices: what is needed is the ability and will to address new issues, to call existing structures and mechanisms into question – with regard to the demands of European integration and the globalisation processes that embrace all areas of life.

In this regard, analyses accommodating students' experiences and evaluations are useful.

3°

*Key intercultural qualifications for a professional career: students' experiences.*

The PhD awarded jurist *Elske Hildebrandt*, who graduated from our integrated course, summed up the innovative aspects of her student years in Germany and France in our

recently published anthology “Communication of Culture and Inter-culturalism” (9). Hildebrand believes that a qualifying double degree like hers would be simply impossible without acquiring intercultural competences, if one wishes to move and assert oneself on the international job market “in times of increasing globalisation, growing mobility and flexibility, which inevitably results in the constant increase of communication between people of different cultures”. Hildebrandt’s attempt to compare the process of communication in Germany and France, including its nonverbal aspects, is particularly insightful: “In France, communication is (...) usually mostly indirect (...). The general rule is to remain polite and to make sure not to hurt the feelings and condition of one’s interlocutor. Explicit and direct formulations (such as “that is wrong” or “that is absolutely unacceptable”) are close to never used. Contrary to Germany, where such clear statements are usually perceived and appreciated as clarity and openness of the interlocutor, these formulations are perceived in France as abruptness, arrogance, or gross impoliteness”. Such observations are especially authentic when they are emphasised in the lecture hall: “Among French people, even conflicts and differences of opinion are mostly played down and belittled, instead of being settled openly. French students usually don’t question professors or lecturers publicly. Open and controversial discussions in the lecture hall, as often seen in Germany, are generally less common in France and would rather be perceived as lack of respect”. Hildebrandt’s conclusion: „intercultural communication is worth it“, in order to learn from mistakes, to become smart through experience and to avoid conflicts in the future”. Graduates of a double degree in legal sciences know the significance of the **legal language** in the communication of *intercultural competence* all too well. Hildebrandt refers to *cultural* misunderstandings due to insufficient (technical) language skills.

**Translation exercises** of legal language are part of the mandatory programme for students in our French-German legal studies. The tendencies of *harmonisation* of the European Union require a detailed, multilingual discussion with national legal contents and legal texts, where the translation bears a central role: “the guarantee of a functional communication is subject to the translation of every type of legal texts, from a sales contract to an insurance report to a court decision” (10). In a contribution of the already mentioned anthology (on *Language of law and legal translation*) (11), Kerstin Peglow, lecturer of German Law and legal language at the University Paris-Nanterre, deals with the evidence that the translation of legal texts cannot simply rely on the linguistic understanding, but that it must – in order to fulfil its communicative function – incorporate the operating context and the embedding of the text in the *area of tension of the legal orders that are involved*. Therefore, the specific competence of the translator is under consideration. Peglow’s conclusion: “On the one hand, the translation of legal contents into another language requires solid knowledge of the Law on which the original text is based, as well as knowledge of the legal system to which the recipient of the translation belongs. On the other hand, mastering both the original and the

target language is essential in order to transmit a legal statement to the recipient in a way that he can understand its meaning despite his affiliation and cultural attachment to another legal system”.

4.

#### Conclusion

Both these contributions indicate why jurists require intercultural competence. And this is not merely for personal enrichment, but also, like the lecturer Jan-Christoph Marschelke from the University of Würzburg claims, in order to *improve the functioning of the legal system*: “It is thereby the role of education to identify the situations in the legal professional life in which this key qualification is of use (for example the hearing of a witness). A canon of technical examples can be built through these situations in order to find a form of applicability in the communication of intercultural competence for jurists. What matters is to ensure an *intercultural opening of justice*. A social necessity is at hand: the optimisation of citizens’ participation in legal protection and legal security (12).

Here in Porto, the aim of the Colloquium is mainly to **reflect on the relation between Law, Culture and Inter-culturalism** by paying special attention to *comparative Law*. Jan-Christoph Marschelke made an appropriate outline of its nature and function: “comparative Law can be seen as a *form of culture comparison*. By practising comparative Law, one compares specific phenomena (legal systems, legal norms, legal cases, legal consciousness, etc) and obtains information on a sub-area of a culture” (14). Therefore, Law is generally understood as a *cultural* phenomenon: “Just like cultures change, Law also changes, and as cultures vary, Law also varies (...). If Law is part of culture, we can call the legal part of culture *legal culture*” (14).

Law comparison (as a *cultural comparison*) is only possible because there are *different legal cultures*. Together, they constitute multi-culturalism within an *open* society or even from a cross-border perspective, in more global international communities: the necessary *intercultural* communication it entails bears opportunities, but (as the refugee crisis in Europe strikingly proves) also risks of conflict.

#### Footnotes

- (1) On the establishment and development of French-German courses for law students at the University Paris-Nanterre, see Otmar Seul: *Les cursus binationaux - une étape vers l'harmonisation des études en Europe. Paris X/Potsdam: un exemple de cursus*

*intégré*, in: O. Seul, B. Zielinski, U. Dupuy (eds.): De la communication interculturelle dans les relations franco-allemandes: Institutions - Enseignement - Entreprises, Bern, Berlin, Brussels, Frankfurt am Main, New York, Oxford, Vienna (Peter Lang) 2003, pp. 285-310 ; Werner Merle: *Erinnerungen: Zur Entstehung und Entwicklung des deutsch-französischen Studiengangs Rechtswissenschaften Potsdam/Paris X-Nanterre*, in: T. Bezenberger, Tilman, J. Gruber, S. Rohlfig-Dijoux (eds.): Die deutsch-französischen Rechtsbeziehungen, Europa und die Welt / Les relations juridiques franco-allemandes, l'Europe et le monde. *Liber amicorum Otmar Seul*, Baden Baden (Nomos Verlag) 2014, S. 325-333. On the recent developments of the curriculum, see Stephanie Rohlfig-Dijoux (2015): *Internationalization of studies and research: the example of the integrated French-German-Law curriculum at the University Paris Ouest Nanterre La Defense*, in: *Miscellanea Historico-Iuridica on the legal education 2015*, University of Bialystok, t. 13, Z. 1, 2014, p. 159-169.

- (2) See <http://www.manioc.org/recherch/HASH01305e8d2dcfc823cf1393c4>; see the founding work of Claude Canet: *Introduction aux approches interculturelles en sciences humaines*, Toulouse (Presses Universitaires du Mirail) 1993, p. 21 - from <https://fr.wikipedia.org/wiki/Interculturel>
- (3) Term *Interculturel*: <https://fr.wikipedia.org/wiki/Interculturel>
- (4) *ibid.*
- (5) *ibid.*: *Memorandum for the Study of Acculturation* (1936)
- (6) *Preamble*, in: Official Journal of the European Communities, C 364/8, 18.12.2000, from [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)
- (7) Our report on experience in the field largely follows the account prepared in collaboration with Tilman Bezenberger (University of Potsdam) for an application for further funding by the FGU (DFH/UFA) in October 2005 (Part VC, p. 19 and following). We also draw on findings from a survey among the academic staff teaching French-German courses at the University of Paris-Nanterre in the spring of 2003, in which lecturers from German partner universities also took part. See Otmar Seul: *Interkulturelles Management im Dienste der Europäisierung von Lehre und Forschung: aus der Praxis eines Professors an einer französischen Hochschule*, in: *Deutsch-Französische Gesellschaft für Wissenschaft und Technik“ (DFGWT) (Hrsg.):*

Wissenschaftliche Karrieren in Deutschland und Frankreich (Tagungsband zum gleichnamigen Kolloquium, Berlin 21./22. Oktober 2006), Bonn, DFGWT, 2006, 16 p.  
- from [http://www.jura-potsdam-paris.de/images/stories/pdf/seul\\_otmar\\_zur\\_deutsch-franzoesischen\\_hochschulkooperation.pdf](http://www.jura-potsdam-paris.de/images/stories/pdf/seul_otmar_zur_deutsch-franzoesischen_hochschulkooperation.pdf)

(8) *Laudatio* for Otmar Seul on the occasion of the award of an honorary doctorate by the University of Potsdam on 22 January 2002 – from <https://drive.google.com/file/d/oBwS6msy8ofPZYzYyMzllZTgtZDQoNCoMTFmLWFkNzAtMDJiMDQ4M2ViYTQ1/view>

(9) *Interkulturelle Kommunikation – die Schlüsselkompetenz des Deutsch-Französischen Studiengangs für Juristen Paris Ouest-Nanterre-La Défense/Potsdam* in: Otmar Seul, Kaïs Slama, Kerstin Peglow (Hrsg.): *Kulturvermittlung und Interkulturalität, ein deutsch-französisch-tunesischer Dialog – Politische, rechtliche und sozio-linguistische Aspekte*, Bruxelles, Bern, Berlin, Frankfurt a. M. New York, Oxford, Wien (PIE Peter Lang), 2017, S. 217-224

(10) Peter Sandrini (Hg): *Übersetzen von Rechtstexten. Fachkommunikation im Spannungsfeld von Rechtsordnung und Sprache*. Tübingen (Gunter Narr Verlag) 1999, S.1 - from <http://www2.uibk.ac.at/downloads/trans/publik/RechtsU99.pdf>

(11) *Language du droit et traduction juridique*, in: Otmar Seul, Kaïs Slama, Kerstin Peglow (Hrsg.): *Kulturvermittlung und Interkulturalität, ein deutsch-französisch-tunesischer Dialog – Politische, rechtliche und sozio-linguistische Aspekte*, Bruxelles, Bern, Berlin, Frankfurt a. M. New York, Oxford, Wien (PIE Peter Lang), 2017, S. 225-242.

(12) Jan-Christoph Marschelke: *Recht und Kultur – Skizze disziplinärer Zugänge der Rechtswissenschaften zu Kultur und Interkulturalität*, in: *Interculture journal* - online-Zeitschrift für Interkulturelle Studien 2012, Ausgabe 16, S. 69 – from [www.interculture-journal.com/index.php/icj/article/.../129/221](http://www.interculture-journal.com/index.php/icj/article/.../129/221)

(13) *ibid.* p. 84

(14) *ibid.* p. 82

## **Law and interculturalism. Law and cultural conflicts**

### **Ancient legal history : Cultural conflicts and the lawmaking process in the Late Roman Empire**

Soazick Kerneis, Université Paris-Nanterre

To illustrate the topic, *Law and interculturalism. Law and cultural conflicts*, I propose to trace back the history. I shall take the example of the Roman Empire as a sort of a precedent of what we call today « globalization ». As we know, the very meaning of the concept « globalization » is to make global what is practised or thought at a local level. From a sociological point of view, it deals with the processes by which the people of the world are incorporated into a so-called « single world society »<sup>1</sup>. Of course culture and education play a great role and pupil exchange programs such as Erasmus one help to create an open mind among young generations. The application of the process of globalization is mainly economic, but it is affects also politics and law.

The term *globalization* is recent. It goes back to the seventies, and scholars mostly assume that its origins has to be found in modern times. But some of them do not hesitate to trace its history further<sup>2</sup>. Roman times may be viewed as an example as there was a feeling that people belonged to a whole community, Rome being a *patria communis*. As regards with ways of life, politics and legal rules, the conquest sounded indeed with romanization. Everywhere in the provinces, the Roman style of life, the Roman standards of politics, the Roman law spread throughout the Empire<sup>3</sup>.

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<sup>1</sup> M. Albrow 1996, p. 9.

<sup>2</sup> B. K. Gills & W. Thompson, 2012.

<sup>3</sup> Woolf 2003.

But if the Roman model was widespread, does that mean this domination was exclusive and the ancient traditions did not survive? Did Romanization mean assimilation or rather integration? In that case how to accommodate Roman values with the local traditions? What about interculturalism in this global Empire and how did Rome deal with cultural conflicts?

The example of Rome thus appears as a sound precedent of what we are currently living. Of course there are many limits to the comparative process as both contexts are so different. But it is useful to think about the dynamic of the different forces and to understand how local forces interacted with State-law, how the relationship worked between the "centre" and the "periphery". I will focus my paper on the legal field and the interaction of the rules in the context of interculturalism. I shall try to observe the law in action in Roman times as an example of the complexity of the lawmaking process. I will consider the question of interculturalism in the Roman Empire and illustrate the topic with the Egyptian example.

## 1 - Rome and the interculturalism

Due to the Roman domination, the *Res publica* was in touch with other societies that had very different rules of law. We would say today different cultures in the sense *The Cambridge English Dictionary* gives of the term as "the way of life, especially the general customs and beliefs, of a particular group of people at a particular time ». But this meaning of the word traces back to the writings of the 19th century German thinkers<sup>4</sup>. The etymology of the word is « *cultura* » which means care, cultivation and the first application of the term is given by Cicero talking about « *cultura animi philosophia est* »<sup>5</sup>. Using this metaphor, Cicero compares the human soul with a field. As the cultivation of a field enables development of crops, it is essential to human development to cultivate the soul. In this sense, culture is used in a singular form and maybe it is the very first opposition between nature and culture. Talking of cultures, a plurality of cultures, Romans would not use this word. They would rather talk of *populi*, or for the most uncivilized of them, of *gentes* or *nationes*.

If we look at the situation in the Western Empire, some of these people are very far from the Roman standards of life. At the time of the Roman conquest, many of them did not live inside cities, they did not have rules of law, and in the case of conflict, they mainly used the feud, the revenge. Actually the Roman domination led to a very delicate balance between

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<sup>4</sup> Descola 2005.

<sup>5</sup> Cicero, *Tusculan Disputations*, 2.13.

different sets of rules, on one hand the Roman rule, the *ius civile*, on the other hand, the rules of the people, their customs.

Scholars are mostly convinced that the Roman Empire admitted legal pluralism <sup>6</sup>. Romans did not impose their law but rather let local laws go on as long as they respected the main Roman values. Everywhere in the provinces, local rules went alongside Roman law and judges had to manage the discrepancies, to solve the cultural conflicts by the way of arrangements <sup>7</sup>. Let us consider the practice of these arrangements.

## 2- The intertwining of the rules

Thinking to the terms, law and customs, it is often assumed that law is issued by the center, the law of the State, while customs are rules created by communities themselves. But things are more complicated and the impact of interculturalism is a process of intertwining of all bodies of rules.

To understand the intertwining of Roman law and customary law, it is necessary not to consider the sole official sources, the law in books, but to have a look on a broad spectrum of sources, to step into the reality of the law, the law in practice. I shall take the example of Egypt due to the quality and the richness of its documentation, its numerous greek papyri that give us a glimpse into how the legal process worked in the Roman Egypt. At first what appears is the blossoming of a provincial legal culture which at the same time imported legal elements from Rome, but also showed resilience towards a trend of pure assimilation. Considering the place of the law in the Eastern provinces, we have to move from the idea of law as a culture, a body of rules shared by a community to focus on law in action, an utilitarian view of law that used all bodies of law that were available <sup>8</sup>.

**For example, a text (P. Yale 1.61) attests that in March 209, the Roman prefect during his visit to Arsinoe, received 1804 petitions in two and half days, that means 700 to 750 per day ...** <sup>9</sup>. Recent research points out this awareness of the provincials that, as inhabitants of the Roman Empire, they had rights and the capacity to claim and perform them. Becoming Roman in Egypt means to develop a legal culture, getting the conviction that you have access to courts in order to get justice.

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<sup>6</sup> Humfress 2011.

<sup>7</sup> Méléze-Modrzejewski 2014.

<sup>8</sup> Bryen 2012.

<sup>9</sup> Lewis 1983, 189-190

**But** which laws did the provincials claim? Roman law? Provincial laws – Greek law, Egyptian law? It looks as if this question is not relevant because we have to forget the idea of personality law. Claims of litigants were often based on arguments that mixed previously judged cases, edicts, precedents, rescripts, all sorts of texts litigants quoted in an indiscriminate form. People played the rules in order to exploit them and Anglo-saxon scholars currently speak about forum-shopping <sup>10</sup>. A very selfish use of law that nevertheless reflects the deep faith in the system <sup>11</sup>.

A plurality of rules therefore, but one should be cautious with the very idea of legal pluralism. Local law was not automatically applied. Roman judges had to check the content of the rules because local rules to be applied had to be consistent with the Roman values. For example, whereas Greek law gave to the father the right to break the marriage of his daughter (the *apheresis*), Roman judges said that this right was inhuman and cruel and forbade it <sup>12</sup>.

In 212 CE, Roman citizenship was granted to all the inhabitants of the Empire . Would it be that local laws had been abandoned in favour of the “universal law of the Romans”? Papyri show that they were still vivid. The main effect of the generalization of the Roman citizenship has been to convert the local indigenous laws in Roman provincial laws. As long as they met the Roman values, they were currently integrated into the Roman body of law. Rather than thinking in an exclusive way, Roman law versus local laws, it is relevant to consider that Roman law was a sort of yardstick from which situations were evaluated. The picture would be quite complex with a central power surrounded by many bodies of law that all looked ahead Rome. As Joseph Méléze- Modrzejewski pointed out, the main tendency was the consecration of the customary law integrated into the Roman order <sup>13</sup>.

But the trend towards the transfer of rule was not in a sole way as Roman law was itself deeply influenced by native customs. In many cases, imperial constitutions validated local laws. For example the use of *arrae*, the *praescriptio longi temporis* have been borrowed from Oriental laws. This is the main issue of the so-called « vulgar law », *das Römisches Vulgarrecht* as it was first defined by German scholars in the late 19<sup>th</sup> century when they focused on the discrepancies between the rules of State law, the *Reichsrecht*, and the practice of law in the provinces, the *Volksrecht*.

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<sup>10</sup> Humfress 2013.

<sup>11</sup> Bryen 2012.

<sup>12</sup> Méléze-Modrzejewski 1988, 393.

<sup>13</sup> Méléze-Modrzejewski 2014.

The generalization of the Roman citizenship does not mean that local laws, local identities disappeared. Rome was the *patria communis* for all the Roman citizens, but the Roman citizenship was not exclusive. People when they identified themselves, claimed their attachment to Rome but they mentioned also their local cities and were proud of these local identities. The Romanization, this sort of globalisation that has taken over the provinces, does not mean the death of local ways of life, local traditions and the generalization of the Roman law did not sound with the end of local rules. Local legislations were still vivid, so vivid that sometimes they were transplanted into the Roman legislation. If we look at the past, globalization does not mean uniformity but rather an open access to diversity, the hybridization of rules.

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## **Criminalization of domestic violence and interculturalism**

### **Nanterre Colloquium – Law and Interculturalism**

**8<sup>th</sup> - 10<sup>th</sup> June 2017**

*Maria Elisabete Ferreira, Catholica Porto Law School*

#### **SUMMARY:**

- 1. Introduction.*
- 2. The incrimination of corporal punishment.*
- 3. Public nature of the crime of domestic violence.*
- 4. Spousal refusal to testify.*
- 5. Interculturalism – the Istanbul Convention and the criminalization of domestic violence in Portugal.*
- 6. Conclusions.*

#### **1. Introduction.**

A well-known sociologist named GIDDENS states that home is the most violent place to be, and the likelihood of being assaulted within the family home is much higher than the one of being killed or raped in the street at night<sup>14</sup>. My intervention in this Nanterre Colloquium will address the problems posed by interculturalism concerning the criminalization of domestic violence.

Domestic or family violence, or, to be more precise, domestic and family violence, is a very serious social issue, with excessive costs at many different levels: it imposes on society

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<sup>14</sup> GIDDENS, 2001, p. 193.

and the State extremely high demands, regarding Welfare, Housing, Healthcare, and legal support for the victims<sup>15</sup>.

None of the expressions used previously – “domestic” or “family” violence is adequate to translate this phenomenon in its full extension, so, for accuracy sake we should use both expressions combined. Domestic violence implicates the existence of some sort of cohabitation - that the victim and the aggressor live under the same roof, whether they are involved in a family relationship or not. On the other hand, if the victim and the aggressor do not live together but are bonded through a family relation, such as marriage, or parenthood, we are still in the presence of “domestic violence”, interpreted in a wide sense. I will use both this terms indistinctively.

The social-ecological model of explanation for domestic violence was introduced in the decade of eighty of the 20th century. This model considers the complex interplay between individual, relationship, community, and societal factors. It allows us to understand the range of factors that put people at risk for violence or protect them from experiencing or perpetrating violence<sup>16</sup>. The first level (individual) identifies biological and personal history factors that increase the likelihood of becoming a victim or perpetrator of violence. Some of these factors are age, education, income, substance use, or history of abuse. The second level (relationship) examines close relationships that may increase the risk of experiencing violence as a victim or perpetrator. A person’s closest social circle – peers, partners and family members – influences their behavior and contributes to their range of experience. The third level (community) explores the settings, such as schools, workplaces, and neighborhoods, in which social relationships occur and seeks to identify the characteristics of these settings that are associated with becoming victims or perpetrators of violence. The fourth level (societal) looks at the broad societal factors that help create a climate in which violence is encouraged or inhibited. These factors include social and cultural norms that support violence as an acceptable way to resolve conflicts. Other large societal factors include the health, economic, educational and social policies that help to maintain economic or social inequalities between groups in society.

So, as we can acknowledge, domestic violence is a partially cultural induced problem. Its emergence depends on the cultural acceptance of violence as a whole and the acceptance of domestic violence in particular. The slow or rapid change of social and cultural norms will directly interfere with the way as the criminal law draws the frame of State intervention.

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<sup>15</sup> MANUEL LISBOA *et al.*, 2003, p. 13.

<sup>16</sup> *See* CORSI, 1999.

## **2. The incrimination of corporal punishment.**

Today, in Portugal, domestic violence is a crime, stated in article 152 of the Penal Code. This article of the Portuguese Penal Code states that:

*“1 – Any person who, repeatedly or not, inflicts physical or psychological maltreatment, including corporal punishment, deprivation of freedom, and sexual offenses:*

*a) To spouse or ex-spouse;*

*b) To a person of different or same sex with whom the agent keeps or has kept a dating or similar to spousal relationship, even without cohabitation;*

*c) To progenitor of a common descendent in the first degree; or*

*d) To a especially defenceless person, due to her age, disability, illness, pregnancy or economical dependence, with whom the agent cohabitates;*

*will be punished with a penalty of one to five years of imprisonment, if higher penalty is not applicable by another Criminal Code disposition.*

*2 – In the case stated in the previous number, if the agent acts against a minor, in the presence of a minor, or in the common domicile or in the victim’s domicile, will be punished with a penalty from two to five years of imprisonment.*

*3 – If from the facts defined in number 1 results:*

*a) Serious offence to the physical integrity, the agent will be punished with a penalty of two to eight years of imprisonment.*

*b) Death, the agent will be punished with a penalty from three to ten years of imprisonment.*

*4 – In the cases stated in the previous numbers, may be applicable to de defendant accessory penalties of prohibition of contact with the victim, prohibition of use of weapons, for a period of six months to five years, and obligation of frequency of domestic violence prevention specific programs.*

*5 – The accessory penalty of prohibition of contact with the victim shall include the withdrawal from her residence or place of work and its reinforcement shall be supervised using remote control technical means.*

*6 – Any person who is sentenced by crime defined in this article may, regarding the concrete severity of the act itself, and its connection with the agent’s exertion of function, be inhibited of parental rights (...) for a period of one to ten years.”*

The law describes a certain number of conducts which fulfil the criminal type, such as the infliction of physical or psychological maltreatment, *including corporal punishment*, deprivation of freedom, and sexual offenses.

The first of the considerations I would like to leave here concerns to the criminalization of corporal punishment. Corporal punishment is related, of course, to one particular category of domestic violence victims – children. By children, we mean every person under 18 years of age, according to the definition proposed by the Convention on the Rights of the Child from 1989.

Today, from a legal point of view, we can only discuss if criminalization of corporal punishment is reasonable when the victim is a child, because, when we refer to adults, mainly spouses, the Portuguese Constitution of 1976, in its article 36, and later, the Civil Code Revision of 1977, have recognized explicitly the equality between spouses. In the present, the 1952 Lisbon's Court of Appeal ruling stating that the husband had a right to moderate domestic correction towards his wife would not bind by the Constitution.

This same article 36 determines the parental right to raising and educating the offspring. Whether this right to education comprehends the right to correction, or, if correction allows the use of corporal punishment, is to be discussed and it is my understanding that the answer is timely and socially determined – it is not a definitive answer<sup>17</sup>.

The incrimination of corporal punishment is very recent in the Portuguese law – it is a conquest of the 2007 Penal Code Reform – and has its origin in a complaint of the World Organization against Torture to the European Committee of Social Rights against Portugal. This Committee considered, in a decision of December 2006, that the State of Portugal was not in compliance with article 17 of the Revised European Social Charter, by not establishing explicitly in the law the prohibition of any form of corporal punishment against children. Whether this explicit prohibition should come in the form of a criminal provision or otherwise, remains uncertain, at least to me.

As we all know, Sweden was the first country in the world to abolish all forms of corporal punishment against children, but this abolition was first entered in the *Parents and Children's Code*, which consists in a civil law instrument. My problem with the Portuguese solution is, on the one hand, the acknowledgment that not only corporal punishment hurts children, and in fact, quite a few forms of non-corporal punishment tend to have deeper consequences on child development and well-being that a light, immediate and corrective spank, and these forms of violence will only fit the criminal type if they can be lead to the provision of psychological maltreatment. On the other hand – and I hope I am not misinterpreted, when I say this – I am not certain that this one-time spank, applied by a parent to a child, in considering the child's age, knowledge and health, with the use of very light force, as a last resource, with the only purpose to educate, should be criminally pursued. One thing is to legally declare, in the Civil Code, that the parental right/duty of education should be pursued by non-violent means, through example and speech, another completely

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<sup>17</sup> See FERREIRA, 2017, p. 213.

different thing is to criminally prosecute a parent that spanked, lightly, in his behind, a restless hyperactive five-year-old, jumping in bed, who wouldn't go to sleep at 12 p.m.

And here is where culture may play a decisive role again: in my point of view, considering the present Portuguese society and the current societal standards regarding parents/children relations, it is still relatively safe to say that either we consider this kind of behaviour is not comprehended in the criminal type, according to the Social Adequacy Theory, or at least we have to consider it as a cause of exclusion of unlawfulness, because the parent acted in the exercise of a correction right. Over recent years, it is possible to find a couple of Court of Appeal's rulings subscribing that theory. The main issue with this conception is where to draw the line between legitimate and justifiable use of very light force, with corrective purpose and, of course, when to consider that this use of force is light and when it is not, and in this last scenario, should give cause to prosecution.

Despite these difficulties, it seems to me that this is a more honest point of view that bares in mind the serious consequences that a criminal proceeding shall bring, not only to the offender – in this case, the parent, but also to the child and the whole family, when such cases, as the example above, are considered.

### **3. Public nature of the crime of domestic violence.**

Another aspect in which we may find strong cultural influences concerning the criminalization of domestic violence is to whether this crime should take a public nature or not. Statute number 7/2000 established the public nature of the crime of maltreatment – the legal type that preceded the crime of domestic violence<sup>18</sup>. In general, the private nature of crimes is due to the minor importance of the juridical assets that these crimes protect, or results of a need to protect the victim's privacy. When we are considering domestic violence, one cannot acknowledge today, in the current state of the Portuguese society, the lesser relevance of the juridical asset but could easily recognize the intimate nature of these issues. Nevertheless, this intimate nature cannot hold the grounds for the criminal intervention's postponement, depending on the victim's file of complaint, because, as we previously conceded, domestic violence does not interfere with the private sphere only, but, instead, this is a rather complex phenomenon with high social costs, present and future.

So, today, according to our criminal procedure law, the actions described in the current criminal type may be taken, by any means, to the knowledge of the competent authorities - to

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<sup>18</sup> About the contributions brought about with the entry in force of this Statute, see FERREIRA, Maria Elisabete – *Algumas considerações acerca da Lei n.º 7/2000, de 27 de maio que torna público o crime de maus tratos a cônjuge - como instrumento de combate à Violência conjugal*, in *Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977*, p. 711-723.

the Police or the Public Prosecutor – regardless of who communicates the wrongdoing. Public Prosecutor’s Office will be compelled to initiate the criminal procedure and even if this communication took place with a formal complaint filed by the victim, the plaintiff will no longer have the power to drop the charges against the defendant once the complaint is filed.

#### **4. Spousal refusal to testify.**

Although the crime of domestic violence has a public nature under the Portuguese criminal law, the fact is that the good use of two criminal procedure rules can translate into the Defendants impunity. On the one hand, the Defendant has the constitutional and legal right to silence (article 61, number 1, d) Criminal Procedure Code. And, on the other hand, article 134 of the Criminal Procedure Code determines that...

##### **“Article 134**

##### **Refusal to testify**

*1 – The following persons may refuse to testify as witnesses:*

*a)(...)*

*b) Whoever has been the defendant’s spouse or who, being of another or of the same sex, cohabits or has cohabited with him as though they were spouses, regarding facts occurred during the marriage or cohabitation.”*

This means that, when domestic violence takes place indoors, and leaves no physical marks that may point out the identity of the aggressor, and there are no witnesses aside from the victim, the conviction of the Defendant depends almost entirely on the victim’s cooperation and testimony. In that case, if the Defendant since the first time he was questioned exerts his right to silence and the victim is or has been the defendant’s spouse or, being of another or of the same sex, cohabits or has cohabited with him as though they were spouses, will have the right to refuse to testify as witness, regarding facts occurred during the marriage or cohabitation.

This is a silent way to contradict the public nature of the crime of domestic violence, a way to obtain impunity through criminal procedure rules conceived to ensure the protection of other rightful interests. That is why it is questionable that this privilege should stand at least when the witness has herself filed the complaint against the aggressor.

This privilege has itself a cultural background: the reason why this privilege was conceded was for the protection of a certain relation of spousal (and similar) trust and intimacy which could be in jeopardy if the spouses should be forced to testify against each

other. Instead, the law preferred to concede the possibility of refusal of testimony, to protect trust and intimacy within family relations.

It seems to me that, when the victim herself filed the complaint against her spouse, it no longer makes any sense to maintain the right to refusal of testimony, since there is not an underlying interest worth protecting any more. It is thinkable to fit this action of the spouse, who complains and, later in the game, at trial, refuses to testify, into the category of abuse of rights. Nevertheless, if our criminal procedure law stays untouched, this is a spouse's given right that we cannot compromise.

## ***5. Interculturalism – the Istanbul Convention and the criminalization of domestic violence in Portugal.***

The Istanbul Convention was created on the 11<sup>th</sup> of May 2011, signed by Portugal, approved by the Portuguese Parliament by the Resolution Nr. 4/2013 and ratified by the President through the Decree Nr. 13/2013. The Istanbul Convention recognizes the structural nature of violence against women as gender-based violence and violence against women as one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. Recognises with grave concern that women and girls are often exposed to serious forms of violence such as domestic violence, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men and aspires to create a Europe free from domestic violence. The Convention aims to promote international co-operation with a view to eliminating violence against women and domestic violence and provide support and assistance to organisations and law enforcement agencies to effectively cooperate to adopt an integrated approach to eliminating violence against women and domestic violence. Parties under the Istanbul Convention should take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.

The entry in force of Istanbul Convention did not impose a substantial number of changes in Portuguese criminal law concerning domestic violence. Prior to the entry in force of the Istanbul Convention, Portugal already possessed a very satisfactory legal framework<sup>19</sup>. But in other member parties, important legal changes were introduced. This means that, due to the entry in force of the Istanbul Convention, we may now find common grounds through all member parties, towards a more unanimous approach towards domestic violence. However, the migration movements from countries outside Europe pose defying challenges

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<sup>19</sup> See FÉRIA, 2016, p. 185-210.

concerning the criminalization of domestic violence in European countries, because, in general, these migrants do not share the same cultural standards.

Take, for instance, the case of the female genital mutilation practices<sup>20</sup>. These practices may occur in family context. The Istanbul Convention, article 38, addresses this human's rights issue and demands all State-parties to take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; coercing or procuring a woman to undergo any of the acts listed above or inciting, coercing or procuring a girl to undergo any of these acts.

So, what if an African migrant is caught performing female genital mutilation on his or her daughter, is brought before de Courts and claims while in trial, that he or she was unaware of the prohibition of these kinds of practices in our country (Portugal)? Should this claim be relevant to exclude his or her criminal responsibility, admitting these practices are socially accepted in his or her country of origin?

The Portuguese criminal law provides the answer in article 17 of the Penal Code: *Error Juris*. An error concerning the unlawfulness of a certain behaviour shall only be relevant to exclude fault and, consequently, the criminal responsibility for an agent's actions when that error is not censurable. That means that the exemption of responsibility is difficult to be acknowledged in cases as the reviewed above, because, considering the nature of the rights involved – the right to individual sexual freedom and self-determination – the law assumes that every citizen ought to know that we are in the presence of natural, inalienable rights which admit no violation.

The problem here lies on one ground: the fact that the agent was born and raised in a different society with different values and culture, so, he or she may not be aware that in his or her host country, these kinds of practices are forbidden.

The same line of thinking may be applied to the infliction of corporal punishment to children. Some cultures are more tolerant to these practices than others, and in some countries, corporal punishment is an accepted and legal means of education. So, depending on the migrant's country of origin, he or she may not be aware of our standards of education towards children, so, once again, it is thinkable that the migrant might inflict a corporal punishment to a child convinced that is behaviour is accepted by the law.

The definitive answer to these problems, however, will be given regarding several factors, such as the time during which the agent has been living in Portugal, the level of integration in the Portuguese community and the language barriers. This last factor is not relevant when considering African communities, because they are Portuguese speakers. So, it is my understanding that, when we are in the presence of reasonably well integrated

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<sup>20</sup> See FARIA, 2016, p.99-128.

individuals, living in Portugal for some years, the exemption of responsibility based on *error juris* is not precedent.

## **6. Conclusions.**

Domestic Violence is a highly culturally determined phenomenon and the legislative evolution regarding this social issue was set by the slow changes in the thought and understanding regarding the family and relationships, as well as the relative value of women and children.

In the present, in and out flows of people, migrant movements, pose new and difficult challenges to the law and the Courts. Although our constitutional system highly considers and respects the fundamental rights of the defendants, we must not forget that the relevance of the rights threatened or violated in this domain require a firm hand because domestic violence is, above all, a human's rights issue.

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## **Fair use in USA Copyright v. EU InfoSoc Directive closed list of exceptions and limitations**

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**Abstract:** Anglo-American Copyright and Continental Copyright are two great systems that though having a common origin, with the evolution, mainly because of the French Revolution, became very different from one another. Anglo-American Copyright being considered positivist, and pragmatic, without a philosophical foundation, and Continental Copyright having a strong philosophical foundation, considered a natural right of the human being. Nevertheless, things are not so black and white because Copyright issues, namely in the Information Society are global and demand similar answers. Because of International Treaties, and EU Directives, the two systems are converging in many aspects.

In this article we want to address a subject in which USA and EU still have different approaches, which is Fair Use v. the closed list of limitations and exceptions contained in **Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, usually** named InfoSoc Directive.

There is much discussion about copyright wars, but regardless of our position defending closed list of exceptions and limitations, a general clause of Fair Use, or a mixed system, we must point out that InfoSoc Directive is total error, in the way the exceptions and limitations were legislated. There are very few exceptions and limitations regarding Information Society, there is no harmonization, there is also no certainty, and the technological protection measures and rights management information, which cannot be circumvented for free uses, further limit the interest of the Directive and create an disequilibrium harmful for users.

The limits and exceptions are also subject to the three step rule, which, in interpreted in a strict sense, as the Directive seems to contemplate, is not adequate to the digital environment.

The ultimate decision is of the courts, that don't have the same interpretations of the exceptions and limitations, some times the interpretation goes to far, sometimes it is to narrow.

It is true that in USA, with Fair Use, as in EU, with the closed list of limitations and exceptions, courts have the last word. But while in USA there is the precedent principle, that doesn't happen in Continental Copyright. The problem in EU is that the InfoSoc. Directive is a total error, which creates much greater level of uncertainty. We can observe that certain court decisions that openly go against InfoSoc Directive. Because of this lack of security, and because of the way InfoSoc exceptions and limitations were ruled, we think that in the EU InfoSoc Directive should be revoked a solution closer to the fair use USA solution would be better. Europe could adopt a general clause like the Fair Use one, solution that we believe is

the best, or establish an equilibrate interpretation of the three step rule, it could also allow analogy when the same interests meet and the situation is not in a list of limits and exceptions. It is important to approach the court decisions from the law, which will not happen if this issue is not properly addressed.

Key Words: Anglo-American Copyright; Continental Copyright; Limits; Exceptions; InfoSoc Directive; Fair Use; three step rule.

**Summary:** 1. Introduction 2. Common origin and evolution of Anglo-American and Continental Copyright Systems 3. Convergences and divergences between both systems 4. InfoSoc limitations and exceptions. 5. USA Fair Use. 6. Conclusions

## 1. Introduction

The distinction between the two major systems of copyright is many times assumed as a “dogma”: Continental Copyright (Droit d'Auteur) and Anglo-American Copyright are considered to be two separated worlds, which, in fact, is not true. Also, within these two major systems there are subsystems. For example, German Copyright is different from French Copyright, though both belong to Continental Copyright. American Copyright is, in many ways, different from English Copyright, namely in what regards formal requirements, though both belong to the Anglo-American System.

Nevertheless, Anglo-American Copyright and Continental Copyright are in many ways different.

The terminology itself is diverse. In the countries of the Roman-Germanic tradition, it is called "Direito de Autor" (Portugal), "Droit d'Auteur" (France and Belgium), "Urheberrecht" (Germany) "Diritto di Autore" (Italy), "Auteursrecht" (Holland), "Ophavsret" (Denmark), "Upphovsrätt" (Sweden), putting the emphasis on the creator of the literary and artistic work. In countries of Anglo-American tradition (eg, England, Ireland, the United States, Australia or New Zealand) the terminology is more pragmatic and limiting: "Copyright" (and not the literal translation "Author's Right").

Terminology is indicative of a different kind of attitude.<sup>21</sup>

The origin of the term "Copyright" is not clear. The very history of the Copyright is unclear. The Statute of Anne, of 1709, generally considered the first recognition of a "copyright" does not even mention the term. The oldest documents in which the term "copy right" appears, in two words, are the 1701 reports of the Stationers Company, a London society that brought together all agents involved in the book trade. It was, literally, a copy right belonging to the corporation, a right to reproduce a particular written work for the purpose of selling it<sup>22</sup>.

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<sup>21</sup> STROWEL, A., 1993, p. 18 ; ROCHA, M.V., 2008, pp. 735-750, footnote 2; for further details about the Stationer's Copyright, see ELLINS, J., 1997, pp. 36-40.

<sup>22</sup> SROWEL, A., 1993, pp. 18-18, ELLINS, J. 1997, pp. 36-40; ROCHA, M. V., 2008, p. 735 text and footnote 2.

The term "Droit d'Auteur", which originates in French law, does not appear in the revolutionary legislation of July 24, 1793, which marks the beginning of the "modern" protection of literary and artistic works. In that law the expression "propriété littéraire et artistique" is used instead. The expression seems rather to be due to A.C. Renouard, author who, in 1838 and 1839 publishes the famous treatise entitled *Traité des droits d'auteurs, dans la littérature, les sciences et les beaux arts*.<sup>23</sup>

In the second half of the nineteenth century the expression is generalized and adopted by legislators. In Bavaria, in 1865, with the codification of the copyright law, the term "property", used by the Prussian law of 1837, is replaced by the term "Urheberrecht". In the French law of 1866, on the rights of heirs and other successors of authors, the term "property" is also abandoned.<sup>24</sup>

The term "property" however, is never definitively abandoned. Thus, in the French law of 1957 and in the present Code de la Propriété Intellectuelle. The same is true of Spanish legislation, in the Texto Refundido de La Ley de Propiedad Intelectual. This has to do with a certain conception related to the Copyright nature as a special form of property<sup>25</sup>.

In the case of copyright of Roman-Germanic tradition, we have a right that is thought in function of the author, in the sense of the natural person who creates the work. In the case of "Copyright", we have a right based on the copy of the work, the product of creation that is preserved against the copy. In the first case, the center of gravity is the author, in the second, the work, the immaterial creation contained in physical support.

At the origin, Copyright appears as a right that is intended to prevent copying, that is, reproduction. It has a philosophical foundation, if at all, rather humble, in comparison with the philosophical foundations of Continental Copyright. It is simply a right to oppose copying of the physical medium and the purpose it pursues is to protect the copyright holder against any unauthorized reproduction of such material<sup>26</sup>.

In the Continental tradition the work is the expression of the personality of the author. Attempting against the work implies an attempt against this personality that is reflected in the work. Hence the importance gained by the so-called moral rights of authors. In Anglo-American Copyright the work is totally separated from the personality of the author, acquires absolute legal autonomy. It is a product, which can have a free economic existence. Nevertheless, in Continental Copyright the expression "personality of the author" is misleading because Copyright protects works that have a minimal creativity, that is, where

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<sup>23</sup> RENOARD, A. C., *Traité des droits d'auteurs, dans la littérature, les sciences et les beaux arts*, Tomo I, Jules Renouard and Cie., Paris, 1838, Tomo II, 1839, *apud* STROWEL, A., 1993, p. 18.

<sup>24</sup> STROWEL, A., 1993, p. 19 ff; ROCHA, M. V., 2008, p. 735, footnote 2.

<sup>25</sup> About the many theories related to the nature and structure of Copyright, see MELLO, A. SÁ e, 2016, pp. 353-376.

<sup>26</sup> STROWEL, A., 1993, pp. 19-21, p. 26; ROCHA, M. V., 2008, pp. 736-737, footnote 2.

we cannot see the personality of the author reflected in them, as is the case of the so called small change/*Kleine Münze*/*petites monnaies*/small change, that is, works that deserve to be protected because they are the result of an independent creation, but where creativity or originality is minimal. It was never intent of Continental Copyright to protect only the great works. Works such as TV guides, recipe books (the 100 ways of cooking rice), documented camping sites, and so on, all deserve protection, if there is a minimum of creativity/originality, that is, if they are not ordinary, in the sense that they are not used by everyone, and they are the result of an independent activity of the author<sup>27</sup>.

Curiously, both expressions have the same ambiguity, and therefore lend themselves to more or less broad interpretations.

Continental copyright does not refer only to authors, it also covers publishers, and other economic intermediaries, to whom the patrimonial rights may be licensed or transmitted, namely in the case of works made for hire or under an employment contract. Related rights belong to performers, but also to audio and video producers and to broadcast entities. In Portugal, collective works may belong, from the beginning, to a company, which approaches our system, in this aspect, from Anglo-American Copyright (cf. arts. 16<sup>o</sup> and 19<sup>o</sup> of Código de Direito de Autor e dos Direitos Conexos-CDADC).

Anglo-American term “copyright” covers, besides the works of authors (that can be companies or physical persons), performances, audio and sound productions, broadcasts, and the activity of other economic intermediaries. Plus, “copyright” allows to oppose not only to unauthorized reproduction, but also to other forms of exploitation, namely communication to the public, making it available on line and on demand, broadcast, transformation in other type of work, translation, public lending and renting, to name the most usual forms of exploitation of patrimonial rights. The term remains "copyright" when these other forms of use become much more important than the literal copy with the evolution of technology and, particularly, Information Society<sup>28</sup>. Copyright has the advantage of not leading to the misleading idea that rights are legally recognized or only for the benefit of authors.<sup>29</sup>

Anyway, the philosophy behind Anglo-American Copyright and Continental Copyright still remains different and there are different approaches to some subjects like the one we will refer in this study: free uses. Nevertheless, in a global society as ours, we observe a constant convergence of both systems, though still with different approaches in many cases.

## 2. Common origin and evolution of Anglo-American and Continental Copyright Systems

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<sup>27</sup> See, in detail, ROCHA, M. V., 2008, pp.733-792.ROCHA, M. V., *Portugal*, 2017, pp. 45-49.

<sup>28</sup> With further detail, STROWEL, 1993, pp. 17-28; ROCHA, M. V., 2008, p. 736, footnote 2.

<sup>29</sup> STROWEL, A., 1993, p. 25; ROCHA, M.V., 2008, p.736, footnote 2.

There is a similar origin of Anglo-American and Continental Systems. They were for the first time founded on literary works, because at the time it was in relation to these works that a reproduction, and therefore a counterfeit, was first possible, thanks to the invention of the printing machine by Gutenberg. It is well known that Copyright, either Anglo-American, either, Continental, has its origin and evolution directly related to the new technologies that appear and demand new approaches and answers to the new and defying questions that appear with these technologies.

At the beginning, in both cases there were no rights belonging to the authors, but privileges given by the crown to the printers/booksellers. That happened in England and in France, during the Ancient Regime.

2.1. In France, the privilege assured the publisher a monopoly, which protected him against a competition that other publishers could do to him, profiting from the exclusive privilege to print old works. In relation to new works, these were submitted to a pre-approved by the University, which worked for the crown as a means of censorship. In practice, over time, printers began to request (at the same time) permission to print and the privilege of having the exclusive. Privilege was not a consecration of copyright insofar as it was not a reward for the creation of the work. The goal was to cover the publisher of printing costs.<sup>30</sup> As a rule, who used to get the privilege was the publisher. It is true that sometimes, later, the privilege was granted to the author, but the author, in turn, had no choice but to transmit it to the publishers, since these had a monopoly on the manufacture and sale of books<sup>31</sup>. The system then in force had a dual function: economic and political. The first from the editors' point of view, the second from the crown's point of view.

To reinforce control over ideas, the king tended to grant no privileges except in the express condition that the publication be made in a bookseller from Paris<sup>32</sup>. This gave rise to the protests of the provincial booksellers, since the position of the booksellers of Paris was reinforced by the fact that they enjoyed numerous extensions of their privileges. This created a conflict between the booksellers of Paris and the booksellers of the province. In the beginning of the eighteenth century, in the midst of a conflict between these two groups of booksellers, the question of authors' rights finally arised. Oddly enough, the issue didn't even arise as a claim of authors, but it was raised by the lawyer of the Paris monopoly booksellers, Louis d'Héricourt, in a text of 1725 (*Mémoire sur les vexations qu'exercent les libraires de Paris*)<sup>33</sup>

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<sup>30</sup> STROWEL, A., 1993, p, 83 ff.

<sup>31</sup> SROWEL, A, 1993, p. 83; ELLINS, J., 1997, p. 38; ROCHA, M. V., 2008, p.737-738, footnote 2.

<sup>32</sup> STOWEL, A., 1993, p. 84; ROCHA, M.V, 2008, p. 738, footnote 2.

<sup>33</sup> *Apud* STROWEL. A., 1993, p. 84. See also ROCHA, M.V., 2008, pp. 738-739, footnote 2.

It is not surprising that this lack of claiming attitude on the part of the authors, since at that time they accepted with gratitude the pensions or other benefits that the great masters of the world gave him, considered as unworthy to make commerce and to be enriched by the product of their works. There was still no interest in being protected by a right. The author still lived of the cult of the patron. However, evolution was already germinating. Many authors (like Balzac) thought that the money earned by publishing books by the bookseller was not ignoble, but legitimate.<sup>34</sup>

Louis d'Héricourt, in the text referred above, wrote that a manuscript which is not contrary to religion or the laws of the State, nor to the interests of individuals, is in the person of the author a good which is really proper to him because it is the fruit of his work. For this fundamental reason, the author must be able to dispose of it as he wishes to obtain, besides the honor that awaits him, a profit that satisfies his needs and those of his loved ones. Now, if an author is constantly the owner and sole owner of his work, only he or who represents him can transmit to others his right. Therefore, the king has no right over the work, while the author or his heirs are alive, and therefore cannot transmit the right to anyone in the form of a privilege, without the consent of the one to whom it belongs. Héricourt tries to assert the idea that there is a property right and not just a privilege conferred by the crown. With this thesis the booksellers of Paris had as objective to defend their interests under the cover of the property of the authors. As STROWEL recognizes, this thesis, was a double-edged sword, which, once the authors became aware of their rights, could turn against the booksellers themselves. And this, inevitably, and soon, happened, since the authors and, above all, their heirs, began to assert that the privileges could not be renewed in favor of the booksellers without their consent<sup>35</sup>.

Héricourt's ideas were welcomed on several occasions. For example, in an arrêt of 1777, the council of the king decided to reenter in the family of Fénelon the privilege granted to its works. The "arrêts" of the council of the king, of 30.08.1777 recognized that the author had the right to publish and sell their works. STROWEL sees in them a real Code of the Intellectual Property<sup>36</sup>. In one these "arrêtés" it is said that the privilege of booksellers is a grace, but it is founded on justice. Its purpose is, when agreed by the author, to reward his work. If it is agreed to the bookseller, to ensure the reimbursement of the costs and the compensation of his costs (Arrêt du Conseil du Roi, portant règlement sur la durée des privilèges en librairie, of 30.08.1777 )<sup>37</sup> It should be noted that there is a different legal qualification of the prerogative, depending on the different objectives and the different recipients. While the author "a sans doute un droit plus assuré à une grâce plus étendue", the

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<sup>34</sup> STROWEL., A., 1993, p. 84; ROCHA, M.V., 2008, p. 739, footnote 2.

<sup>35</sup> STROWEL, A., 1993, p. 85; ROCHA, M. V., 2008, footnote 2.

<sup>36</sup> STROWEL, A., 1993, p. 85.

<sup>37</sup> *Apud* STROWEL, A., 1993, p. 85; also referred by ROCHA, M. V., 2008, p. 739, footnote 2.

bookseller has only "une faveur proportionnée au montant de ses avances". That is why there are several deadlines for protection. The author enjoys his privilege for himself and his heirs perpetually. The bookseller (publisher) only for a limited time<sup>38</sup>.

This "arrêt" draws a clear line of separation between the author and the work, on the one hand, and therefore, the prerogatives of the author, and, on the other hand, the question and prerogatives of the booksellers. Although still in the garb of a privilege, something more and different about the authors begins to emerge. It is even said that the privilege of the author is a "propriété de droit". On the other hand, there is already a concern to protect the investment, at the time, by the booksellers, and such protection is seen as a "libéralité". STROWEL considers that in this "arrêt" one can see the progression of the copyright, along with the progression of the idea of property, of a preexisting right of its own, although covered by the name of privilege. The privilege, relative to the authors, appears here, clearly, not as constitutive, but only as declaratory of a preexisting right. We don't agree with the author, we think he goes too far, we think that the change from privileges to rights only happens with the French revolution.<sup>39</sup> For us, what happens is that more value is given to authors, and it is recognized that these have more legitimacy to have privileges than the booksellers do.<sup>40</sup>

The change in the concept of preferences in France can be said to be based on two fundamental reasons. One, which comes from the Ancient Régime, is the conflict between the booksellers, therefore, a factor of socio-economic order. The fight between the booksellers of Paris and the booksellers of province, and the defense of Hélicourt turned in favor of authors. But another factor, rooted in the evolution of thought, which is the Enlightenment, emerges as a powerful force<sup>41</sup>.

The thinkers of the time perceived well the connection existing in the emergence of a public sphere, indispensable for the development of a critical activity and a circulation of what was printed<sup>42</sup>).

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<sup>38</sup> STROWEL, A., 1993, pp. 85-86; also referred by ROCHA, M. V., 2008, pp. 739-740, footnote 2.

<sup>39</sup> STROWEL, A., 1993, pp. 85-86; ROCHA, M. V., 2008, p. 740, footnote 2.

<sup>40</sup> ROCHA, M.V., 2008, p. 740, footnote 2.

<sup>41</sup> STROWEL, A., 1993, pp. 86-89; ROCHA, M. V., 2008, pp. 740-742, footnote 2. For the general notions about Enlightenment, see [https://en.wikipedia.org/wiki/Age\\_of\\_Enlightenment](https://en.wikipedia.org/wiki/Age_of_Enlightenment) (seen in 30.09.2017); in regard to the relation between Enlightenment and the French Revolution, see CHARTIER, R., *Les origines culturelles de la Révolution française*, Paris, Seuil, 1990.

<sup>42</sup> See with detail, STROWEL, A., 1993, pp.86-88; ROCHA, M. V., 2008, pp. 740-742, footnote 2. But another factor, rooted in the evolution of thought, which is the Enlightenment, emerges as a powerful catalyst. (STROWEL 86).

The thinkers of the time perceived well the connection existing in the emergence of a public sphere, indispensable for the development of a critical activity and a circulation of what is printed. (Cf. DIDEROT, CONDORCET).

Diderot, in, *Lettre historique et politique adressée à un magistrat sur le commerce de la librairie*, in *Oeuvres Complètes de Diderot*, Paris, Garnier Frères, 1876, T 18, pp. 5-75, affirms that there is no good that can belong to

With the French Revolution, in 1789, all the privileges, including those of the booksellers, ended. Copyrights became considered to be natural rights of the human being. The State had the duty to recognize them<sup>43</sup>.

2.2. As to the origin of the Anglo-American copyright, we find many aspects in common. Usually to portray the history of copyright, one goes back to Queen Anne's famous English law of 1709, the Statute of Anne. But the Statute of Anne is only understood if we consider the events that preceded its edition.

It is necessary to understand three concepts of copyright: the stationer's copyright, that is, the copyright of the publishers/printers; the common law copyright, which is the copyright resulting from jurisprudence with force of precedent; the statutory copyright, the one consecrated in the Statute of Anne. The central question posed in England was whether the authors' rights were derived from common law or whether they originated from a statute<sup>44</sup>

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man if he does not belong to the work of the spirit, the only fruit of his education, his time, his research and observations, his most beautiful hours, his thoughts and feelings (*apud STROWEL*, 1993, p.87).

Interestingly, this Diderot text had implied the legitimation of the rights of the Parisian booksellers who, restless, since the 1760, by a continuous suppression of their privileges, ordered Diderot to write a text to present his complaints. Understanding the author as owner of his work, it is emphasized that the author has the power to dispose of the work. With this argument, Diderot legitimizes the assignment in favor of the booksellers.

Condorcet, in *Fragments sur la liberté de la presse*, 1776 (Condorcet, M.J.C., *Oeuvres*, Paris, Firmin Didot Frères, 1847, T11, p. 312, *apud STROWEL*, p.88) stresses the importance of proper regulation of the press to the effect of how truths expand. He defends freedom of opinion and impression by regulating the activity of books trade. Condorcet considers the privileges of the booksellers of the time as prejudicial to the progress of the Enlightenment.

Thus, while Diderot was concerned with defining private prerogatives in relation to the work, Condorcet put in the foreground the fact that the progress of the Enlightenment depended on public access to works.

<sup>43</sup><sup>43</sup> An Assembly first established, by decree of January 13 and 19, 1791, the right of representation. On this occasion, the Rapporteur of the decree, Le Chapelier, marked as statements that have become famous and are read repeatedly in the doctrine, in which it seems to underline the absolute character of literary property. According to Le Chapelier "La plus sacrée, la plus légitime, la plus inattaquable, et, si je puis parler ainsi, la plus personnelle des propriétés, est l'ouvrage fruit pensée d'un écrivain". (*Apud STROWEL*, p.90 and LUCAS., A., LUCAS, H.J., 2001, p.10).

By the decree of 19 and 24 July 1793 the exclusive right of reproduction is established. This time the reporter is Lakanal, who considers that "De toutes les propriétés, la moins susceptible de contestation, celle dont l'accroissement ne peut blesser l'égalité, ni donner d'ombrage à la liberté, c'est sans contredit celle des productions du génie et si quelque chose doit étonner, c'est qu'il ait fallu reconnaître cette propriété, assurer son libre exercice par une loi positive; c'est qu'une aussi grande révolution que la nôtre ait été nécessaire pour nous ramener sur ce point comme sur tant d'autres aux simples éléments de la justice plus commune" (*apud LUCAS., A., LUCAS, H.J., 2001, p.10*). In detail, regarding the origin and evolution of french Droit d'Auteur, see LUCAS., A., LUCAS, H.J., 2001, pp.3-18.

<sup>44</sup> See, STROWEL, A., 1993, p. 112 ff; ELLINS, J., 1997, p. 36 ff.; ROCHA, M. V., 2008, pp. 743-745, footnote 2.

The assumption that the Statute of Anne is the origin of copyright is justified because it is the first law on literary property edited by Parliament and that, for the first time also, a Copyright Act does not contain provisions on censorship.

Between 1557 and 1709, a period of relentless religious fighting, censorship was a policy of government, and the stationer's copyrights granted by the sovereigns were therefore a privileged instrument. By giving booksellers' corporations the power to control printing and publishing, and eventually to destroy books not conforming to the laws of the time, sovereigns used these corporations to model opinion. On the other hand, the stationers were happy to receive these privileges, which allowed them to regulate effectively the commerce of the books.

In summary, stationer's copyright was an instrument of regulation of the books trade and political censorship, running in the interest of publishers and government.

Over time, the role of censorship diminished, but under stationer's copyright the editors' monopoly developed.

It was precisely to limit this monopoly that arised the Statute of Anne of 1709. There were two major differences between them in this respect: the stationer's copyright was perpetual and limited to members of the corporation; statutory copyright was provided for a limited period of 14 years, with the possibility of renewal open exclusively to the author; this legal copyright could be held by anyone, not just an editor.

The Statute of Anne did not immediately abolish stationers' copyright, which persisted on a transitional basis for 21 years. At the end of this period the publishers of London, who were the owners of almost all titles published before 1710 and entered in the register of the stationers' company, attempted to extend their monopoly against the editors of the province that began to publish various titles, since Queen Anne's law had put an end to copyright and these titles were in the public domain. The conflict became known by the battle of booksellers and developed before the courts.

This is where the concept of common law copyright enters. The argument of the stationers, as in France, the dominant editors' strategy that masked their interest behind the figure of the authors, was that the author had a common law copyright, the existence of which was independent of the statutory copyright and prior to this. Thus, the authors could license or transmit it to the publishers, and there was a presumption that it occurred. That is, under cover of this common law copyright, the publishers could maintain the monopoly that the stationers' copyright previously assured them.

The conflict gave rise to a first decision of the House of Lords, in 1769, in the case *Miller v. Taylor*. Miller was the editor of James Thompson and owned the copyright of his poem "The Seasons." Following the expiration of the first 14-year period provided for in the Statute of Anne, defendant Taylor decided to publish the same text. Miller presented a claim based on the rights of the author deriving from his work The House of Lords accepted this idea, based

on a principle of natural justice, according to which it is up to the author to choose the manner and time of publication, the number of copies, volumes, for those who want to entrust the printing, etc., because it is fair that the author maintains the pecuniary profits of his work.<sup>45</sup>

In the case *Donaldson v. Beckett*, in 1774, the stationers' monopoly came to an end. The House of Lords decided in opposition to what was decided in the *Miller v. Taylor* case. Once again there was a case opposing the London Stationers against the province printers, in this case the Scottish printers. It was considered that the stationers were trying to manipulate the law, against the public interest. There was no common law related to published works, only a time limited monopoly. When the term of this monopoly ended according to the Act of Anne, the work became free. The natural property conception of copyright came to an end. Copyright was not based in a natural right but it was in positivist conception, it only existed if regulated in an Act, like the Act of Anne<sup>46</sup>. The spirit of the time had turned against monopolies and protectionism. That's why the Stationers had no luck in trying to pass a new law in Parliament that would protect them. With this, the battle of booksellers ended<sup>47</sup>. The Anglo-American system, never got to have the natural foundation, like the French post revolution one. Until now, it is much more pragmatic and based in a positivist conception<sup>48</sup>.

### 3. Convergences and divergences between both systems

<sup>45</sup> See STROWEL, A., 1993, pp. 114-115, with more details, describing Stationaries' Copyright, the Act of Anne and the battle of booksellers, and all the evolution until the Copyright, Designs and Patents Act of 1988, ELLINS, J., 1997, pp. 36-58. About the *Millar v. Taylor* case, see pp. 47-48.

<sup>46</sup> ELLINS, J., 1997, pp. 48-49.

<sup>47</sup> ELLINS, J., 1997, p. 49.

<sup>48</sup> The English copyright story is the prehistory of American copyright. The first federal law of 1790 is modeled on the Statute of Anne. However, the various positions taken at the end of the 18th century and various legislative texts suggest that, at least initially, American jurists did not subscribe to the thesis of the House of Lords in the *Donaldson* case. For example, between 1783 and 1786, twelve states adopted copyright laws that appear to be built around the idea that it is important to encourage knowledge and under the idea that the author has natural rights over his work.

Most of the time American copyright is described as a legal monopoly. Monopoly, by its origin and legal because the monopolistic position results from the attribution of a right, not a factual power. There is, however, an alternative conception, which considers copyright a natural right, or a property of the author, which finds its origin in the act of creation (STROWEL, A., 1993, p. 128). At the level of jurisprudence there is an oscillation between the two conceptions, with predominance for the first in the Federal Supreme Court, while lower jurisdictions tend to see copyright as "the primarily proprietary in nature" (STROWEL, 1993, p. 129). With detail, see STROWEL, A., 1993, pp. 117-129.

About the evolution in other countries, for Germany see ELLINS, J. 1997, pp.58-74; for Portugal, see ASCENSÃO, J. de OLIVEIRA, 1992, pp. 12-20 ff; LEITÃO, L.M. de MENEZES, 2011, p. 31-36; REBELLO, L.F., 1993, pp. 34-48. Every Manual on Copyright has a part dedicated to the origin and evolution of Copyright, so there are many options different of ours.

The differences between “Droit d’Auteur” and Copyright are traditionally emphasized, much more than convergences. But one must not forget that the issues caused by new technologies, namely in Information Society, are global, thus, global answers are needed, and similar solutions are desirable.

It is true that Continental Copyright originates from the mere fact of creation, through the exteriorization of it by any means. On the contrary, in Anglo-American Copyright, especially in the American system (not in English law, where no formalities are required, because England was since the beginning part of the Berne Convention) is conditioned by the completion of formalities. These have, however, been mitigated because, since 1989, USA is also member of the Berne Convention.

As for rightsholders, there is a marked disagreement. According to the principles guiding the Continental Copyright, only the author, in the sense of creator, can be the original owner of rights. Not legal entities, because they create nothing. Therefore, only natural persons can be holders of rights. In Copyright, in American doctrine, there is no obstacle to moral persons having rights. But, once again, the situation is more complex than this, since the Continental Copyright regimes make investment concessions, constructed and articulated in various ways, but with similar results. And in Portugal, for example, collective works might originate from a company (see arts. 16<sup>o</sup> and 19<sup>o</sup> of CDADC)<sup>49</sup>.

Another apparent difference lies in the criterion of originality. Usually it is considered that under Anglo-American law the work is protected, that is, it is original, when it is simply not copied from another work. The basic idea of the system of Copyright is to protect the products resulting from intellectual activity, from the most sublime and personalized, to the humblest ones that sometimes require modest efforts and little originality. But if we study well both systems, there is not much difference, because works with very small amount of creativity are protected in EU and in Anglo-American In USA copyright was denied for works that required much labor, investment and effort, but that lacked creativity. The case *Feist v. Rural Telephone Service Inc.* is an example of that approach. Copyright was denied because though there was much effort, investment and labor (*sweat of the brow*) to create a database with the telephone numbers in alphabetical order, but copying this database was not considered infringement of Copyright because it lacked creativity<sup>50</sup>. Because not all countries of EU have an identical protection against unfair competition, this case is in the basis of the Directive on databases, that created a *sui generis* right for manufacturers of databases. Many countries include this right within related rights, but Portugal protects it in a separate law

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<sup>49</sup> With further detail, ROCHA, M. V., *Portugal*, 2017, pp.50-54 pp. 56-58.

<sup>50</sup> *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* 111, S. Ct. 1282, 18, USPQ 2d, 1275 (1991).

(DL 122/2000, of 4 July), because it is considered that the nature of this right is not clear.<sup>51</sup> Another apparent difference lies in the criterion of originality. Usually it is considered that under Anglo-American law the work is protected, that is, it is original, when it is simply not copied from another work. The basic idea of the system of Copyright is to protect the products resulting from intellectual activity, from the most sublime and personalized, to the humblest ones that sometimes require modest efforts and little originality. But if we study well both systems, there is not much difference, because works with very small amount of creativity are protected in EU and in Anglo-American Copyright. In USA copyright was denied for works that required much labor, investment and effort, but that lacked creativity. The case *Feist v. Rural Telephone Service Inc.* is an example of that approach. Copyright was denied because though there was much effort, investment and labor (*sweat of the brow*) to create a database with the telephone numbers, in alphabetical order, copying this database was not considered infringement of Copyright because it lacked creativity. But, as we saw above, in Continental Copyright a very small of creativity is required, thus there is protection of the so called “Kleine Münze/petite monnaies/small change/ calderilla. The work is protected because it is the result of an independent activity of the author and it is not ordinary, in the sense that it is not something usual to everybody. This approach has been emphasized by EU Directives<sup>52</sup>.

Another difference lies in the so-called moral rights. These were developed by French courts over the years, before they were legally recognized, but became very important in Continental Copyright. The Anglo-American Copyright didn't give them the emphasis they have in the Roman-Germanic tradition. Because there is a link between the attribution of moral rights and the nature of copyright conceived as a natural right, inherent to man. On the contrary,

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<sup>51</sup> See, ROCHA, M. V., *Portugal*, 2017, pp. 34-39. Computer programs are also protected in a special law (DL 252/94 of 20 October, and, contrary to what the Directives on computer programs, they are not considered literary works, but works analogue to literary works, and the norms contained in CDADC are not, therefore, directly applicable to computer programs, but require a case-by-case analysis to check that the analogy of the situation is such that they can justifiably be applied (further details in ROCHA, M. V., *Portugal*, 2017, pp. 29-34.

<sup>52</sup> See ROCHA, M., V., 2008, pp.748-757. ROCHA, M. V., *Portugal*, 2017, pp. 45-51; Directive 91/250/EEC, of 14.05, on the legal protection of computer programs, amended by Directive 2009/24/EC, of 23.04.; Directive 96/9/EC, of 11.03, on databases; Directive 93/98/EEC, of 29.10, revoked by Directive 2006/116/EC of 12.12, as amended by Directive 2011/77/EU, of 27.09, all regarding on the term of protection of copyright and certain related rights. In all these Directives creativity/originality is the result of an independent activity of the author, no other criteria are accepted; see, in detail, ROCHA, 2008, p. 733 ff. pp. 763-765 and p. 792; ROCHA, M.V, *Portugal*, 2017, pp. 29-39, pp.92-94, pp. 98-99. For further information, SAIZ GARCIA, C., 2000, pp. 106 -118. The only aspect still open to discussion is to know if more creativity is needed in so called works of applied art. We think these works should be treated equally, but there are different opinions in the doctrine and in court decisions since there may be an overlapping protection with models and designs, protected under Industrial Property Law. See, with detail, ROCHA, M. V., 2008, pp. 755-757; ROCHA, M.V, 2017, p. 16 ff.

because the Copyright is conceived by reference to the materialized work, the moral or personal dimension is said to be forgotten here. Nevertheless, this is not the case, as demonstrated by the recent English laws of 1988 and the United States of 1990, where moral rights are contained<sup>53</sup>

As for the term of protection of copyrights, the application of the traditional category of property to copyright, linked to the concept of natural law would imply that, in theory, it should be perpetual, as shown by the intense debate generated in France in the nineteenth century on the matter. But, even for those that consider Copyright a form of property, it is recognized that it is a special form of property that must be limited in time because, otherwise, it would be unacceptable. There must be a balance between rightsholders and public interest, public domain. Thus, in all Systems Copyright is limited in time. Though, in our opinion, the term of protection of patrimonial rights, namely in the EU, is too long, creating an unbalance that harms users and cultural development.

Oppositions also appear to be on licenses. In Continental Copyright, restrictions on authors' rights, such as non-voluntary licenses, are only accepted in exceptional circumstances, because the status of creator, which is at the heart of these schemes, requires, in principle, the recognition of exclusive rights. In Anglo-American copyright, the essential economic dimension and the investment protection function would legitimize, more easily, the proliferation of legal licensing regimes. Nevertheless, we see in EU Directives many cases of legal licenses in relation to Information Society.<sup>54</sup>

There are also issues concerning the regulation of copyright contracts. This regulation is born of the disparity of forces between the author and the users in the negotiation level of the primary author contracts. The goal of legislation of Continental tradition has been to remedy this disparity. During the twentieth century, several restrictions were placed on the principle of contractual freedom. The regulations, however, are minimal in countries with an Anglo-American tradition<sup>55</sup>.

Related rights, in the Continental Copyright are distinguished from Copyright; in Anglo-American systems the distinction is not made in the law. Nevertheless, what is important is to see it they are regulated in the same way.

It is not our purpose to address all these issues in this study. We will only deal with the distinction between Fair Use and the closed list of limitations and exceptions that exists in the EU because of InfoSoc Directive.

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<sup>53</sup> STROWEL, A., 1993, p. 31 ff.

<sup>54</sup> See STROWEL, A., 1993, p. 32.

<sup>55</sup> See STROWEL, A., p. 32.

Nevertheless, we must emphasize that there has been an approach of both major Systems because Countries of both traditions are members of the Berne Convention (in USA since 1989), members of the TRIPS-Agreement, members of the two WIPO Treaties of 1996 , and, in the EU, there has been a constant approach of solutions, because of several Directives, with the aim of creating an European Copyright Code<sup>56</sup>.

#### 4. InfoSoc limitations and exceptions

The InfoSoc Directive (Directive 2001/29) was implemented in order to update the protection of copyright and related rights in line with the issues due to the digital era and the obligations arising from the two 1996 WIPO Treaties.

The InfoSoc Directive grants authors, performers, phonogram producers , film producers and broadcasters the same level of protection for the right of reproduction (artº 2). Authors have the right of communication to the public, including the right of making the work available on line and on demand of artº 8 of WIPO Copyright Treaty and the distribution right (arts. 3, nº1 and 4, nº1). Performers and phonogram producers have also the right making available their activities on line and on demand provided for in arts. 10 and 14 of the WIPO Performances and Phonograms Treaty (artº 3, nº2). But, as Patricia Akester points out, the InfoSoc Directive goes beyond WIPO Treaty, extending this right to film producers and broadcasters.<sup>57</sup> Artº 2 of InfoSoc Directive addresses all types of reproduction right, of authors, performers, phonogram and videogram producers, and broadcasting organizations. Artº3 is intended do cover dissemination of works and related subject matter on the Internet. Again, going beyond the WIPO Performances and Phonograms Treaty, covering not only audio but also audiovisual material that can be obtained on demand<sup>58</sup>. The question of exhaustion the already granted author's distribution right is addressed in artº 4. Of the wording of the article and the Considerations of the Directive we think that the exhaustion with the first sale is limited to distribution of physical copies<sup>59</sup>.

4.1. We want to emphasize that the exceptions and limitations allowed in InfoSoc Directive because we are very critical about them.

Member States may provide for exceptions and limitations subject to the three-step rule of the Berne Convention (artº 9, nº2).

It is very important to bear in mind that art.5º of the InfoSoc Directive, unlike artº 10 of the WIPO Copyright Treaty and artº 16 of WIPO Performances and Phonograms Treaty, does not establish a general rule, but contains an exhaustive list of exceptions and limitations. As authors point out, although the goal of the InfoSoc Directive may be to avoid too wide

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<sup>56</sup> With further details, ROCHA, M.V. 2017, 2nd ed., pp.79-97.

<sup>57</sup> AKESTER, P., 2005, p. 7.

<sup>58</sup> AKESTER, P., 2005., pp 7-8.

<sup>59</sup> In this sense, PEREIRA, A. L. DIAS, 2016, p. 28.

exceptions and limitations in the Information Society, one must argue that a general clause, or other more open solution, such as fair use, would more easily adapt to the rapid changes of digital technology.<sup>60</sup>

According to art<sup>o</sup> 5, n<sup>o</sup>1, certain technical acts of reproduction are exempted from the scope of reproduction right, if they have no separate economic significance. The InfoSoc Directive goes beyond the WIPO Treaties of 1996, providing one only mandatory exception of the list of 21 exceptions and limitations included: free service and access in what concerns incidental acts of reproduction<sup>61</sup>.

According to art<sup>o</sup> 5, n<sup>o</sup>2, Member States may provide for exceptions or limitations to the reproduction right provided for in art<sup>o</sup> 2 in the following cases:(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightsholders receive fair compensation;(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightsholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightsholders receive fair compensation.

According to art<sup>o</sup> 5, n<sup>o</sup>3 restrictions to the reproduction and communication to the public may be established. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's

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<sup>60</sup> Cf. AKESTER, P., 2005, p. 8; PEREIRA, A. L. DIAS, 2016, pp. 21-49, particularly pp. 26-38; RENDAS, T. 2015, 2015, pp. 26- 39.

<sup>61</sup> This exception is in n<sup>o</sup>1 of art<sup>o</sup> 75<sup>o</sup> of Portuguese Copyright and Related Rights Code, but Portugal goes beyond the InfoSoc Directive when includes in the exception “acts that enable network navigation and temporary storage of information, as well as acts that enable the efficient working of transmission systems, provided intermediaries do not interfere with legitimate usage of technology judged according to good market practice, to obtain data regarding the use of information and, in general, technological processes of transmitting information”. As AKESTER., P., points out, this provision establishes limitations on service providers in line with the Electronic Commerce Directive (Directive 2000/31), but it remains unclear whether the wording only covers the mere conduit, or whether it covers caching and hosting also. In detail, AKESTER, P., 2005., p. 8, text and footnote 8.

name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;(g) use during religious celebrations or official celebrations organised by a public authority;(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;(i) incidental inclusion of a work or other subject-matter in other material;(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;(k) use for the purpose of caricature, parody or pastiche;(l) use in connection with the demonstration or repair of equipment;(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in art. 5..

Article 75<sup>o</sup> CDADC, n<sup>o</sup>2 contain the limitations and exceptions chosen of the catalogue of art<sup>o</sup> 5 InfoSoc Directive. It begins with reproduction, exclusively for private use, in paper or similar medium, effected by the use of any kind of photographic technique or other process having similar effects, with the exception of music sheet, as well as reproduction on any

medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial (a). Reproduction done in these circumstances implies the payment of a fair compensation to the rightsholders, according to art<sup>o</sup> 76<sup>o</sup>, n<sup>o</sup>1, (b). Such compensation must be paid to the author and, in the analogical level, to the editor, by the entity that makes the reproduction. This limitation is redundantly repeated in art<sup>o</sup> 81<sup>o</sup>, n<sup>o</sup>2 of the Code; it is also allowed the media's reproduction and making available to the public, for the purpose of information, of extracts or summaries of speeches, lectures or conferences given in public, so long they are not already included in art<sup>o</sup> 7, (b), because these are excluded from protection (b); regular sections of press articles, by means of press revue are also part of the exceptions (c); fixation, reproduction and public communication of short excerpts of literary or artistic works, by any method, in a news report, justified by the information purpose are also allowed (d); reproduction by photocopying or by other similar means, of the whole or part of a work already accessible to the public, so long as said reproduction is done by a public library, a public archive, a public museum, a non-commercial documentation centre, scientific or education establishments, and the reproduction and number of copies made are for internal use and are not destined to the public, are limited to the necessities of these institutions and do not pursue an economical or commercial advantage, direct or indirect, including the acts of reproduction needed to the preservation and to the archive of any works, is another limit (e). In this case art. <sup>o</sup> 76<sup>o</sup>, n<sup>o</sup>1 (b) is also to apply and the above-mentioned compensation is to be paid. Reproduction, distribution and availability to the public for teaching and educational purposes, of parts of a published work, so long as the copies are confined exclusively to the educational purposes of the respective establishment and are not for economical or commercial advantage, direct or indirectly is also an exception (f). Legitim without the author's consent are also quoting or summarizing works of other authors to support one's own thesis, for the purposes of criticism, discussion, or teaching in the manner justified by the goal to accomplish (g). The inclusion of excerpts or short passages of another author's work in one's own work of teaching is allowed (h), but a fair compensation must be paid to the author and editor, according to art<sup>o</sup> 76<sup>o</sup>, n<sup>o</sup>1, (c). Also allowed is the reproduction, public communication and the acts of making available to the public for the benefit of people with disability of a work directly related with the disability, to the extent required by the specific disability, provided those uses do not have, directly or indirectly, profit goal (i). Performing and public communication of hymns, or official anthems or works of an exclusively religious nature in the course of religious celebrations or practices is another exception (j). Also allowed is the use of flyers to advertise public exhibitions or sale of artistic works, to the extent necessary to promote de event, excluding any commercial use (l). Another exception is reproduction, public communication and making available to the public of current articles, or articles related to economic, political or religious debate, broadcast works or other items of the same subject matters, in cases where such use is not expressly

reserved (m). Another exception is being the use of the work for public security purposes or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (n). The authorization for the use by communication or making available of works and other subject matter not subject to purchase or licensing terms, part of collections of libraries, museums, archives and educational establishments to individual members of the public for the purpose of research or private study, by dedicated terminals on the premises of such establishments, seems to us too narrow exception, and may be related to information society or be considered an old practice adapted to a new medium, thus we are in favor of a broad interpretation (o)<sup>62</sup>. Reproductions to broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals and prisons are a limitation (p) because the rightsholders receive a fair compensation, according to art<sup>o</sup> 76<sup>o</sup> n<sup>o</sup>1, (d). It is allowed the use of works, such as works of architecture or sculpture made to be located permanently in public places (q). Another exception is incidental inclusion of a work or other protected subject matter in other material (r). Also excepted is the use of the work in connection with the demonstration or repair of equipment (s). Another exception is the use of an artistic work in the form of a building, or a drawing, or a plan of a building for the purposes of reconstructing the building (t).

The works reproduced or quoted in the cases outlined in art. <sup>o</sup>75 must be accompanied, whenever possible, by the mention of the author or the editor's name, the title of the work and whatever other indications are being required to identify them, according to art<sup>o</sup> 76<sup>o</sup>, n<sup>o</sup>1. Also, the works reproduced or quoted in the cases outlined in art<sup>o</sup> 75<sup>o</sup>, n<sup>o</sup>2, (b), (d), (e), (f), (g), (h) should not be confused with the works of who uses them, nor may the reproduction or quotation be so extensive as to affect the interest in such works (art<sup>o</sup>76<sup>o</sup>, n<sup>o</sup>2. Only the author has the right to compile in a single volume the works referred to in n<sup>o</sup>2, (b)of art<sup>o</sup> 75<sup>o</sup>, according to art<sup>o</sup> 76<sup>o</sup>, n<sup>o</sup>3.

Today another exception was added to art<sup>o</sup> 75<sup>o</sup>, n<sup>o</sup>2, related to the use of orphan works, due to the implementation of the Orphan Works Directive (art<sup>o</sup> 75<sup>o</sup>, n<sup>o</sup>2, u). We don't think that this exception makes much sense here because orphan works imply that there is no necessity to obtain the author's previous consent, either because one doesn't know who he/she is, or one doesn't know where the author is, after the diligent search done. It makes no sense to subject orphan works to the three-step rule, as art. <sup>o</sup> 75<sup>o</sup> implies. While they are orphan they may always be used. If the author is found he has the right to an equitable amount, but the works are no more orphan works, thus the exception of art<sup>o</sup> 75<sup>o</sup>, n<sup>o</sup>2, t) makes no sense.

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<sup>62</sup> In this last sense, AKESTER, P., 2005., p. 10. With more detail, in favour of a broad interpretation of this important exception, see EVANGELIO LORCA, R., 2008, pp.63-176. Art<sup>o</sup> 75<sup>o</sup> does not contain the exception inspired by French law relating uses for caricature, parody or pastiche. Portugal follows the German model. Parody is protected, even if inspired in another work, in art<sup>o</sup> 2<sup>o</sup>, n<sup>o</sup>1, n) of the Code. Also, we didn't implement the exception of cases of minor importance already in force according to national law.

The uses allowed, with or without payment, are subject to the three step test, according to art<sup>o</sup> 5, n<sup>o</sup>5 InfoSoc Directive and Portuguese art<sup>o</sup> 75<sup>o</sup>, n<sup>o</sup>4. These are the exceptions or limitations (the special cases) allowed and the use of them must not conflict with the normal exploitation of the work or other subject-matter and may not unreasonably prejudice the legitimate interests of the rightsholder.

To avoid unequal power of contracting between the parties, in what regards exceptions and limitations, art<sup>o</sup> 75<sup>o</sup>, 5 considers null any contractual provision that affects the normal exercise of the free uses<sup>63</sup>.

Art<sup>o</sup> 82<sup>o</sup> CADCD, on private copying, is regulated by Law 62/98, of September 1, regarding fair compensation for private copying. Law No. 49/2015, of June 5 introduced important changes to this law adapting it to the digital world.

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<sup>63</sup> Other exceptions, not related to InfoSoc Directive also exist in other parts of the CDADC. Art<sup>o</sup>77 n<sup>o</sup>1, establishes that unauthorized reproduction of another author's work under the pretext of commenting or annotating it is not allowed; however, it is lawful to publish, as a separate offprint, commentaries or annotations that merely refer to chapters, paragraphs or pages of another's work. Art<sup>o</sup> 77<sup>o</sup>, n<sup>o</sup>2, establishes a special case of allowed use of another author's work based on reciprocity: the author who reproduces in a book or booklet, his own articles, letters or other texts that have been subject to controversy previously published in newspapers or magazines may also publish together with his own, texts of the opposing view. The opposing authors are entitled to do likewise, even after the first has been published.

Art<sup>o</sup> 80<sup>o</sup> allows reproduction in Braille or any other system for the the visually impaired, so long it is not for commercial gain, of works that have been lawfully published or otherwise divulged. Art<sup>o</sup> 81, (b) permits copying for strictly private use, so long as it does not affect the normal economic exploitation of the work and does not cause unjustifiable harm to the author's legitimate interests, whereby the copy may not be used for public dissemination or commercial gain. Art<sup>o</sup> 123<sup>o</sup>, n<sup>o</sup>2 permits the recitation or performance of works which were not included in the recital or concert programming response to the insistent requests from the audience, with no responsibility or onus for the organizers. Art<sup>o</sup> 152<sup>o</sup> allows radio broadcasting stations to record works which are to be broadcast for the exclusive purpose of broadcasting by its own stations. Such recordings must be destroyed within three months (except in case of exceptional public interest for documentation for official archives), during which time they may be used three times, notwithstanding remuneration due to the author. Art<sup>o</sup> 168<sup>o</sup>, n<sup>o</sup>1, permits, barring agreement to the contrary, the reproduction or publication of a photograph of a person made by hire, by the person who was photographed, the heirs or or persons to whom the work was transmitted without consent of the photographer. If the name of the photographer appears on the original photograph it should also be indicated on the copies (art<sup>o</sup> 168<sup>o</sup>, n<sup>o</sup>2).

Regarding related rights it is important art<sup>o</sup> 189<sup>o</sup>, n<sup>o</sup>1: private use is exempted (a); the extracts from a performance , a phonogram, a videogram or an emission of broadcasting, provided that recourse to such excerpts is justified by the purpose of information or criticism or any other case of those that authorize the quotations or abstracts referred to in (g) of art<sup>o</sup>. 75<sup>o</sup>, n<sup>o</sup>2 is allowed (b); (c) the use intended solely for scientific or pedagogical purpose is also allowed(c); the ephemeral fixation made by the broadcast entity is lawful (d); the fixations or reproductions carried out by public entities or concessionaires of public services for some exceptional interest in documentation or to file are also free (e); other cases in which the use of the work is lawful without the consent of the author are included (f). Limitations and exceptions on copyright shall apply to related rights, if it is compatible with nature of these rights (art<sup>o</sup> 189<sup>o</sup>, n<sup>o</sup>3).

4.2. In our opinion the InfoSoc Directive deserves sever criticism and ought to be revoked, because of several reasons

First, the title of the Directive is misleading. The Directive 2001/29/EC of the European Parliament and of the Council, of May 2001, on the harmonization of certain aspects of copyright and related rights in the information society<sup>64</sup>, does not deal with subjects only related to the information society. In fact, most aspects don't have any relation to the information society, that is, Internet.<sup>65</sup>

Second, the InfoSoc Directive creates an exhaustive list of the exemptions and limitations allowed (see consideration 32), some related to the reproduction right (art<sup>o</sup> 5, n<sup>o</sup>2) some related to both, the reproduction and the public communication right (art<sup>o</sup>5<sup>o</sup>, n<sup>o</sup>3).

There may be no more. In the Information Society it is especially important the new right of making the work, the performance, the audio or video or broadcast available to the public on line and on demand (art<sup>o</sup>3). The exceptions to this right are totally new.

Anyway, the exhaustive list is too strict. Lacks flexibility and the digital environment is always changing, besides having few exceptions and limitations directly related to Information Society.

Furthermore, the InfoSoc Directive allows the EU countries to choose, from the list, which exceptions or limitations they want to implement in the national laws. Of the list of 21 exceptions and limitations only the exemption regarding acts of incidental reproduction is compulsory. This means that each EU Country may have a very different list of exceptions and limitations, thus the aim of harmonization cannot be reached. That is, the Directive is a failure from this point of view. One may question its utility.

All the exceptions and limitations of InfoSoc Directive are subject to the three step rule of the Berne Convention. That is, the general clause of the Berne Convention related to the exceptions to reproduction right (art<sup>o</sup> 9<sup>o</sup>, n<sup>o</sup>2), extended to all intellectual property rights by the TRIPS Agreement (art<sup>o</sup> 13<sup>o</sup>) and implemented to all copyrights and related rights by the two WIPO Treaties of 1996 (arts. 10<sup>o</sup> of the Copyright Treaty and 16<sup>o</sup> of the Performances and Phonograms Treaty).

Because the three-step rule is a general clause it is subject to the different interpretations by the courts. Thus, it depends of the judges to restrict or enlarge the apparently strict list of exceptions and limitations, that is, each case may be decided differently. If the Directive says nothing, a too strict interpretation of the exceptions and limitations may prevail. As

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<sup>64</sup> OJ L 167/10-19, of 22.6.2001.

<sup>65</sup> In the same sense VICENTE, D. M., 2005, p. 162; PEREIRA, A. L. DIAS PEREIRA, 2016., p.26, amongst other authors.

HUGENHOLZ points out, the Directive as little or nothing to offer in terms of harmonization and in terms of certainty, or of anything else<sup>66</sup>.

In the 44 consideration of the Directive seems to limit furthermore de exceptions and limitations. There, after a reference to the three-step rule, we can read: “The provision of such exceptions or limitations by Member States should duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain new uses of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.”. As A. DIAS PEREIRA emphasises, some authors consider this one fourth step added to the three-step rule<sup>67</sup>, and he considers that there are specialities in the digital environment, leading to a copyright system in two velocities.<sup>68</sup>

In this legal context orphan works could not be considered an exception, there could not be a presumption of agreement, although the author was unknown, or one didn't know where he was<sup>69</sup>. So, during the excessive period of protection (life of the author plus 70 years after his death, ending in 1 of January of the year after the death; in works of collaboration, after the death of the last co-author), the works couldn't simple be used, namely digitalized<sup>70</sup>.

If we look to other numbers of the previous considerations of the Directive, like 40<sup>71</sup> and 42<sup>72</sup>, for example, though knowing that these previous considerations are not compulsive, it is

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<sup>66</sup> HUGENHOLZ, P. BERNT, “ 2000, pp. 499-501; ASCENSÃO, J. de OLIVEIRA, “O fair use no direito autoral”, *Anais do XXII Seminário Nacional da Propriedade Intelectual: A inserção da Propriedade Intelectual no Mundo Económico*, ABPI, São Paulo, pp. 94-98. PEREIRA, A. LIBÓRIO DIAS, 2016., pp. 26-27; PEREIRA, A. L. DIAS, 2014, pp. 31-42.

<sup>67</sup> TRITTON, G., (ed.), 2002, p. 369.

<sup>68</sup> PEREIRA, A. L. DIAS, 2016, p. 30.

<sup>69</sup> Notice that this presumption exists in our Code, in Related Rights. When the rightholder cannot be contacted there is a presumption of agreement (artº 196º)

<sup>70</sup> See PEREIRA, A. L. DIAS, 2006., for further details.

<sup>71</sup> (40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

<sup>72</sup> (42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

clear that the InfoSoc Directive pretends a stricter interpretation of limitations and exceptions in the digital world, that is, in the Internet.

But because the three step rule is a general clause, and the wording of some exceptions or limits allow different interpretations, InfoSoc Directive, in the end, leaves it all to the Courts to decide, in a case-by-case approach as we will see with further detail in the last section of this study.

4.4. But the InfoSoc Directive may be harmful for other reasons. Technological protection and information for the management of copyright and related rights regulated in Portugal, as in the other countries of the EU, have been established in accordance with the 1996 WIPO Treaties (respectively, arts. 11 and 12 of the Copyright Treaty and articles 18 and 19 of the Treaty on Performances and Phonograms) and InfoSoc Directive (arts. 6<sup>o</sup> and 7<sup>o</sup>). Nevertheless, in InfoSoc Directive technological measures and information systems have been regulated in a way that is so highly protective that they jeopardize the balance between protection and free use, creating a paradox because users can become worse off than in the analog era. Infosoc Directive went further than the WIPO Treaties referred to, as regards technological measures, since it did not merely prohibit measures to neutralize technological devices but also covers acts preparatory to such neutralization, such as the manufacture and sale, rental, advertising for the purpose of sale or rental or possession for commercial purposes of such products. In addition, it covers not only infringement of author's rights and related rights but is extended to the *sui generis* right of the manufacturer of the database, which is not covered by the WIPO Treaties (cf. art<sup>o</sup> 6, n<sup>o</sup>1 and n<sup>o</sup>3 InfoSoc Directive; art<sup>o</sup> 217<sup>o</sup> CDADC is in line with these provisions).

Art<sup>o</sup> 6, n<sup>o</sup>2 of InfoSoc, complementary to n<sup>o</sup>1, requires Member States to protect against the manufacture of, or dealing in, illegal circumvention devices and services. Thus, art<sup>o</sup> 218<sup>o</sup> CDADC provides that the act of circumvention implies criminal liability. When the circumvention of any effective technological measures is carried out in the knowledge, or with reasonable grounds to believe the goal of circumvention is being pursued, this may lead to imprisonment for a term up to one year or a fine up to 100 days. The criminal proceeding can be initiated even in the absence of any complaint. Art<sup>o</sup> 219<sup>o</sup> CDADC, in relation to preparatory activities deals with criminal liability, that can lead to imprisonment for a term up to six months or a fine up to 50 days. Criminal proceeding does not depend of complaint.

Civil liability may also emerge from the violation of technological protection measures, according to art<sup>o</sup> 226<sup>o</sup>.

Art<sup>o</sup> 6, n<sup>o</sup>4 of the InfoSoc Directive addresses the disequilibrium that may occur in when the legal protection of technological measures affects the exceptions and limitations that imply that the uses are free.

The technological protection measures, as well as the criminalization of its circumvention, from the beginning raised the issue of being a serious change to the balance of interests provided by rightsholders and users. Art<sup>o</sup>6,n<sup>o</sup>4 of the InfoSoc Directive addresses the disequilibrium that may occur in when the legal protection of technological measures affects the exceptions and limitations that imply that the uses are free, because technological measures have a strong incidence on the limits or restrictions provided for in art<sup>o</sup> 5 of InfoSoc Directive.

If a work exists in the analogue world and we are faced with an exception or limitation on copyright or related rights, the user may access the work without having to request any authorization; however, if the work in question only exists in the digital domain, which is becoming more and more common, namely with e-articles, e-papers, and e-books, even if the law allows free access, the work cannot be used if it protected by technological measures, since the law doesn't allow to circumvent the measure, even for free uses.

It is true that the InfoSoc Directive seems to be concerned with the imbalance generated. Art<sup>o</sup> 6 (4) stipulates that if rightsholders fail to take appropriate measures, Member States should ensure that they are made available to users. But this does not prevent the InfoSoc Directive not to allow directly the circumvention of technological measures. In addition, the restrictions to which the aforementioned option applies are not all those contained in art<sup>o</sup> 5. Of the 21 restrictions typified in this article, only some are candidates for the application of the regime of article 6 , n<sup>o</sup>4. In other words, it was not enough for art<sup>o</sup>.5 to contain very few exceptions, the InfoSoc Directive tuned them ineffective in the digital age. It is not enough not to create new exceptions that are appropriate to the digital age, but are still eliminated in the digital context, by this indirect way, most of those that subsisted in art<sup>o</sup> 5, and which are common restrictions.

Art<sup>o</sup> 6<sup>o</sup> also fails to create a harmonized solution in the EU. Each may have very different approaches, which, again, leads to uncertainty.

The Portuguese law, in art<sup>o</sup> 221<sup>o</sup>, trying to ensure a balance between the rightsholders and users creates a solution that is well intended but totally ineffective. The solution of asking previous permission to the Inspeção Geral das Actividades Culturais (IGAC), for some of the uses, simply doesn't work. The system is so complex and slow that it doesn't function at all. More, not all the exceptions and limitations are covered by this system (because of art.<sup>o</sup> 6<sup>o</sup> of InfoSoc Directive), which implies, in practice, counterfeiting, conflict, giving up, or pay per view.<sup>73</sup> .

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<sup>73</sup> See, for further details ASCENSÃO, J.de, OLIVEIRA, 2012., p. 110 ff. ASCENSÃO, J. de OLIVEIRA, 2008, p. 14 ff.; GARROTE FERNÁNDEZ-DÍEZ, I., 2007, p. 2047 ff., commenting art. 160<sup>o</sup> TRLPI; LEITÃO, L. M. TELES MENEZES, 2011, p. 366 ff.; LEITÃO, L.M. TELES de MENEZES, 2012, p. 137 ff, in particular, pp. 139-140; KOELMAN, J. K./HELBERGER, N., 2000, p. 165 ff.; ROCHA, M. V., 2012-2013, p. 429 ff.; VICENTE, D. MOURA, 2009, p. 506 ff; VICENTE, D. MOURA., 2009, p. 500 ff.

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This may lead to a paradox. If a work exists in the analogue world and we are faced with an exception or limitation on copyright or related rights, the user may access the work without having to request any authorization; however, if the work in question only exists in the digital domain, which is becoming more and more common, namely with e-articles, e-papers, and e-books, even if the law allows free access, the work cannot be used if it protected by technological measures, since the law doesn't allow to circumvent the measure, even for free uses.

One of the examples that most shocks us is the right of quotation. The supreme limit on copyright and related rights is not included in the digital domain for the purposes of art. 6 of InfoSoc Directive.

If the rightholder does not voluntarily make available free uses to the beneficiaries by keeping the protection by technological measures, the Directive does not impose any penalty. Moreover, each Member State does what it thinks is best. As the safeguarded restrictions have practically no economic interest, recourse to legal proceedings is not even a solution, as users will not be willing to bear the costs and delay of the process for a use which is most likely to have lost its topicality.

The CDADC, from this point of view, appears with a solution, only apparently interesting, but devoid of any practical interest. Art<sup>o</sup> 221 requires holders of protected rights to deposit with the Inspeção Geral das Actividades Culturais (IGAC) free copies, that is, of the means by which users can benefit from the uses allowed by law, n<sup>o</sup> 2 of art<sup>o</sup> 75, in (a) reproductions for private purposes, in any medium, performed by a natural person; (e) reproduction and making available to the public for the purpose of informing speeches, speeches or conferences, which are not included in article 7, by extract or summary; (f) reproduction, distribution and public availability for exclusive teaching purposes in a given establishment, parts of a published work; (i) reproduction, public communication and making available to the public in favor of persons with disabilities and to the extent strictly related to that disability; (n) use of the work for the purpose of public security or to ensure the proper conduct or reporting of administrative, parliamentary or judicial proceedings; (p) reproduction of the work by non-profit social institutions, such as hospitals or prisons, when it is transmitted by broadcasting; (q) use of works, for example, of architecture or sculpture, made to be kept in public places; (r) episodic inclusion of work or other material protected in another material; (s) use of the work related to the demonstration or repair of equipment; (t) use of an artistic work in the form of a building, design or plan for the purpose of repair or reconstruction.

In any case, the rule of the three steps of the Berne Convention (art<sup>o</sup> 75<sup>o</sup>, paragraph 4) and the remuneration required in art<sup>o</sup> 76<sup>o</sup>, n<sup>o</sup>1 must always be respected, within the limits of als. (a), (e) and (p); in the case of (f) the works reproduced should not be confused with the work of those who use them, nor should the reproduction be so extensive as to prejudice the interest in such works.

Also covered is (b) of art<sup>o</sup> 81<sup>o</sup>, that is, reproduction for exclusively private use, provided that the three steps of the Berne Convention met and art<sup>o</sup>. 151<sup>o</sup>, n<sup>o</sup> 4, that is, fixations of broadcast works having an exceptional interest in documentation.

Concerning the related rights, the limitations of (a) private use; (c) reproduction for purely scientific or educational purposes; (d) ephemeral fixation by a broadcaster; (e) fixations or reproductions made by public entities or concessionaires of public services for the exceptional interest of documentation or for archiving are also covered.

But a large number of limits and exception are not mentioned.

By way of example, these are not included: the reproduction of speeches, addresses and lectures given in public (art<sup>o</sup> 75, n<sup>o</sup> 2, b); the press magazines (art. 75<sup>o</sup>, n<sup>o</sup> 2, c); the inclusion of fragments of literary or artistic works in reports of current events (art.75<sup>o</sup>, n<sup>o</sup> 2, d); the insertion of quotations or summaries of others' works in support of their own doctrines (art.75<sup>o</sup>, n<sup>o</sup> 2, g); the inclusion of short pieces or fragments of other works in one's own works intended for teaching (art.75<sup>o</sup>, n<sup>o</sup>2, h). This, just to mention the limitations that, clamorously are not covered by art<sup>o</sup> 221<sup>o</sup>.

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Private use is also affected since art. 221, n<sup>o</sup>8 states that the provisions of the remaining paragraphs do not prevent rightsholders from applying technological measures to limit the number of authorized reproductions relating to private use

Still, we have the serious question of art<sup>o</sup> 222<sup>o</sup> CDADC, which, if interpreted broadly, by its restrictive potential of free uses of works, services and products, in the overwhelming majority, available online, annihilates paradoxically free digital uses, with significant negative effects on the right of access to information and, consequently, on research and teaching. Art<sup>o</sup> 222<sup>o</sup> states that the limitations to the protection of technological measures foreseen in art<sup>o</sup>. 221 shall not apply to works, performances or productions made available to the public for access on demand. The situation would be even more serious if the art<sup>o</sup>. 221 had some practical utility, which it does not have.

In fact, according to art<sup>o</sup> 221, n<sup>o</sup>1, in fine, and n<sup>o</sup> 2 and n<sup>o</sup> 3 of that article, the interested party, although cannot withdraw the technological measure, may contact the Inspeção Geral das Actividades Culturais (IGAC) in order to achieve the intended use, since holders of rights protected by technological measures must deposit therein the means to benefit from legally prescribed forms of use (n<sup>o</sup> 1), and right holders should take appropriate voluntary measures. Such as agreements between themselves or their representatives and interested users to enable free access (n<sup>o</sup> 2). If IGAC is the entity to which the user is directed by requesting access to the resources deposited therein (n<sup>o</sup> 3), due to the omission of conduct by the rightsholder, the technological measure prevents or restricts free access.

The purpose of the rule is to enable the parties concerned to use a more expeditious and less expensive means than the use of normal procedural means, in situations where such a remedy will not even be justified, at least in the case of the limited situations provided for in art<sup>o</sup> 221.

However, the measured has no interest, or has a negligible interest, for several reasons. First and foremost, IGAC does not have the power to decide. In addition, the right holder is not sanctioned if he does not provide the means of free access by omission of conduct, therefore, the IGAC *acquis* will be zero or close, even in matters of national intangible goods. In addition to that, in the absence of standardization of such procedures at Community level, let alone worldwide, the *acquis* in question will not even cover foreign works, services or products. Moreover, the resolution of disputes is subject to the necessary arbitration by a Mediation and Arbitration Commission (whose members are designated by order of the Prime Minister, under the terms of article 30 of Law 83/2001, of August 3, that is to say, the arbitrators cannot even be freely chosen by the parties, for which reason the use of voluntary arbitration would be more valuable), of which decisions can be appealed to the Court of Appeal, with merely devolutive effect (art<sup>o</sup> 221, the latter number concerning the Commission's regulation).

Failure to comply with the decisions of the Mediation and Arbitration Commission may give rise, at the most, to the compulsory sanction provided for in Article 829-A of the Civil Code (n<sup>o</sup>. 5 of art<sup>o</sup> 221), which is already very restricted. This means that art<sup>o</sup> 2221 removes, without any justification, the use of specific enforcement.

Finally, although the procedures foreseen are of an urgent nature, to enable them to be concluded within a maximum period of three months (n<sup>o</sup> 6), the urgency of such an action must be called in question if there is no penalty if the time limit is which, as the practice teaches us, will be highly probable. Also, precautionary procedures are of an urgent nature, with a maximum expected duration of 2 months, and in practice they may last for two years or more. Already not to question if 3 months is not an excessive time, attentive to the possible urgency of the user, as will be the normal case.

That is, the legislator might as well have stayed quiet. The system is so inadequate that it falls within the same system of recourse to traditional judicial remedies.

The only minimally acceptable solution seems to us to be the proposal, *de iure condendo*, by OLIVEIRA ASCENSÃO: to attribute to IGAC, or another administrative entity, the means of withdrawal of the protection measures, the power to authorize access or intended use when the legal assumptions are met, a summary

4.6. Member States must adopt remedies against devices related to rights management information. Art<sup>o</sup> 7 of InfoSoc Directive is not as the WIPO Treaties in relation to this subject but extends its protection to the *sui generis* manufacturer of databases. Arts. 223<sup>o</sup> and 224<sup>o</sup> of CDADC implement art<sup>o</sup> 7 of the InfoSoc Directive, but once again, we think that there is overprotection, because draconian measures ought to be expressly considered void, giving rise to criminal liability.<sup>74</sup>

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assessment being sufficient. If there is still a conflict between the user and the rightsholder, a procedural solution will be intervened through a Mediation and Arbitration Commission.

However, even this solution does not satisfy us, since there is no guarantee that the beneficiary of the technological measures will deposit anything with the administrative body, whose collection may be zero. The deposit of works /performances free of technological constraints should constitute an obligation, covered as a contravention subject to fines and generating civil liability. In addition, the administrative entity should be networked with administrative entities from other countries, at least in the EU, to create a broad database and be obliged to decide within a very short time, at most 48 hours, silence, or a lack of acquiescence if the beneficiary was not sanctioned or if the agreement was not reached with administrative entities in other countries functioned as an authorization for the withdrawal of the measures by the user.

If a fast and efficient route is not opened, the whole complicated provision of art<sup>o</sup> 6 of the Directive and the CDADC is useless. As OLIVEIRA ASCENSÃO points out, "It would be truer to say that in digital there are no restrictions, at least for the sake of small stingrays."

It should be noted that it is not a question of contesting technological devices. It is normal to pay to obtain a good, material or immaterial, but it is no longer normal that the access and use of this good is unreasonably hampered or impeded, which is exactly what happens.

<sup>74</sup> Rights management information systems are provided for and protected by Article 223 CDADC in favor of the holders of copyright and related rights, as well as of the manufacturer of the database, except for computer programs.

They allow to follow the uses that are made of the work, service or protected product, functioning as watermarks. Art<sup>o</sup> 223<sup>o</sup>, n<sup>o</sup>2 defines them as all the information provided by rightsholders identifying the protected work, performance and production, information on the conditions of use of rights, and any numbers or codes representing that information. According to n<sup>o</sup> 3, protection shall cover all information for the electronic management of rights contained in the original or in the protected copies, or in the context of any communication to the public.

Its withdrawal is sanctioned with civil responsibility, in the general terms, and penal liability. As for the penalty, art<sup>o</sup>. 224 (a) and (b), also cover preparatory acts and attempts. The withdrawal of measures and preparatory acts shall be punished with an equal penalty of up to one year's imprisonment or a fine of up to 100 days. The attempt is only punishable by fine. Contrary to technological measures, withdrawal and preparatory acts are subject to the same penalty, although the attempt is still not punishable by imprisonment. It is required intention or awareness of the act not authorized (see art<sup>o</sup> 224<sup>o</sup>, n<sup>o</sup>1, which refers intentionally or have reasonable grounds to know).

Although the measures for the illicit information and management of data are not mentioned, which seems regrettable, they should not be protected in the light of the law on the protection of personal data in the field of cybercrime. We regret, however, that no reference has been made in the CDADC to measures of this kind which, when placed, take personal information from the computer or other hardware of the right holder. On the other hand, these measures can be used to prevent interoperability with other products, which will also be illegal and unplanned.

## 5. The InfoSoc Directive closed list of exceptions and limitations v. The US Fair Use

Contrary to what happens in the EU, in the US a general clause is used. Such clause is called Fair Use. It is an affirmative defence that the user of a protected work can use when being accused of violation of copyrights. He will have to prove that the use was fair.

Fair use is an expression created by the courts, now codified in Copyright Act of 1976, Section 107, that states: “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any case is a fair use the factors to be considered shall include—

(1)

the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2)

the nature of the copyrighted work;

(3)

the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4)

the effect of the use upon the potential market for or value of the copyrighted work.

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Sony's gaming consoles and Lexmark cases for printers are known to try to prevent the use of generic ink cartridges. These are situations which cannot be accepted in the light of the Community rules on competition law. In such situations there should be an expeditious way of withdrawing the device, so as not to fall into the delays and costs of traditional procedural forms.

But if the national legislator still made a failed attempt on technological measures, there is no concern in this area. Measures cannot be withdrawn unless in normal procedural ways, which will be highly detrimental to the user. Moreover, draconian measures such as those which, for example, in the market for computer games for a single player require a constant Internet connection for the player to be able to play and obtain updates, by connecting to the server of the rights holder, to control piracy, harms the interests of consumers in terms of costs, without much interest in companies, which would better prevent piracy by doing business otherwise. For example, selling at a cheaper price and adding value, providing upgrades at zero cost or at low prices. It is not by putting a draconian measure that is practically impeded the piracy, being certain that the true interested in the game always acquire it of licit form and are harmed. Consumers and competition law within the EU are those who are hit hard, without the draconian measure achieving its desired effect.

Besides the balance against users due to Technological Devices and Management an Information Systems, especially in the EU, because InfoSoc goes beyond what the two WIPO Treaties of 1996 predicted, there are much other facts that lead to an excessive protection.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

Thus, fair use demands from the courts a case by case analysis based on the four factors and others that the court may use. The commercial use is a circumstance that does not favour fair use; the greater creativity of the work or the fact that the work is less known, also does not favour fair use; if a large part of the work is used, this also does not favour fair use; the negative effect on the market and the economic value of the work are also factors to take in consideration.<sup>75</sup>The general clause of fair use seem much more flexible than the option of the InfoSoc Directive. But, on other side a closed list, duly reflected (not the one of InfoSoc Directive) seems much more predictable. Nevertheless, these stereotypes of copyright wars are exaggerated on both sides of its defendants.<sup>76.</sup>

In the EU more and more authors claim for a revision of the InfoSoc Directive, mainly because the system implies a delay of Europe regarding new forms of use in the digital era, as compared to what happens in the USA.

Nevertheless, the InfoSoc disastrous ruling, has not been decisive in this matter. Because, in the end, all depends of the way courts decide, there may be a broader interpretation, though EU does not have the general clause of fair use.

The European Court of Justice, in the Infopac case<sup>77</sup> decided that beyond the three-step rule, the exceptions and limits to copyright must be subject to a restrict interpretation, because the exceptions and limitations have the nature of exceptions to the rule of exclusivity of copyrights, which implies that there may not be analogue application and demands a restrictive interpretation. Nevertheless, in other cases, the Supreme Court of Justice and the national courts have done broad interpretations to the exceptions and limits, taking account its purpose. This leads to large insecurity in the EU.

The European Court of Justice, itself, two years after the Infopaq case, in the Premier League<sup>78</sup> case, made clear that it was very important to attend to the purpose of the exceptions and limitations, even within a strict interpretation, otherwise the exceptions and limitations wouldn't have a useful purpose. Thus, art<sup>o</sup> 5, n<sup>o</sup>1 of InfoSoc Directive had to make possible and grant the development of new technologies and maintain a fair balance between the rights of the users of new technologies, and of the rightsholders. The Court ruled that the reproduction acts done in the memory of a decodifyer of satellite and in one TV screen may be done without permission of the right holders and do not go against art<sup>o</sup>5, n<sup>o</sup>1 of InfoSoc Directive. Since this decision, national EU courts, namely in Germany in the case related to Thumbnails, that opposed an artist against Google, because of the Google Image Search. The

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<sup>75</sup> With further details see RENDAS, T., 2015, p. 29.

<sup>76</sup> About this “copyright wars” largely studied, see RENDAS, T., 2015., p.30 ff.

<sup>77</sup> InfoPaq, C-5/08, paragraph 56.

<sup>78</sup> Premier League, C-403/08 and C-429/08, paragraph 164.

Court, in a very broad interpretation, considered that the artist had given an implied consent because he uploaded the images to the net without using the possibility of blocking the automatic indexation by the search engine.<sup>79</sup> In France in the SAIF case also v. Google, the same was decided based in a different argument: the reproduction of the images on line has a temporary character and is part essential for the search engine to function<sup>80</sup> The same result was reached with the fair use clause in the USA, namely in the cases Kelly v. Arriba Soft Corporation, The use of protected images was considered fair because of the importance of the search engines<sup>81</sup> and in the Perfect 10, Inc. v. Amazon com Inc., also based in the public utility of the search engine<sup>82</sup>.

Relating Caching, in the USA, in the case Sony Corporation of America v. Universal City Studios, it was decided the recording of TV programs for further visualisation is fair use<sup>83</sup>.

The Supreme Court of Justice in the case Public Relations Consultants Association<sup>84</sup> maintaining that the InfoSoc list of exceptions and limitations of art<sup>o</sup> 5, <sup>o</sup>1, must be strict, it also must grant the development of new technologies and a fair equilibrium between the copyright holders and the users, thus the cache copies may be done without permission of the copyright holders.

In a similar case in the USA, the case Field v. Google, with the only difference that the unlike the former case, where the copies were in the cache memory of the computer, and in this case the copies were in the Google web Crawler (Googlebot), Google also won. The Court based its decision in fair use ruling and in Google's good faith, because it removed the caches of the website of Blake Field when Google took notice of the court action. On the contrary, Blake Field was clearly in bad faith because he didn't block the caching to sue Google. The Court also considered that the plaintiff didn't use meta-tags to prevent Googlebot to make the cache copies, which is the equivalent of an implicit license<sup>85</sup>.

In Spain, in the case Google v. Megatikin, the court went to far, and concluded that though it was not a case of temporary reproduction, the step rule has not only a negative interpretation value, but also a positive one, being a manifestation of the good faith principle, of the prohibition of abuse of law, and of the constitutional construction of intellectual property as a limited right. The strict interpretation of the limits and exceptions of InfoSoc Directive does

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<sup>79</sup> Bundesgerichtshof, I, ZR 69/08, of 29.04.2010). See RENDAS, T. 2015. pp. 31-32.

<sup>80</sup> Court d'Appel Paris, 26.01.2011, *apud* RENDAS, T., p.32 and footnote 46.

<sup>81</sup> Kelly v. Arriba Soft Corporation, 280 F. 3d 934( 9th Cir. 2002), analysed by RENDAS, T., 2015., p. 32

<sup>82</sup> Perfect 10 Inc, v. Amazon.com Inc.508, Fd 1146 (9th Cir.2007), analysed by RENDAS, T., 2015, p. 32.

<sup>83</sup> Sony Corporation of America v. Universal City Studios, Inc. 464, U.S. 417 (1984).

<sup>84</sup> Case PRCA, C-360/13.

<sup>85</sup> FIELD v. Google Inc., 412 E Supp. 2d 1106 (D. Nev.2006), mentioned and analysed by RENDAS, T., 2015., p.

not exclude these principles, leading to absurd solutions. Thus, the Court considered the uses of the search engine and of the cache service of Google allowed<sup>86</sup>.

Regarding downloads, namely by P2P (peer-to-peer) services, in the USA the act was considered illegal. Napster case, of 2001, is well known, but in that case, there was a central server. In 2005 in a peer-to-peer share, in the case *BMG Music v. Gonzalez*, the download by a private person, without, and not directed to the entity that furnishes the software that allows the access to the net, and without a central server, the same was decided in other cases<sup>87</sup>.

Curiously in EU countries, bounded to InfoSoc Directive, several cases of P2P downloads for private use have been considered lawful. In Portugal the Public Attorney as refused to present charges against 2.000 complaints of ACAPOR (Associação do Comércio Audiovisual de Portugal) , considering lawful the downloads for private use<sup>88</sup>. But the Courts don't decide always in this sense. So, in the end, it all depends of each court in a case to case basis.

The Supreme Court of Justice decided to condemn P2P downloads for private use in the *ACI Adam BV and others v. Stichting de ThuisKopie and others* case.<sup>89</sup>It was decided that a national legislation that does not make a distinction between downloads from a licit source or na unlawful one, may not be accepted. The Court decided in the same line as USA Courts.

Very unexpected was the decision of the Supreme Court of Justice in the case *Darmstad Technical University v. Eugen Ulmer KG*<sup>90</sup>. The Court goes against the strict interpretation of the exceptions and limits of InfoSoc Directive, making na interpretation based on the purpose of the exception or limitation in cause. The University allowed the digitalization of a book of Ulmer for the purpose of being consulted in the terminals of the library and allowing also the students to make copies in paper and download part or the whole book to a pen drive. In case was artº 5, nº3 al.n) of InfoSoc Directive. This allows the use of publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, by communication or making available, for research or private study, to individual members of the public by dedicated terminals on its premises of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections. The Court decided that the exception was with no interest if there wasn't the possibility of such establishments did not have an instrumental right of digitalizing the works in question. This goes directly against the three-step rule,

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<sup>86</sup> Tribunal Supremo, Sala Primera de lo Civil, Sentencia 172/2012 of 3.04.2012, mentioned and analysed by Rendas, T., 2015., p. 33.

<sup>87</sup> Cf. *AGM Records Inc. v. Napster*, 239 E3d 1004 (2001); *BMG Music v. Gonzalez*, 430 E3d (7th Cir. 2005). In detail see RENDAS, T., 2015, pp. 33-34.

<sup>88</sup> Decision nº 6135/11.7TDLSB, of 20.07.2012.

<sup>89</sup> *ACI Adam*, C-435/12, paragraph 37.

<sup>90</sup> Case *ULMER*, C-117/13, paragraph 36.

because Ulmer had books to sell. Nevertheless, the digitalization, not of the whole collection of the library, but of specific acts of reproduction ought to be allowed. The answer to this question, submitted to the Supreme Court of Justice by the Bundesgerichtshof, to us, was totally unexpected. But the fact that the Court decided that not the whole collections could be digitalized, prevented the use this decision to open the door to the digitalization of works of the library, namely orphan works<sup>91</sup>. Thus, the Directive 2012/28/EU of the European Parliament and of the Council, of 25.10. 2012, on certain uses allowed of orphan works.

USA Courts have a much larger interpretation. US District Court for the Southern District of New York, in its decision of 14.11.2013, allowed the non-authorized digitalization of millions of works, within the Google Books Project, basing its decision in de fair use doctrine. The Court considered that Google transformed text in a word index, with cultural purposes, notwithstanding the commercial aim of the company. The Court compared Google Books with the bookshops shells, both with the aim of making the works and authors known to the public and to attract buyers. This decision as a straight relation to the orphan works Directive, because EU couldn't stay being the digitalization process. Nevertheless, the European Union could go far beyond, following this decision of the Supreme Court of Justice, and allowing the digitalization of all works that stay years long in a grey zone, namely in the deposits of libraries, and that are very seldom sold. We think that in those cases the exclusive right ought to be replaced by a simple remuneration right: the work could be used, namely digitalized, and an amount of money ought to be paid to the rightsholder. This seems to us a much better solution than the one opened by the Ulmer case<sup>92</sup>.

## Conclusions

The copyright wars, of authors and courts defending a general clause like the fair use one, in other for Europe not to stay behind de USA, and others defending a strict closed list of exceptions and limitations, will remain, with arguments of both sides. Nevertheless, we consider the InfoSoc Directive a total error, in the way the exceptions and limitations were legislated, as well as protection measures and rights management information. Not only there is no harmonization, but there is also no definite regulation. What happens is that the ultimate decision is of the courts, that don't have the same interpretations of the exceptions and limitations, sometimes the interpretation goes too far, sometimes it is too narrow. One never knows. In USA as in EU courts have the last word. But while in USA there is the precedent principle, that doesn't happen in Continental Copyright and Related Rights. Thus, the problem in EU is that there is a much greater level of uncertainty<sup>93</sup>. And we can observe

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<sup>91</sup> RENDAS, T., 2005, p. 35, in a different interpretation, says the Court does not close the door to the digitalization of the whole of the library collections.

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<sup>93</sup> See RENDAS, T. 2015., pp. 38-39 and bibliography mentioned by the author.

that certain court decisions go openly against InfoSoc Directive. We defend a solution closer to the USA fair use.

Because of this lack of security, and because of the way InfoSoc exceptions and limitations were ruled, we think that in the EU there should be a solution closer to the fair use USA solution. Europe could adopt a general clause like the fair use one, solution that we believe is the best, or establish an equilibrate interpretation of the three-step rule, it could also allow analogy when the same interests meet, and the situation is not in a list of limits and exceptions. It is important to approach the court decisions from the law, which will not happen if this issue is not properly addressed.

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# **Language pitfalls in the EU legislation and how to deal with this challenge**

**NANTERRE Network**

**COLLOQUIUM**

**LAW AND INTERCULTURALISM**

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Giorgio Gallizioli<sup>94</sup>

## *1. Introduction.*

This paper is intended to identify the legal difficulties posed by the use of an ever-increasing number of languages in European Union (EU) legislation. It does not focus on the rulings of the European Court of justice (ECJ) issued following a request for interpretation of ambiguous EU law provisions. A large literature analysing the ECJ's case-book on this topic is available.

It rather illustrates the procedures and techniques adopted by the EU Institutions to lessen the risk of adopting legal texts containing unclear terms.

After having recalled the main features of the EU law-making process and the rules on the use of the languages involved, the paper will give some hints on how the EU Institutions tackle the problem of linguistic divergences amongst the different versions of the same legal texts and will draw some short conclusions.

## *2. The EU's unique linguistic regime.*

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<sup>94</sup> Former adviser at the European Commission. Views expressed in the article are solely those of the author.

The Treaties on European Union are published in 24 languages, drawn up in a single original deposited in the archives of the Government of the Italian republic. These languages are: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

Each of these languages is equally authentic<sup>95</sup>, i.e. equally authoritative.

The same 24 languages are the official languages and the working languages of the EU Institutions<sup>96</sup>. As a consequence, regulations and other documents of general application shall be drafted in all those official languages.

The Official Journal of the European Union is currently published in 23 languages.

This situation is quite unique as the biggest international organisations in the world have generally 3 to 5 authentic languages.

It is obvious that the more languages are in use, the more difficult it is to ensure all versions are consistent.

Could the European Union have decided otherwise and given predominance to a limited number of languages?

Yes, certainly. The Treaty establishing the European Coal and Steel Community (ECSC) stated that the only authentic language should be the French (Art.100)<sup>97</sup>.

It is worth recalling that the Six founding countries which established in 1957 the European Economic Community (now the European Union), i.e. Belgium, Federal Republic of Germany, France, Italy, Luxembourg and The Netherlands used four languages only.

In 1972 a further 4 languages were added (English, Irish, Danish and Norwegian), and other languages were also added at every subsequent enlargement, until the number of 24 authentic languages was reached with the accession of Croatia. This number could even be increased in case of accession of the currently recognized or potential candidate countries to EU membership, which are Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo<sup>\*98</sup>, Montenegro, Serbia, and Turkey.

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<sup>95</sup> Art.55 Treaty on European Union (TEU), consolidated version. Art.55 TEU applies also to the Treaty on the functioning of the European Union (TFEU), see Art.358 TFEU.

<sup>96</sup> Some limitations apply for the Irish until 2021.

<sup>97</sup> This Treaty expired on July 2002.

<sup>98</sup> As is known, the status of Kosovo as an independent State is disputed.

The reason why the national languages of each State Member of the EU are authentic and should be used by the European Institutions is based on the fundamental principle of the respect of the “cultural and linguistic diversity”<sup>99</sup> of people combining the Union. This principle is enshrined in Art. 3.3 TEU and Art.22 of the Charter of Fundamental Rights of the European Union (Charter).

In fact - and this is a remarkable difference compared with other international organizations –EU legislation has a direct impact on European citizens. In plain terms, EU provisions create directly rights and obligations without the need of transposition into national law.

Moreover, Art.41.5 of the Charter stipulates that “Every person may write to the institutions of the Unions in one of the languages of the Treaties and must have an answer in the same language”.<sup>100</sup>

Those rules imply that every citizen shall be able to read and understand EU legislation in an easy and plain way and is entitled to address the Institutions using his/her national language.

### 3. ECJ special rules.

The rules applied for the procedure before the ECJ are peculiar.

Any of the 24 official languages may be the language of the case before the ECJ, that is to say the language in which the proceedings will be conducted. The language is chosen, in principle, by the applicant. However, if a Member State is defendant, that State's official language is automatically the language of the case. Moreover, in preliminary ruling proceedings where a legal question on EU law is submitted by a national court, the language of the case is the language of the referring court or tribunal.

What is particular to the CJEU procedure is the exclusive use of French as its internal working language. It is therefore in this language that the hearing is prepared by the judge rapporteur, and that all judgments are drafted, revised and finalised, before being translated into the language of the case (which is the legally authentic version) and all other official EU languages.

The ECJ is tasked with the interpretation of provisions of EU law, in particular when the meaning of concepts or terms used by the legislator gives rise to doubts (Art.19 TEU and 267 TFEU). We can avail ourselves of a rich case-law as regards the interpretation of terms used

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<sup>99</sup> The knowledge of foreign languages is fostered by the *European Strategy for Multilingualism*.

<sup>100</sup> The Code of Good Administrative Behaviour for staff of the European Commission in their relations with the public, annexed to the Rules of Procedure, provides that the Commission must reply to letters from citizens in the language of the initial letter, provided that it was written in one of the EU's official languages.

by the EU legislator, precisely because of the multilingualism of the EU. However as the judges struggle with the difference between the semantic and teleological approaches and the principle of linguistic equality, they do not necessarily attain a satisfactory result.

Hence the necessity to avoid ambiguity to a maximum extent prior to the adoption of a legal text.

#### 4. *EU secondary legislation.*

Not surprisingly, the very first Regulation issued by the European Economic Community (EEC) was the one determining the languages to be used by the EEC. In Art.4 of this Regulation it is stated that “*Regulations and other documents of general application shall be drafted in the four official languages*”.<sup>101</sup>

This Art.4 has been regularly amended following the adoption of the Act of accession of new Member States. It lists now the 24 national languages that we have named above.

Such a linguistic complexity entails a significant risk of misunderstanding and discrepancies between different language versions. It can bring about serious consequences as these texts are binding provisions creating rights and obligations. It can entail significant financial consequences for States or individuals, e.g. in case of disagreement on the interpretation of provisions in a given language relating to the admissibility of disbursement of sums under the common agricultural policy or the structural funds, as has often occurred in the past.

#### 5. *Procedures aimed at reducing the risk of uncertainty.*

Beside the case of a legal text that raises doubts as to the intended meaning in all languages, the situation on which we are focusing in this paper concerns the uncertainty as regards the interpretation of terms in one or more linguistic versions.

In such a case, the difficulty may be the consequence of an error occurring during the translation process. We shall therefore take a closer look at the EU Institutions’ translation machinery.

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<sup>101</sup> In *OJEU* 1958, p.385. A similar provision is contained in Art.4 of Regulation n.1 « *portant fixation du régime linguistique de la Communauté Européenne de l’Énergie Atomique* » in *OJEU* 1958, p.401. Art.342 TFEU states that the Council, acting unanimously by means of regulations, shall determine the rules governing the languages of the Institutions of the Union.

The starting point of the whole law-making procedure is obviously the drafting process. “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise”<sup>102</sup>.

The initial preparatory work for legislative proposals is thus in the hands of European Commission officials, who are experts in a technical sector but are not necessarily lawyers, nor specialists in legislative matters or having a substantial linguistic background.

In addition, the drafter often uses a language (usual English<sup>103</sup>) that is not necessarily his mother tongue<sup>104</sup>. Once a Directorate-General responsible for the initiative has formulated its first draft of the legislative proposal, it submits it for comment to the other DGs concerned as part of the Inter-Service Consultation, which is designed to ensure that the Commission works in an effective and coordinated manner. The Commission Legal Service must be consulted on all drafts or proposals for legal instruments and on all documents which may have legal implications<sup>105</sup>.

The formal quality of the draft is checked by the Legal Revisers in the Legal Service’s Quality of Legislation team.

Because there is a need to take due account of comments and suggestions expressed by consulted departments, the original draft undergoes several amendments before it reaches the college of Commissioners to be finalized and approved.

Before transmission to the Parliament and the Council for examination and eventually adoption, each proposal for a legislative act must have been translated into all the official languages.

The same rule applies as regards any legal acts to be addressed to all Member States.

Given the paramount importance of quality drafting as a precondition for accurate translation, the EU Institutions encourage their legal drafters to follow the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*<sup>106</sup>. This guide provides instructions aimed at

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<sup>102</sup> Art.17.2 TEU.

<sup>103</sup> Nowadays the large majority of Commission drafters write mainly in English. The impact of the “Brexit” on the use of the language is under evaluation. Whether English will remain in any case an EU official language, since it is used by Ireland and Malta is debatable as the Reg.n.1, *cit.*, refers to “language recognized as an official languages”, while Ireland and Malta have another official language.

<sup>104</sup> See EP, *Drafting European Union legislation*, 2012.

<sup>105</sup> “The agreement of the Commission to a proposal by one or more of its Members may be obtained by means of a written procedure, provided the Directorates-General directly involved are in agreement and the proposal has been endorsed by the Legal Service”, Art.12, Rules of procedure of the Commission, in *JOEU* n. L.208/2000, p.26.

<sup>106</sup> Latest edition 2015. See also EC, *Legislative drafting. A Commission Manual*, 1997.

ensuring that the legal acts are drafted clearly and precisely. In fact, only under these conditions can EU legislation be correctly understood and properly implemented.

To be comprehensible for everyone, provisions shall be clear, precise and unambiguous. Legal certainty requires that every reader has no doubts as to the rights and obligations resulting from the text.

The translator's task is greatly facilitated when he works from an original draft that is clearly structured and exempt from ambiguous terms. Of course, the translation of legal texts is particularly complex as attention shall be paid not only to lexical aspects but also to national legal culture which may or may not have similar legal concepts.

#### *6. The quest for quality drafting.*

The awareness that EU legislation was becoming too complex reached the highest political levels of the EU. In 1992, the European Council declared: "We want Community legislation to become simpler and clearer"<sup>107</sup>. This move led to a Council resolution on the quality of drafting of Community legislation, where was set, as the top criteria, that "the wording of an act should be clear, simple, concise and unambiguous"<sup>108</sup>. In 1997, the Amsterdam Intergovernmental Conference adopted Declaration No 39 on the quality of the drafting of Community legislation. It states in particular that the quality of the drafting of Community legislation "is crucial if it is to be properly implemented by the competent national authorities and better understood by the public and in business circles".

In 1998 the European Parliament, the Council and the European Commission adopted an Interinstitutional agreement on common guidelines for the quality of drafting of Community legislation<sup>109</sup>. The three Institutions stressed that "legislation must be clear and precise and its application foreseeable by individuals. That requirement must be observed all the more strictly in the case of an act liable to have financial consequences and imposing obligations on individuals in order that those concerned may know precisely the extent of the obligations which it imposes on them."

The pursuit of a clearer legislation moved progressively towards the goal of simplifying EU law through a series of EC initiatives, the first being the "Better Regulation" programme and the most recent one the REFIT<sup>110</sup>. The trimming of the administrative burden on enterprises

<sup>107</sup> See *Birmingham declaration*, p.3.

<sup>108</sup> Council Resolution 8.6.1993, in *OJEU*, C n. 166/1993, p.1.

<sup>109</sup> In *OJEC* C n.73/1999, p.1.

<sup>110</sup> The Regulatory Fitness and Performance Programme (REFIT). See EC, COM(2012)746. The EP stressed the need for a change when it adopted the *Resolution on the Commission White Paper on European governance* where it was pointed out that "Better law-making must become part of public administration 'culture' at all levels in the European Union, and must also encompass the implementation of laws and rules by Member State authorities; this will require effective and appropriate information and training of officials, both at European level

brought about by regulations now deemed unnecessary and rules considered unclear became the predominant stimulus to obtain a more accessible and clearer EU law-book<sup>111</sup>.

To this end, the three EU Institutions signed the interinstitutional agreement on “Better Law-Making”, renewed in April 2016, where the Institutions agree to promote “simplicity, clarity and consistency in the drafting of Union legislation” and to promote the utmost transparency of the legislative process as well. The Institutions also restated that that “Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement”<sup>112</sup>.

### 7. *Better, smart and above all less legislation.*

The initiatives for a “EU Better Regulation” and for a “Smart Regulation<sup>113</sup>”, were launched by the Barroso Commission in 2004 and brought further ahead by the Juncker Commission. These initiatives aimed at streamlining the law-making process by avoiding needless provisions and repealing obsolete or ineffective rules.

If the declared goal was to reduce administrative burdens and make legislation more accessible, it brought about as side effect a significant reduction in the number of legal acts contained in the *Directory of European Union legislation in force*. It was indeed noted that hundreds of legal acts were still included in the *Directory*, although they were in fact obsolete. In order to remove these acts from the law-book, formal legal acts were needed with the sole objective of repealing the text.

The Commission also took stock of the fact that “The European Union has frequently been criticised – often rightly – for producing excessive and badly written regulation and for meddling in the lives of citizens or businesses with too many and too detailed rules”<sup>114</sup>.

The Commission hence adopted the initiatives referred to above which are intended, on the one hand, to restrain the production of new legal acts (mainly through the filter of an Impact

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and at national, regional and local levels, in order to guarantee decentralised administration and ‘Europe-friendly conduct’ at all levels”, in *OJEU*, n.C 153E/2002, p.314, point 38.

<sup>111</sup> A first initiative has been the SLIM (Simpler Legislation for Internal Market) “The broad objective [of SLIM] is to streamline the operation of the Internal Market by identifying ways in which relevant legislation can be simplified and improved. The focus is on those provisions which give rise to excessive implementation costs and administrative burdens, diverging interpretations and national application measures and difficulties in application”, in EC, *Review of SLIM : Simpler Legislation for the Internal Market*, COM(2000)104.

<sup>112</sup> In *JOEU*, n.L 123/2016, p.1.

<sup>113</sup> EC, *Strengthening the foundations of Smart Regulation – improving evaluation*, COM(2013)686.

<sup>114</sup> EC, *Better Regulation: Delivering better results for a stronger Union*, COM(2016)615, p. 2.

Assessment of any major proposal) and, on the other hand, to revise and reorganise the EU “acquis<sup>115</sup>” by making use of legislative techniques, such as:

- codification: all amendments made to a piece of legislation over the years are incorporated into a single new act, reducing volume and complexity;
- recasting: similar to codification, but in this case the legislation itself is amended at the same time as previous amendments are incorporated to form one consolidated text<sup>116</sup>;
- repeal: unnecessary and irrelevant laws are removed from the EU “acquis”;
- withdrawn: when a proposal lacks sufficient political support;
- insertion of a review/sunset clauses: so that laws are reviewed or automatically removed after a given period;
- soft law: instead of legally binding laws, to opt for voluntary agreements (self-regulation).

In this context, we can also recall the technique of using definitions. Often legal texts provide the reader with a list of definitions, which are deemed to facilitate the understanding of the provisions of that specific text, as is clearly indicate in the formula “For the purpose of this Regulation/Directive/Decision, the following definitions apply:”. Therefore, it would be misleading to refer to a definition given in a specific legal text when interpreting another text. In fact, often the meaning of a definition in a legal text is not equivalent to the “meaning in everyday language”. We have an easy example at hand. We know what a fisherman is. EU law has however a stricter definition since a person could be considered a fisherman (and be admitted to benefit of EU grants) only if he/she is engaged in professional fishing on board an operational fishing vessel, as recognised by the Member State<sup>117</sup>. But why should those fishing ashore or from a snow sleigh on an iced lake or those gathering molluscs on a beach not benefit from certain financial supports? It took decades to adapt the terminology so that nowadays a fisherman is any person engaging in commercial fishing activities, as recognised by the Member State<sup>118</sup>.

### *8.The translation machinery.*

As we have seen, the translation of a proposal into the other official languages is of

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<sup>115</sup> “Acquis”, previously “acquis communautaire” is a French word which stands for: the body of common rights and obligations that are binding on all EU Members; the principles and political objectives of the Treaties; the EU legislation ; the case law of the ECJ; the declarations and resolutions adopted by the EU; the measures relating to the common foreign and security policy; the measures relating to justice and home affairs; the international agreements concluded by the EU and those concluded by the EU countries between themselves in the field of the EU's activities. The countries that intend to adhere to the EU shall accept the “acquis”.

<sup>116</sup> Not to be confused with the consolidated texts prepared by the EU Publication Office which are only documentation tools and are not binding texts.

<sup>117</sup> See, *i.a.*, Reg.1198/2006 Art.3b, in *OJEU* n.L 223/2006, p.1.

<sup>118</sup> Reg.508/2014, Art 3.2(6), in *OJEU* n.L 149/2014, p.1.

paramount importance. Translation should be accurate to the maximum possible extent. In order to minimise the risk of mistakes, the Institutions have set up entities tasked to ensure precise translation and adopted tools and procedures for quality control.

Given the number of the languages in use, it is not surprising that the translation services of the EU institutions are the largest in the world in terms of size and variety of languages. In addition, given the broad competences of the EU, translation services cover a large number of themes. Some 2 million pages are translated each year into 24 languages.

With some 2500 staff, the Directorate-General for Translation (DGT) is pivotal in ensuring that all language versions convey the same meaning. This task is essential to guarantee the legitimacy and the transparency of EU law.

Translation is also essential to allow European Institutions staff to read, understand and monitor the correct application of EU legislation.

In addition to the DGT, a Translation Centre for the Bodies of the European Union (CDT) was created in 1994 to match the translation needs of European agencies and offices.

Translation nowadays relies more and more on computer-based tools and database. "Interactive Terminology for Europe" (IATE) is the biggest terminology database in the world today. It contains 8.4 million terms, including 540.000 abbreviations and 130.000 phrases, and covers all official EU languages<sup>119</sup>.

It is a fundamental means to ensuring uniformity in the translation of words into the other languages.

The Translation Quality Guidelines give indications to the translator on how to attain quality translation. It specifies for instance what shall be intended for revision ("bilingual examination of target language content against source language content for its suitability for the agreed purpose") and for review ("monolingual examination of target language content for its suitability for the agreed purpose").

Once translated, a text undergoes a revision carried out by a person other than the translator. Further checking may be needed in case a wording or a legal concept is unfamiliar to the translator who therefore seeks the help of a native speaker.

Booklets with tips on clear writing are regularly produced by the Translation services aimed at alerting drafters to "false friends" and words that can be the cause of ambiguity, such as "notably", "eventually", "until", "where applicable", etc., when translated into other languages

## 9. Procedure at Commission level.

When a document is ready for Commission approval, language versions should be

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<sup>119</sup> It replaces Eurodicautom, created in 1975. The Commission also runs EURAMIS (European advanced multilingual information system) the EU's inter-institutional translation memory repository. It contains every single sentence that has been ever translated in the history of the whole European Union in every available language. This totals over 700 million sentences or 10 billion words.

available<sup>120</sup>.

Without entering into details of the procedure of no importance in the present analyses, it should be noted that the main rules adopted by the Commission when it deliberates as regards documents submitted for approval, pursuant to Art.4 of *Rules of procedure of the Commission*<sup>121</sup>, is that they shall be delivered in the working languages<sup>122</sup>.

The EC conducts its internal business in three ‘procedural’ (working) languages (English, French and German) for practical considerations<sup>123</sup>.

Once adopted by the European Commission, the text shall be transmitted to the European Parliament and the Council for examination and eventually adoption<sup>124</sup>. The proposal is accompanied by an “Explanatory Memorandum” which resumes the goals pursued by the Commission with the proposal.

#### 10. Procedure in the EP and at Council level.

Obviously the text of a proposal as adopted by the EC, in particular if it deals with politically-sensitive matter, is subject to amendments during the examination and until its formal adoption. As we know, the EC has the right of initiative but the legislators are the EP and the Council, with the exception of those texts under the remit of the EC.

The linguistic regime at the EP is similar to that of the other institutions<sup>125</sup>. But the EP President is entitled to decide in case of discrepancies<sup>126</sup>.

At Council level in case of doubts regarding the terms used, the Council’ services seek an agreement with the Member State’s representative. This is part of the procedure: before reaching the political level in the Council for final adoption, the linguistic versions are examined in the so-called Mertens Group which is in charge of the preparation of the COREPER I<sup>127</sup> where the Member States are able to lodge linguistic reservations<sup>128</sup>. This is the point where Member States contribute to the drafting process with linguistic

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<sup>120</sup> There is an incentive to produce short, concise documents (less than 20 pages) because they are a priority in translation.

<sup>121</sup> In *OJEU*, n.L 308/2000, p.26

<sup>122</sup> EC, *Simplification and rationalisation of the language process in Commission decision-making procedures*, SEC(2001)2031.

<sup>123</sup> See Art.6 Rules of procedures of the Commission.

<sup>124</sup> It may also be transmitted to the Committee of the Regions and the European Economic and Social Committee for opinion, pursuant to the relevant Treaty provisions.

<sup>125</sup> “All documents of Parliament shall be drawn up in the official languages”, EP, *Rules of procedures*, 2017, Art.158.1.

<sup>126</sup> “After the result of a vote has been announced, the President shall rule on any requests concerning alleged discrepancies between the different language versions”, Art.158.5. EP, *Rules of procedures*, cit..

<sup>127</sup> Comité de Représentants PERmanents.

<sup>128</sup> According to Art.14 of the Council’s rules of procedure (Dec. 2009/937) in *OJEU* n.L 325/2009, p.35), “Except as otherwise decided unanimously by the Council on grounds of urgency, the Council shall deliberate and take decisions only on the basis of documents and drafts drawn up in the languages specified in the rules in force governing languages”[i.e Reg.n.1]. Moreover “Any member of the Council may oppose discussion if the texts of any proposed amendments are not drawn up in such of the languages referred to in paragraph 1[i.e. the official languages] as he or she may specify”.

comments<sup>129</sup>. At this stage, mistakes may occur but not necessarily unintentionally.

At the end of a lengthy and complex process, during which many participants have a word to say and where the EU Institutions' services and the rotating Presidency are often compelled to make compromises in order to attain majority support, if not the totality of the Member States, unsurprisingly the text finally published in the Official Journal may differ on points of substance but also terminologically, from the one drafted by the Commission's services.

Once formally adopted, the 23 official versions are sent to the Publications Office of the European Union with a view to its publication in the *Official Journal*.

If after the publication in the Official Journal linguistic mistakes are spotted in the text, different situations may occur. In case of a patent error, a corrigendum for the linguistic versions concerned by the mistake, published in the OJ, will suffice. Conversely, if the error is not manifest, then there is a need to adopt for the concerned versions a correcting act, following the same procedure used for the act containing the mistake. In this case, attention should be paid to the legitimate expectations of those concerned which has a bearing on the date of entry of the correcting act.

#### 11. *Can the risk of uncertainty be reduced?*

We have seen that despite the efforts to avoid uncertainties, legal texts may still contain terms that create ambiguities in certain linguistic versions. We have also considered that the objective to reach compromises needed for the sake of finalizing the law-making process and have the text adopted may be conducive to unclear wording.

The ECJ is the body tasked, when requested, to issue interpretation of a Union legal text. Unfortunately, multilingualism makes interpretation a particularly difficult task.

Scholars have studied the criteria applied by the Court of justice when requested to rule on the meaning of a provision and have commented on its jurisprudence swings<sup>130</sup>. Many underline that the case law does not contribute towards the predictability, i.e. the possibility to foresee the outcome of the case, which is an essential aspect of legal certainty.

The basic principle of uniform implementation of a provision throughout the EU is hard to ensure nowadays in the presence of 24 versions. In fact, only a legal action could unveil a case of a different interpretation of the same provision in one or several Member States. This situation can be to the advantage or disadvantage of a given Member State, a business or the citizens. The ECJ's approach to ensure uniform interpretation is essential as it is the expression of the non-discrimination principle. However, it should be counter-balanced by

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<sup>129</sup> EC, *Study in lawmaking in the EU multilingual environment*, 2010, p.22.

<sup>130</sup> For the need of this text it is not necessary to recall the different criteria adopted by the Court of justice, namely the linguistic, the systemic and the teleological approach. See, *i.a.*, PAUNIO E., LINDROOS-HOVINHEIMO S., *Taking language seriously: an analysis of linguistic reasoning and its implication in EU law*, in *European Law Journal*, July 2010, p.395.

the need to protect the legitimate expectations of the citizen who trusts his or her own language version, that it is an authentic version as well.

Future difficulties are deemed to increase with the inclusion of other languages resulting from the likely accession of new countries to the EU. The fact that these languages are used by relatively small populations does not reduce the risk of ambiguity. On the contrary, since those are lesser known languages, mistakes can be overlooked more easily.

It is alarming to note that even Reg.n.1/1958 stating the Institutions' linguistic regime is tainted with ambiguity. This indeed poses a political difficulty nowadays. As we have seen, there was no original English version of this Regulation since the UK joined the EU in 1972. The question arises now whether a Member State — and we refer obviously to Ireland or Malta<sup>131</sup> which use English — can have more than one official language. Ireland and Malta declared respectively Irish and Maltese as their official language (since English had already this status). The wording of Reg.n.1 in its different versions allows opposite conclusions as regards the possibility to allow more than one official language. It should be recalled that Irish and Maltese are the official languages of these two countries.

## *12. Some conclusions.*

Notwithstanding every effort to improve quality control and to equip the services with the most advanced technologies, it seems “mission impossible” to prevent any possible legal uncertainties in presence of 24 authentic versions of the same text<sup>132</sup>.

Mistakes can go unnoticed or emerge years after the entry into force of the text, generally when a national judge seeks clarification from the EJC or in the course of a dispute between the EC and a Member State which holds a different view on the interpretation of a given provision.

The reduction of the EU body of law through the simplification initiative can indirectly eliminate possible uncertainties as well as the EC self-restraint policy in producing legislation.

A drastic solution would be to reduce the number of official languages used for secondary legislation. This move is legally possible, though it requires unanimity. However, it would run counter to the fundamental principles of equality and the prohibition of discrimination as regards languages which are incorporated in the EU treaties.

In short, despite the problems involved, the EU Institutions acknowledge the importance of

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<sup>131</sup> “...Every law shall be enacted both in the Maltese and English language and, if there is any conflict between the Maltese and the English texts of any law, *the Maltese text shall prevail*” Art.74 of the Constitution of Malta.

<sup>132</sup> According to SCHILLING T. “no two texts in different languages will ever have exactly the same meaning”, See EP, *Legal aspects of EU multilingualism, Briefing*, January 2017.

multilingualism for the achievement of European integration and consider that it outweighs the administrative inconvenience, delays and costs inherent in having to work in the official languages of all 27 (for the time being) Member States<sup>133</sup>.

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<sup>133</sup> See EC, *Multilingualism: an asset for Europe and a shared commitment*, SEC(2008) 2444.

**Quo Vadis: Cultural conflict between the public, private, social and  
cooperative sectors**  
**or**  
**On the way to a cultural and legal blurring of their autonomy?**

Rute Saraiva<sup>134</sup>

**1. Introduction**

Historically, socially and economically and therefore legally and academically, the difference between the public, private and Third Sectors has been recognized and emphasized. The Third Sector, sometimes referred to as nongovernmental or nonprofit, has, none the less, survived the dynamic and ideological tension between the public and the private sectors and, in the last decades, has prospered with both the crisis of the Welfare and of the Neoliberal State with the exponential growth of its organizations. Nevertheless, global cultural changes, the penury of public finances, followed by a massive delegation of State functions, the competition for financial resources, reputation issues and the active threat of terrorism and fraud in a context of asymmetric information have pushed for a call of hardening the regulation of the Social Economy entities. Refusing what they consider to be public interference and a loss of their autonomy and identity, the Third Sector organizations (TSO) fight back with self-regulation proposals and also with changes in their inner structure and procedures by “privatizing” them. Moreover, the simultaneous process of “publicizing” and “marketizing” of their funds assists their struggle but paradoxically blurs their nature. A similar phenomenon happens with the public and private sectors with an increasing institutional and means convergence. Hence, in this changing context, why should more and more alike institutions present different legal frameworks which might hinder competition and the efficient and fair provision of goods and services?

To answer this question, we firstly look at the delimitation of the Third Sector and then the process of convergence between the three productive sectors and their organizations, before we conclude.

**2. Looking for the Third Sector**

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<sup>134</sup> University of Lisbon, Law School.

TSO have been shaped around the world by different traditions:

- i. Philanthropy (*e.g.* charities, the community sector), which is particularly influential in the United Kingdom and Ireland;
- ii. Civic commitment to the entire community, aiming to foster equality and democracy. It prevails in Scandinavian countries;
- iii. The principle of "subsidiarity" has been central, chiefly with respect to Church related initiatives, in countries such as Germany, Belgium, Ireland and the Netherlands;
- iv. In several countries the cooperative movement was closely linked to the development of the voluntary sector, either through a common civic background fostering participation and democracy (as in Denmark and Sweden), or through a common religious inspiration (as in Italy, Belgium and France);
- v. The role assigned to the family in countries such as Spain, Portugal, Greece and Italy has also played a major influence on the pace of development of the Third Sector, particularly regarding the provision of personal services (*e.g.* childcare, elderly care).

These several historical roots help explaining the multiplicity and diversity found in the Third Sector and even the difficulty in delimitating and denominating it.<sup>135</sup> Indeed, manifold terms are used to describe it such as nonprofit sector, nongovernmental sector, Third Sector, third system, Social Economy, solidararian economy, civil society, social institutions, alternative economics, signalling the struggle to accurately define and to distinguish it from other productive and economic realities. After all, it presents dissimilarities in origins, aims, instruments, size, composition, structure, financing and role across the globe. On the other hand, legal definitions are normally confined to a specific kind of institution or sector (ex. cooperatives, associations, religious institutions...) and there seems to be a lack of a real transversal pre-legal description although some characteristics and key-elements can be deduced from soft and hard legal instruments. As a result, in Common Law countries, TSO are tied to charity and non-profit rationality and in continental Europe to a fuzzier reason attached to an institutional approach based in tradition and in legal recognition.

The Third Sector exists clearly as an intermediate sector, which is intimately interrelated with the State, private for-profit companies and the informal sector. Hence:

- i. The importance of the social and political role of TSO, which are otherwise usually only recognized for their economic role as alternative service providers;
- ii. The intermediating role of TSO, in relation not only to States and markets, but also to the informal or community sphere;
- iii. The synergetic mixes of resources and rationales available to TSO, rather than a substitution or assimilation process between clear-cut sectors;
- iv. The recognition of the enormous variety of ways in which intermediary organizations act as hybrids, intermeshing different resources and connecting with diverse areas,

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<sup>135</sup> For all, NAMORADO, R., 2006.

which therefore underlines the limits of attempting to map precisely the Third Sector and to assess its accurate size.

Its characteristics are shaped by and simultaneously shape the respective influence of State institutions, market actors, the informal sector and families. A constant tension emerges at the borders separating the market, State and informal areas. Also, may we detect conflict between the instrumental rationality of the market, which is oriented to the maximization and distribution of profits, and the solidarity-based, social and democratic values of both the Third Sector and the State. Additionally, pressure related to State institutions and their universalistic values in contrast with the particularistic logic of most private actors arises. Furthermore, the tension extends between formal organizations and the informal worlds, thereby making it harder to draw a clear line between the latter and the Third Sector in areas of help and self-help.

Besides tensions, also overlapping occurs between:

1. The Third Sector and the market, which suggests that some social “corporations”, such as cooperatives and the so-called "social enterprises", do fully operate in the market and seek profits while adopting rules of conduct different from those of typically capitalist companies;
2. The State and the Third Sector, for example with quasi-public entities where nonprofit organizations are explicitly given official public responsibilities in terms of defining and implementing public policy and often comprise the nexus of networks of public and private bodies with strong mutual interest in regulating a certain field;
3. The community and the Third Sector, for instance a variety of mutual-aid and self-help groups or the backing of individuals who are not necessarily members of the institution but who still contribute with their time and/or money to carry its activities and to help it achieve its goals.

These overlays will be explored during this paper but we can advance, concerning interactions and partnerships with the State, that, in several countries, public authorities have historically supported the voluntary sector as a service provider, on the basis of the subsidiarity principle, while in other countries, like in Scandinavia, the State chose to act as the main - if not the sole - social services provider. But transformations of the Welfare State in recent decades led to drastic changes in the relations between the Third Sector and public authorities. New types of partnerships were set up, with the State progressively focusing on its regulatory function and outsourcing the delivery of personal services. The State did not only recognize and support existing or emerging civil society initiatives, it also occasionally took the lead in shaping and fostering voluntary organizations according to its priorities. This evolution in the (at times close) interactions between the Third Sector and the State has tended to blur the boundaries between both spheres and between public and civic responsibilities.

On the other hand, the Third Sector has become gradually associated with its productive role, especially as a service provider, and has to compete in the market with private and public providers. This asks for professionalization and more specific education and management. Nevertheless volunteering is increasing or remains at high levels. Then effectively we witness a higher emphasis on the economic dimension of the Social Economy with business-like methods and strong social enterprise promotion strategies that may cause tensions with the private sector and between production-oriented entities and others more focused on civic commitment.

However, some specific structural and organizational characteristics can be pointed out for TSO, helping to describe and define them:

- i. Organization, *i.e.* they have some structure and run regularly their operations (ex. meetings, members, and decision-making procedures), whether or not formally constituted or legally registered;
- ii. Private, *i.e.* they are institutionally separated from the government, although they may receive its financial support<sup>136</sup>;
- iii. No distribution of profit (or public benefit in a large sense), *i.e.* not (for starters) commercial in their purpose and no distribution of profits to the directors, “associates” or managers. These civil society entities can generate profits in the course of their operations, yet the surplus must be reinvested in their objectives;
- iv. Self-governed, *i.e.* they have their own internal governance mechanisms. They are able to cease their activities and control all operations;
- v. Voluntary, *i.e.* being a member, participating or contributing with time or money is not required by law or as a condition for citizenship, determined by birth or otherwise coerced;
- vi. Specific set of values and value-driven with a strong sense of philanthropy.

These six traits define widely one sector of civil society, involving formal and informal organizations, religious and secular, entities with paid staff and others with some volunteers, or only consisting of volunteers and institutions that play expression functions (ex. advocacy, cultural expression, environmental protection, human rights) or service functions (ex. health services, education, social services). Actually, the International Classification of Nonprofit Organizations (the classification system recommended in the UN Handbook on Nonprofit Institutions in the System of National Accounts) helps in their delimitation by categorizing them into major activity groups, pointing out the importance of their mission in their nature.

In the Portuguese Constitution there is no specific rule solely on Social Economy but several provisions are consistent with its values (ex. fundamental and social, economic,

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<sup>136</sup> On the myths about public money of TSO, BRODY, E., TYLER, J., 2012.

environmental and cultural rights) and make references and connections to it, starting with the mention of a solidarian society in its first article and with the delimitation of the sector in article 82 n. 4, comprising the means of production owned and managed by cooperatives, in obedience to the cooperative principles; the community production facilities, owned and managed by local communities; the means of production subject to collective exploitation of workers; and owned and managed by legal persons, with nonprofit character, whose principal objective is social solidarity, namely mutuals. Also, article 63 n. 5 states the support and supervision of the activity and functioning of private institutions of social solidarity and others of recognized public interest and nonprofit, in chase of social solidarity objectives, namely, in article 67 n. 2 paragraph b), article 69, article 70 n. 1 paragraph e) and articles 71 and 72 (protection of children, youth, family and disabled).

Accordingly, and besides implementing a mixed economy with sectors coexistence in articles 80 paragraph b), 82 n. 1 and 288 paragraph f), the Constitution predicts a special protection to the cooperative and social sector in article 80 paragraph b) and f) with the promotion and support of cooperatives by the State, namely through tax positive discrimination, in article 85, and the freedom of building cooperatives and of developing their activities in article 61.

The Framework Law of Social Economy, Law n. 30/2013, 8th May, builds on these constitutional principles and tries to establish its scopus through an institutional definition of Social Economy in article 2 n. 1 by including all the economic-social activities freely undertaken by the entities referred to in article 4. Nonetheless, article 2 n. 2 adds a teleological note by referring that the activities should pursue the general interest of society, either directly or through the chase of the interests of their members, users and receivers when socially relevant. The (incomplete) reference of some of the former presented characteristics of TSO pops out and escorts us in the hazy conception of the Third Sector and its organizations. The guidance is reinforced with the list of accepted institutions, *i.e.*, according to article 4:

- i. Cooperatives;
- ii. Mutual associations;
- iii. Misericórdias;
- iv. Foundations;
- v. Private institutions of social solidarity not covered by the previous paragraphs;
- vi. Associations with altruistic purposes that operate in cultural, recreational, sport and local development;
- vii. Entities covered by community and self-managed subsectors integrated under the Constitution in the cooperative and social sector; and
- viii. Other entities having legal personality, who respect the guiding principles of Social Economy set out in Article 5 and listed in the database of the Social Economy.

According to the latter, the main guidelines that differentiate them from public and private

entities are:

- i. The primacy of people and social objectives;
- ii. Free and voluntary membership and participation;
- iii. Democratic control of the respective bodies by their members;
- iv. The reconciliation of the interests of members, users or beneficiaries and the general interest;
- v. Respect for the values of solidarity, equality and non-discrimination, social cohesion, justice and fairness, transparency, individual and social shared responsibility and subsidiarity;
- vi. Autonomous and independent management from public authorities and from any other entities outside the Social Economy;
- vii. The allocation of surpluses in pursuit of the goals of Social Economy entities in accordance with their interest.

In this context, the law recognizes to the TSO the freedom to create or join a group of other social organizations and their representation in the Economic and Social Council and other bodies with expertise in developing strategies and policy development of the Third Sector.

In their relationship with their members, users and recipients, they should ensure the required levels of quality, security and transparency.

In their relationship with the entities of the Social Economy, the State should encourage and support their creation, activity, development and also social innovation (ex. through tax benefits), ensure the principle of cooperation, supervise and guarantee the indispensable stability of established relationships in line with Decree-Law n. 120/2015, 30th June.

### **3. The Third Sector in the mist**

Traditionally, the three productive sectors are presented as independent, alternative and rival competing for production and resources in an environment where ideological, political and cultural preconceptions dominate and even dictate unfair competition claims<sup>137</sup>. For instance, the communist, socialist or even welfarist and paternalistic models believe in the higher ability, legitimacy and efficiency of the public sector, in its good faith and benevolence against an egoistic and profiteer private sector and an unorganized, volatile and engaged Third Sector. The libertarian models, on the other hand, especially popular with the rise of the Chicago School and the Public Choice Theory, suspect the competence and impartiality of the public institutions and the agenda of TSO which seem subversive and connected to protest movements by whistleblowing public and private (alleged) abuses.

Consequently, instead of being perceived as complementary and cooperative, the three

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<sup>137</sup> WEISBROD, B. A., 1997, 543.

sectors historically mistrust each other as they vary cyclically in importance. Furthermore, there is a wrong idea behind a zero sum game between the public and the private sectors where the Third Sector just keeps the leftovers as it is nonprofit and nongovernmental. Then again this theory has a hard time explaining the boom of TSO, their contribution to the added value and to employment.

In simple words, the three sectors present nowadays both a competitive and complementary nature although they seem to embrace *a priori* different rationalities:

- i. The private sector pursues profit and efficiency and is market and price-based. Firms are its main institutional form of organization;
- ii. The public sector aims the collective welfare and presents a hierarchical and bureaucratic structure and mechanism of command;
- iii. The Third Sector has a solidaritarian and cooperative rationality and has the civil society as its core pillar. Therefore, it offers an informal, voluntary and participative structure and is value driven.

Nonetheless, in the last few years, after the 2008 financial crisis, the different sectors are remodeling their institutions and converging, consequently accelerating a trend that became gradually visible since the World War II.<sup>138</sup> Government agencies, private firms and social structures progressively personify a new and more broad institutional meta-category: the Organization.<sup>139</sup>

It is important to start by pointing out the fact that this constitutes a simultaneous and multidirectional movement. In other words, even if we are mostly focusing TSO, they are not the only ones changing and getting closer to firms and the administration. Public institutions are also meeting private and social paradigms and private companies are incorporating public and social traits.

Two central and correlated reasons may help explaining this blurring phenomenon.

Firstly, an institutionalist, sociologic and dynamic explanation<sup>140</sup>: worldwide socio-cultural changes, enhanced and accelerated by globalization and technology, are for a long time now in motion. On the one hand, there is an emphasis on scientific and systematic rationality and a strong belief in man's ability to understand and transform his environment. More than on intuition, institutions must run on valid technical expertise and knowledge and for that reason search the most adequate, effective and efficient solutions in a risk society and uncertain world. This methodological approach demands transdisciplinarity and closer cooperation and share between organizations in order to foster learning and meliorance. On the other hand, with the revival of jusnaturalism after the Second Great War but also with the popularity of neo-liberal ideas in western countries, the individual is increasingly empowered

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<sup>138</sup> HALL, P. D., 2000.

<sup>139</sup> BROMLEY, P., MEYER, J. W., 2015, 1, 19. On the contrary, preferring to see a cooperative institutional model, HANSMANN, H., 2013, 1-10.

<sup>140</sup> BROMLEY, P., MEYER, J. W., 2015, 1-2, 11 ss.

and the legal reasoning accentuates the approach of rights and the narrative around ability, autonomy and accountability. The rise of the human rights discourse in global challenges like climate change or food and energy security is paradigmatic, showing a strategical and recurrent option to overpass the limits of traditional lines of attack.

Secondly, financial and economic reasons, frequently in heterogeneous communities<sup>141</sup> also matter: the crisis of the Welfare State with a decrease of public power and decentralization but also of the neo-liberal model and the competition for resources, especially funds. Not being able to comply with the promises made, the State suffers from political and social pressure to rethink its philosophy and rationality. Besides, the financial calamity in 2008 and the consequent sovereign debt debacle affect both private and public revenues and funding. The markets are unable to satisfy all needs and suffer from transversal mistrust. The public authorities face enormous financial struggles with public debts skyrocketing and public safes emptied. To accomplish its tasks, the State must find alternatives and the delegation of functions and competences to other sectors, namely the Third Sector, seems a valid, lawful and efficient option. Accordingly, and with the rise of solicitations and needs, the race for funds worsens and intensifies. Private players, even if seeking for profit, hunt for new financing. The public actors naturally count on public money and authority prerogative to harvest private savings. The TSO, which usually record very low levels of own revenues, rely in public subventions and private bounties.

In sum, the perceived differences between sectors and institutions continue to blur with the arising of hybrid structures and of the combination of dissimilar rationalities, ends, means, strategies and procedures. This phenomenon occurs because of both cooperation and competition between the several sectoral entities: cooperation stands for dialogue, exchange and share of good practices, expertise and experiences and building together new and balanced solutions; competition implies an increase in efficiency and the exclusion of the weak, ineffective and costly structures, organizations, practices and procedures, although mitigated by some path dependencies.

The mist involving the three productive sectors and their institutions is witnessed at four levels: Ends and tasks; organization; management; and financing.

Beginning with the missions, targets and activities, we observe an overlapping and interconnection between sectors that occur mainly through the delegation of responsibilities from the Administration to the private and Third Sectors because of ideological and cultural changes and the public finance crisis. This delivery, that was impossible for instance after the Portuguese Revolution in 1974 when part of the economy was nationalized and with limited access to private initiative, happens primarily through public procurement, contracts and particularly public-private partnerships which exceed traditional contractual relations. In

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<sup>141</sup> Defending that heterogeneous societies are more prone to the development of TSO, WEISBROD, B. A., 1997, 541-555.

some cases we witness a kind of quasi-government solution where the firms or TSO exclusively work for the State and are submitted to its authority and superintendence that lead to deep influences in the leadership, governance and accountability of the delegate institution. In other words, with all the advantages and disadvantages of a principal-agent relation, the commissary is hardly more than an extension of the Administration.

So we now have firms and TSO providing emblematic goods and services of the State like education, healthcare, sports, social security and gaining access to areas like energy, water, sewerage, banking and insurance. TSO and private companies, for example, run day care centers, schools, nursing homes, hospitals but also build energy and water nets or accept cash deposits or lend money. Furthermore, TSO are also gradually moving into more traditional private areas such as travels arrangements, gyms and leisure activities.<sup>142</sup> For TSO this implicates moving from charity to philanthropy, *i.e.* passing from a religious (catholic) sense and from a pain relief rationality to a more lay and wider dimension of systematically solving social problems, which explains the urgency of prudential and conduct regulation in order to promote trust, reliability and transparency.

For the private firms, both the collaboration with the Administration and the pressure of competitive markets demand for more than pure utility maximizing and profit-seeking. A social preoccupation emerges. Since command-and-control solutions for imposing value-intended policies in private entities face unsurmountable costs and scarcity of public resources and since they are more and more interested in differentiate themselves from competition, the best way is to let them handle endogenously the question. Social corporate responsibility gains momentum and enacts formal, material and procedural alterations in the private firms. Indeed, not only do they embrace it internally, for example at the recruitment level with anti-discrimination policies, but also turn to the society to act as a helper, assuming, among others, the defense of humanitarian, environmental or artistic causes, namely by supporting local actors or global NGO<sup>143</sup>. This new rationality signals qualitative information about the company to the markets and possible partners like the State or TSO. Without any ingenuity, these politically and socially correct strategies are not innocently altruistic. They work as marketing tools and as customer service, widening their area of influence, building a strong and positive reputation, gaining the economic agents and supervisors' trust and projecting their products and services. Even if there might be a social shared responsibility ideal where firms (and TSO and the public entities) are an actual part of the community, and thus, have an obligation towards it, it does not invalidate and put away interested goals. After all, a stable and cohesive environment nurtures economic activity and therefore profit. Additionally, they enjoy public and civic recognition at a very low cost and feed on their moral compass and social nature, diverting attention from prices or other less

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<sup>142</sup> WEISBROD, B. A., 1997, 544.

<sup>143</sup> For example, SÁNCHEZ FERNÁNDEZ, M. D., 2012, 139-159.

appealing traits of their product. To balance inner morality individuals often choose according to their perception of their bigger or smaller moral compass. For example, buying from an environmentally engaged firm might compensate for littering. On the other hand, these policies, especially when focused on the company structure and management, may be aligned with a rationalization and upgrade of resources, the reduction of costs and/or the increase of productivity: switching incandescent bulbs for led lamps, hiring more women and minorities, or provide friendly work environments help the firms to raise profits. Thus *pro bono* initiatives are not free lunches and naïve efforts. They provide experience and airtime. In terms of organizational blurring, the firm institutional model emerges as the primarily reference, with public entities and TSO being inspired by it. Roughly, three main reasons may explain this institutional and organizational isomorphism: firstly, the perception of its effectiveness and efficiency, with a delicate balance between hard and soft elements; secondly, the massification of academic education with reflexes in the knowledge and practice of the public and TSO leaders and staff, especially considering the transversal relevance given to economics in the last decades; finally, the job mobility between the different sectors, with studies showing that the change from the private to the Third Sector is mostly due, seen and perceived as a promotion and to the public sector involves more managers than technical staff.<sup>144</sup>

As we look into the Third Sector, a new generation of initiatives appeared in the final quarter of the 20th century often dealing with new challenges, such as the fight against unemployment (*e.g.* worker cooperatives, worker-owned firms, work integration enterprises), the need to combat social exclusion (housing and urban revitalization initiatives, new services for the poorest and people at risk in many respects), or local development of remote areas. Public authorities, acknowledging the public benefit dimension of these activities, designed specific programmes and schemes to support them. As a result, various types of initiatives have become registered, labelled and identified with such public schemes. In some countries, legislation was even passed to create new legal forms, better suited to some types of organizations; in several cases, these new legal forms have been associated to general frameworks designed for cooperatives (this was the case in Italy, France, Portugal, Spain and Greece), while in others, they have tended to encompass several types of enterprises pursuing a community interest or a social aim (in Belgium, the United Kingdom, Italy), sometimes narrowly focused on the work integration of disadvantaged groups (Finland, Poland). In a somewhat contrasting way, we are currently witnessing the rise of new generations of associations, marked by a stronger orientation to members' interests, for instance in leisure activities, while traditional entities pursuing the benefit of the whole community may sometimes experience a certain decline. Newer local associations also tend to remain quite autonomous, avoiding affiliation to national umbrella structures.

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<sup>144</sup> SU, X., BOZEMAN, B., 2009, 1106-1114.

Moreover, although presenting a wide spectrum of organizational forms, the new watchword is social entrepreneurship, which, in simple terms, stands for entrepreneurship activity with an embedded social purpose and is characterized by a decentralized mechanism through which neglected positive externalities are internalized in the economic system, namely by a reallocation of resources to deserted social problems.<sup>145</sup> This is a growing economic phenomenon with new business models that address basic human needs. Normally, they start with small and local efforts but often target problems with global relevance and the innovative solutions they validate in their local context can be replicated around the world (ex. microfinance).

The main goal concentrates on the offer of sustainable solutions through empowerment Strategies. Differently from traditional entrepreneurship models, it emphasizes an altruistic and non-competitive dimension and focuses on cooperation systems that usually transcend formal institutions. And more, it is centred on the creation of value and not on the appropriation of value.

We are thus in the presence of a hybrid form that combines elements of commercial and profitable entrepreneurship and social sectors organizations and that generates value since the utility of society members increases after accounting for the resources used in the activity. In sum, addressing problems involving neglected positive externalities is the distinctive domain of action of social entrepreneurship. Consequently, social entrepreneurs are more likely to operate in areas with localised positive externalities that benefit a powerless segment of society, to look for sustainable solutions more than sustainable advantages and to build a solution based on empowerment instead on control.

Still, the doubt remains: Is an entrepreneurial and business-like model the most appropriate for charitable and philanthropic missions? Isn't there a risk of crowding out the philanthropic and humanitarian nature of TSO with this greater formalization and rationalization of means? Will the infiltration of market and efficiency rationalities not cannibalize the more organic and proximity-based relation between the TSO and their members and the recipients?

On the other hand, think of the cost the business-like model represents for smaller social entities and in more informal environments, for example, in parallel economy environments, frequent in less developed and developing countries and at level of the marginalized populations. In other words, the new paradigm does not fit all situations and there must be a case by case prior evaluation before choosing the organizational model. So, corporate law may only be applicable to public entities and TSO in some situations, particularly when it does not touch their specific nature and ends. After all, it affects the enactment and results wanted but also the management, the functional approach and the financing options.

In terms of management, we observe a gradual bet in professional solutions that must target

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<sup>145</sup> SANTOS, F., 2009.

a sound, prudent and efficient administration, with the correlative accountability. Executives and staff are not perennial and answer for their performance. Furthermore, they are expected to comply with fidelity duties more than pure obedience or loyalty duties<sup>146</sup>, which implicates the respect and alignment with both the interests of the “associates” and of the outlined assignment. Therefore, continuous education and best practices sharing networks for the amelioration of human capital play an important part as do the fomentation of inner and outsider participation and hearing. On the other hand, running the different entities resorts progressively to traditionally private tools like contracts and to market and social instruments as ranking and rating systems. Outsourcing is also multiplying transversally in the search for the most efficient solution. Moreover, there is a transversal risk management, with TSO (just like private corporations and the administration) finding instruments like strategic plans to control variables and eventual changes in an environment of uncertainty in order to prevent surprises and guarantee stability. In other words, in a context of massive cultural scientific changes, the management also adopts a more scientific approach.<sup>147</sup>

As for financing, diversification of sources becomes mainstream for all sectors, starting with the cutting of the range of the numerous existent organizations. Public, private or social, they try to delimit their scope to a niche in order to gain market power and competitive advantages. As mere illustrations, a public corporation only for wind energy production, or a TSO specialized in young children with cystic fibrosis, or a private napolitan restaurant.

TSO, for instance, have been enlarging their sources of revenue. Four examples speak for themselves: lotteries; the “marketization” of proceeds by raising funds through the offer of their products and services just like private firms; the reliance in social networking and sharing mechanisms such as crowdfunding, only possible thanks to technological improvements; the use of financial markets, especially for micro-financing but also capital markets with derivatives for social services and products and the construction of social stock exchanges or of a social responsibility index for listed companies, which also works to blur the differences for the private sector since it comes closer to the philosophy of the Social Economy.

We are taking a closer look at social stock exchanges for their novelty and creativity in finding alternatives solutions for new and old problems in a fast changing world.<sup>148</sup> In other words, they represent an innovative way since they replicate the operation of a stock exchange bringing together social entities, projects and investors in order to promote their funding. They basically can be described as trading platforms listing only social businesses, where investors can buy shares in a social business just like investors focused solely on profit in traditional stock markets. Basically, a potential investor comes to these exchanges to find a

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<sup>146</sup> SUGIN, L., 2007.

<sup>147</sup> BROMLEY, P., MEYER, J. W., 2015, 19-20.

<sup>148</sup> For all, CHHICCHIA, B.

social business with a mission according to his or her preference. This out-of-the-box solution represents an asset to all players in the industry (including governments, multilateral financing institutions, community organizations, development agencies, and social entrepreneurs) by attending to their different perspectives and particular necessities (ex. tasks fulfillment, visibility, reputation, trust, signaling, funding).

Around the world, we can already discover some experiences:

- i. Brazil had the first experiment which actually is closer to a connexion platform and to a model of crowdfunding;
- ii. The South Africa SASIX was the second global social exchange, opening in June 2006 in an attempt to provide vital finance to anonymous social businesses. It works like a conventional social stock exchange and offers ethical investors a platform to buy shares in social ventures according to sector or province classification.
- iii. In the UK, the Social Stock Exchange opened in June 2013. It does not yet enable share trading but instead serves as a directory of companies that have passed a “social impact test”. Additionally, it also acts as a research service for those wanting to become social investors and ensures the valuable and much-needed visibility of social initiatives;
- iv. In Singapore, the Impact Exchange started working in June 2013 and is, until now, the only public social exchange in the world. It expects to run similarly to the UK social exchange by providing information about valued social businesses and the impact of investing funds. Interestingly, it also embraces non-profits in its list of issuers so they can issue debt securities such as bonds;
- v. In Canada, the Social Venture Connexion was inaugurated in September 2013. It holds itself up as a “trusted connector” for it puts in the spotlight social businesses with access to interested impact investors and service providers and it simultaneously serves to value their triple bottom line at reasonable prices.

In Portugal, the Bolsa de Valores Sociais<sup>149</sup> started working in November 2nd 2009 and runs like a financial platform of typically national civil society institutions, where carefully selected social projects (not companies) are rated. The BVS is managed by BVS Association for Sustainable Financing of Social Impact, part of the social innovation activity axis of the EDP Foundation and counts with the important support of Euronext and the Calouste Gulbenkian Foundation. The available data display fifty-four projects listed since 2009 and the actual help to thirty one social plans, with the raising of a 1.3 million euros investment from circa 1700 individual investors and ten social investing companies. Among the projects funded at 100% are, *inter alia*, the reconstruction of the Casa dos Sabores da Casa de Proteção e Amparo de Santo António or the widening of the “Unidade Móvel de Apoio ao Domicílio” project by the Fundação Casa do Gil.

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<sup>149</sup> <http://www.bvs.org.pt/>

The current challenges of this trend are being assessed and it is too soon to know how they will evolve. The biggest issue is still accreditation among all players: investors, social businesses and the intermediaries who act as vital brokers and valuation experts in the field. Furthermore, social businesses in Singapore and South Africa, for example, must have a primary social purpose, whereas, in the UK, the social purpose could be a core (but not the primary) aim of any social business. The Canadian valuation benefits from the insights of the B Corporation standard to evaluate social and environmental impact. This lack of harmonization may hinder the understanding of this mechanism and its spreading. Additionally, much as to be done in terms of financial and social education, training and awareness and about the creation of social businesses, especially to dispel mistrust and to avoid the loss of solidaritarian rationality to market rationality. Another risk is to feed the impression of needlessness of other sources of funding when, on the contrary, own revenues only contribute yet to a small part of the TSO budgets. Finally, adequate policy and regulation implicate more research and development, mainly in Law Schools where the Third Sector has been overlooked.

This policy of revenue diversification is even more important if we consider that variations in income tax rates might alter incentives to donate charitably as the price of giving is affected and also that higher or lower levels of direct government support might change giving behaviour by leveraging (crowding in) or displacing (crowding out) private giving.

Horne, Van Slyke and Johnson<sup>150</sup>, for instance, recognize that the relationship between governmental funding and private giving is not uniform but depends on some factors including whether the level of public funding allocated is federal, state or local, the individual motivations for charitable giving and the charitable sub-sector targeted for public funding. Constructing a financial buffer with own revenues or counting on financial applications may seem nowadays a sagacious solution. Then again, due to the Third Sector's social and economic relevance for the consolidation and sustainability of the rule of law, the sensitivity of its recipients but also to the fact that in the mist of its delimitation, in Common Law countries, non-profitability assists its definition, some regulation is in order.

#### **4. Final remarks**

A couple of conclusions arises from the former pages:

- i. The difficulty in outlining and even characterizing the Third Sector and its organizations, not only because of their heterogeneity and dynamics, but also because of the lack of sufficient academic and empiric studies comparing to other sectors;

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<sup>150</sup> HORNE, Christopher S., JOHNSON, Janet L., VAN SLYKE, David M., 2005, 136-149.

- ii. The convergence between the three sectors and their actors, blending ends, organizational and management structures, tools, sources of revenue, and increasing their overlapping and competition but also their complementarity.

In this context, and considering the positive constitutional discrimination of the Third Sector and TSO, usually carried out by tax benefits or exemptions and public subventions, it becomes harder and harder to accept different regulations and demands for gradually alike organizations, considering a sound competition<sup>151</sup>. After all, the principle of equality States that equal should be treated equally, and different differently. Moreover, with the exponential growth of TSO, nourished by public and private partnerships, we observe an erosion of the tax base with potential effects at the public finance level, in a vicious cycle.<sup>152</sup>

Thus, the increasingly sensitive role played by TSO, especially when used as an arm of the State or to solve market failures, and its fiduciary relation with donors and beneficiaries, alongside with the management of public money ask for a model of regulation inspired in financial markets with prudential and conduct-based regulations. In sum, a convergence in regulation.

It is true that we still have not arrived to a complete fusion and undifferentiation of organizations so we cannot use one-size-fits-all regulatory solution. The core functions of each sector are still preserved. For instance, many TSO and their activities have little to do with rent seeking. Nevertheless, in some areas the homogeneity is already visible thereby not justifying the maintenance of traditional privileges. For instance, in Portugal, Montepio, a savings bank, or Caixa de Crédito Agrícola Mútuo, a mutual, are nowadays, despite their specific legal framework, truly ordinary commercial banks just like public or private credit institutions. Hence, a case by case and regular assessment of the underlying nature of TSO must be made in order to adjust their regulation and aligned it with similar (public or private) realities. Furthermore, the tax status of TSO should also be systematically re-evaluated which, naturally, will impact their activity and organizational model. Besides, sale-leback arrangements must be forbidden in order to avoid tax fraud schemes resulting from the cooperation between TSO and private firms that merely beneficiate the organizations at the expense of the State and society as a whole.<sup>153</sup>

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<sup>151</sup> In the EU, the Court of Justice has been applying the same competition regulation to profit and nonprofit organizations, in a recognition of the material convergence between the private and Third Sector, defending, in this case, the devaluation of its nonprofit nature. See *inter alia* cases C-41/90 Höfner and Elser [1991] ECR I-1979; C-180/98 a C-184/98 Pavlov Stichting Pensioenfonds Medische Specialisten [2000] ECR I-6451, par. 75; C-222/04 Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA [2006] ECR I-289, 89; C-244/94 Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche [1995] ECR I-4013, par. 21. For all, BREEN, O., 2008, 65-67.

It also seems to be the new jurisprudence in the US: WEISBROD, B. A., 1997, 546.

<sup>152</sup> WEISBROD, B. A., 1997, 545.

<sup>153</sup> WEISBROD, B. A., 1997, 546.

Finally, let us just say that this overall blurring does not mean that the three sectors and their players are more productive and efficient and that this phenomenon is adequate to their intrinsic nature and socially better. In other words, our analysis is more descriptive than prescriptive or normative with the flagged changes emerging apparently more at the legal and scientific definitions level than functional.<sup>154</sup> We just observe the modifications in place without judgement. There is no pretension of glorifying a standardization of organizations. Nor is there a romantic attachment to traditional models. The impacts of the institutional “normalization” and isomorphism theoretically and empirically ask for more research, not only but mainly to avoid inadequate and abusive public regulation and interference and also the loss of the richness of diverse rationalities, for instance of the deeply humanity of TSO, especially because the tension between sectors and organizations depends on a constant and dynamic socio-economic evolution. Field studies must be promoted to understand if, in this trend of “harmonization” are there still arguments to sustain different legal treatments. Do TSO bring particular contributions that justify a positive discrimination? Do they act better or differently after all? More efficiently? With more quality? Are they more trustworthy and backed by the community? These are some of the questions that should be investigated by scholars and policy-makers in the near future.

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<sup>154</sup> BROMLEY, P., MEYER, J. W., 2015, 3.

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This book collects a number of papers presented during the Annual Meeting of the Nanterre Network that took place at the Porto Faculty of Law, Universidade Católica Portuguesa, in June of 2017.

The papers address the general theme of Law and Interculturalism, highlighting several of the challenges that multicultural societies pose to the legal system.

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