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The aim of this paper is to introduce some elements of a research project in legal philosophy. Its goal is to identify some crucial topics for the definition of law.

In the first part (§§ 1 & 2) I analyse some methodological difficulties of the dominant research on the definition of law. In the second part (§§ 3 & 4) I refer to some current development of law and sketch some characteristics of the object to be defined, corresponding to what can be called the process of law differentiation. In the last part of this contribute I try to sum up some elements to be taken in account in the definition of a differentiated law.

Key words: Differentiation of law, Legal pluralism, Justice

Lo scopo di questo lavoro è quello di presentare alcuni aspetti di un progetto di ricerca in filosofia del diritto che si propone di identificare alcuni elementi cruciali per la definizione di diritto.

Nella prima parte (§§ 1 e 2) l'Autrice analizza alcune difficoltà metodologiche nella ricerca dominante sulla definizione di "diritto". Nella seconda parte (§§ 3 e 4) si riferisce ad alcuni aspetti dell'attuale sviluppo del diritto e traccia alcune caratteristiche dell'oggetto da definire, corrispondente a quello che può essere considerato il processo di differenziazione di diritto. Nell'ultima parte del lavoro si cerca di riassumere alcuni elementi da prendere in considerazione nella definizione del diritto all'esito del processo di differenziazione.

Parole chiave: differenziazione del diritto, pluralismo giuridico, giustizia

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The starting point is Fred Schauer's last book "The Force of Law" that is a brilliant and interesting revision of some current trends in analytical jurisprudence, together with a powerful revival of one of the main sources of this tradition, the one that goes from Bentham to Austin. According to this tradition Schauer's main idea is that in order to define law the most important element is its force, its ability to coerce into doing what it establishes.

Insofar as I understand the book, this perspective is elaborated in contrast with a literature insisting on the idea of law as reasons for actions in the context of a dominant debate on the internal point of view. The point is that the conception of law as reasons for actions seems to imply a loss in terms of pluralism. The prevalence of legal reasons as exclusionary reasons “eliminates” part of possible reasons for actions (those called “first order reasons”), as long as who uses law has to adopt the “legal” ones (Raz 1990). Against this suggestion, it is possible to paraphrase Bernard Williams’ criticism to utilitarianism (Williams 1973) and say that the approach to law centred on exclusionary reasons asks too much: it is intuitive that those who obey the law have personal reasons for actions (values, goods, identity: all those things that give meaning at their lives) to which they do not renounce. Law is obeyed with the awareness of playing a role in a social practice (in the case of officials) or just taking part in it (in the case of citizens), but it requests a commitment that is impossible without agents’ deliberation and personal engagement.¹ In both cases, it is rare that agents fully share values, evaluations of facts and choices behind mandatory models of behaviours with law. And nonetheless who follows the law has personal reasons for obeying it. In Schauer’s perspective, coercion explains compliance precisely by those who do not share law’s reasons: they perhaps do not share what law imposes, but “it is the law.” The appeal-to coercion then is motivated for the sake of moral pluralism and compliance. At the end of the day, law is understood as a social technique in which the requested commitment is only partial: what matters is that law is supported by raw force and this is compatible with different moral views because of its force and nothing else (reasons and whatever).

Maybe the claim for the sake of pluralism is correct, against a certain and implausible way of understanding legal reasons (the Razian account of exclusionary reasons), but the method followed for defending it is wrong, as well as the reasons presented. Paradoxically – in order to preserve pluralism and, consequently, to emphasize agents’ moral freedom – law must include some moral elements in its definition. But these moral elements concern only a part of morality, or a partial morality, or – in other words – a different perspective: a plural view (Sartor 2001), or a cooperative point of view. It regards what deals with some characteristics of the kind of cooperation promoted by law, i.e. equality and justice. These are the moral requirements of those relationships that law aims at implementing. But in order to admit this hypothesis, it is necessary to recognize cooperation as something worth to be pursued, and to consider justice and equality as necessary conditions of cooperation according to law. And this explanation does not fit with the dominant methodology followed for defining law.

¹ One of the most important developments of the recent literature in this direction can be found in Rodriguez-Blanco 2014, and concerns the very understanding of what is practical reason.

As it is well known, the connection between law and morality is unacceptable in the analytical tradition, characterized on the contrary by the belief in, and the adherence to, the conceptual separation between them. My suggestion is that the separation thesis impedes the comprehension of law and it does not explain how law is compatible with that kind of moral freedom (what I will call reasonable pluralism: in plain words, reasonable compatible with cooperation's values). This characteristic of analytical jurisprudence – as Postema has recently stated (2015) – can be explained in terms of an unsociable jurisprudence: the Austinian delimited province has given birth to an approach to the study of law that separates it from claims of morality and from other social practices. From this point of view, this research – at least as a starting point – is more modest than Postema's one (2015). Our efforts are an attempt to understand law as today appears, rather than a comprehensive and fundamental enquiry on law and human experience that is the vocation of philosophy, and also the vocation of the philosophy of law. In this context, legal theory can be seen as the first step of legal philosophy: the initial stage of looking at law, as a premise for a deeper and comprehensive study of law.

In fact, the main reason for preferring a different approach to the definition of law is not the discovering of defects of this or that theory, but rather the more basic necessity of comprehending the current legal practice, and its evolution. In this line, it is possible to emphasize an important contribution of Schauer's research, related precisely to the topic of the differentiation of law.

As we will see below, there are no doubts about the evolution of law beyond the state, or, in Schauer's words, about the increasing importance of non-state law. This importance challenges old definitions of law, and probably also Schauer's one. The question is: which concept of law is compatible with its differentiation as non-state law? Or, how the different forms of law can be defined together? Is force the key element for defining also non-state law? The answer is negative, at least in the terms in which Schauer describes force, as linked to the existence of the state and in terms of the raw force exercised by the threat of an army, police, prisons, penalties. From the observation of non-state law it seems that the force of law is not related to the means that it uses. Rather, it is related to its aims. And then those ends would have to be relevant for the definition of law. Different forms of law can be defined together considering the purposes of law. The same goals explain the legal character of different phenomena. On the contrary, the conceptual separation between law and morality has had the effect of excluding from theorists' attention precisely the ends of law, as long as they are goals worthy to pursue. Law's aims are compatible with reasonable pluralism. I can think differently from the majority, and at the same time accept its determinations insofar as I am taking part in the legal practice and I am adopting a plural or a cooperative point of view. From this point of view, the force of law can be seen as related to the ability of obtaining the end of cooperation according to

equality and justice. It is the old and simple definition of obligation as a rational necessity. It is the force of a necessary mean for an end, the force of reasons for cooperation. Raw force is relevant, but not decisive.

In the past two centuries, the research on the nature of law has been little by little more determined by what I shall call the “domestic assumption.” The idea is that the most significant case of law is state-law. At the beginning of this period this assumption could be considered justified for many reasons linked to the crucial role of nation states as main legal actors both in the domestic and in the international domain. But we must not forget that the prevalence of state law is only a chapter in the history of law, and not the longest one.

Looking at the current picture, it is difficult to deny the importance of other different forms of law: European law, international law, sport rules, rules of global market, international organizations law, and so on, all those phenomena that Schauer (and many others) call with a negative name “non-state law.” They belong undoubtedly to the legal field, otherwise the use of “law” would be unjustified, but they neither follow the main model of state-law, nor their compliance depends necessarily on the state. And this against Schauer’s thesis, that recalls the Austinian idea according to which non-state law requires always the acquiescence of one or more nation. Perhaps Austin was right at his time. But today this idea is hard to be accepted, even from the point of view of an external observer.

Even seeing clearly the relevance of these different phenomena, and their belonging to the legal field, it is possible to continue affirming that the most developed, the most relevant, the most evolved law is state-law. The result of using the “domestic assumption” is then to work taking state law as a model and comparing every other legal phenomenon with its features. It leads to the identification between the central case of nation states (as historically affirmed) and the central case of legal systems. As I said before, this assumption rests on some methodological premises and on some claims on moral pluralism.

On the one hand, regarding the method, to focus on just one of the expressions of law – state-law – is less complicated than to study a sum of different phenomena that are hard to be put together. The first route moves on the search of a univocal definition of law built on one central element and it easily falls in essentialism. Bentham and Austin for instance are supporters of essentialist concepts of law and they ignore the importance of legal differentiation, at least when engaged in the task of defining state-law. Nevertheless, their legal context was really different from ours.

On the other hand, moral pluralism seems saved by (supposed) neutral² legal systems able to support democratic institutions like those that are possible in the nation state. It is true that states are the best (known) entities able to guarantee participation, but not necessarily the only ones. Democratic participation legitimates the use of public force, that force that law needs. But looking at the problem of law definition from this angle, legitimation is more important than any other element for definition, including force. Coherently, the key element for defining law would be legitimation. And in some way this proves to be true, if we observe how law – both state law and non-state law – are always in search of legitimacy, even if through different paths.

Both these motivations seem to lead to the idea that state law must support all the other forms of law and then that state law has to be indicated as the central case compared to which every other kind of law must be defined. At the end of the day, every form of law can be linked to the force of the state, and to its legitimation. But this strategy prevents us from taking non-state law seriously.

It is worth noticing that a look at law differentiation does not imply the denial that states play an important and crucial role in the domestic and international law. States are powerful actors in the international domain, the most powerful actors, and in some way now even more than in the past.³ But they are not the only ones, and it is not correct to report every form of law to states and the definition of law to some characters of states. Even considering international organizations as groups of states in interaction, they introduce new schemes of states' behaviour. As we will see, the need of cooperation among states introduces new forms of compliance with law. States (have to) cooperate in the context of the international organizations and this cooperation does not depend on the force of international law,⁴ or on the force of a global institution, but on their purposes and voluntary will, as we will see later. One of the most puzzling facts in this picture is that states comply with non-state law. In very plain words, the idea at the bottom of this research is that the challenge of understanding non-state law would teach us important things also on state-law.

One of the merits of Schauer's research is that he tries to afford the topic of differentiation: his book includes the question of how to relate non-state law with the problem of the definition of law, and this is the topic of its last chapter. This is the very current challenge for legal

² It is very difficult if not impossible to identify neutral legal systems.

³ It is worth noticing that the more important are the aims of states, the more important is their role. After the 1948 Universal Declaration, states have formally recognized their commitment to the protection of human rights, and this has emphasized their crucial role in domestic and international domain. This topic is related to the transformation of constitutional states, a topic that is not possible face here.

⁴ According to Schauer's concept of raw force, obviously, international law is at least inadequate.

philosophy nowadays. But the challenge is met neither denying that non-state law is a bastard variant of the central case (Schauer 2013, 288), nor on the contrary defining law from the point of view of non-state law, but rather defining what is law considering all its different forms, according with the principle of complementarity. A definition of law incompatible with non-state law is not (more) a satisfying conception of law, because of its partiality and incompleteness, as it is true the contrary. In order to understand law, we need to take in account its evolution, and non-state law is a good topic for it, as well as some centuries ago the study of the process of centralizing law in the emerging modern states became crucial.

The research proposal is that the enquiry on the nature of law must be faced starting from some evident changes of law. One possible route consists in focussing on some prejudices – deriving from the domestic assumption – to be revised. As Schauer underlies, state-law is neither comprehensive, against Raz’s theory, nor supreme in its territory, against Austin (Schauer 2013, 289). As we shall see later, it is also plausible the idea according to which law does not obtain obedience just using raw force, against Schauer. Although in the framework of a complex definition of law that includes it among other elements, coercion is not a good candidate for defining law precisely because what non-state law is able to do is actually to obtain compliance without raw force. At the same time, this does not mean that coercion is not important for law, but it is not its central feature.

The first point is then methodological. The “domestic assumption” is sophisticatedly articulated in the dominant trend of legal philosophy, the analytical jurisprudence. As a consequence of his approach to the nature of law, Herbert Hart significantly conceives international law as a primitive form of law (Hart 2012, ch. 1). The law advanced *par excellence* is state-law. Again, this does not imply necessarily a lack of attention for different forms of law. It is possible to define law following the flexible method of a central case that admits marginal cases, when some elements of the concept of law are missing or are deficient. And this is the case of the Hartian tradition. But – Schauer highlights – between a marginal and a bastard case the line is very subtle (Schauer 2013, 288).

Schauer’s approach to this challenge is important also from another point of view. If the aim of general jurisprudence is to classify something as law, it will not be necessary to consider its evolution and its diversified phenomenology. The classificatory approach tends to exclude all those elements that could be considered “factual” (Raz 1979, 104-105, Gardner 2012, 301). Schauer refuses this idea. It is necessary to pay attention to all those elements linked to the history and social evolution of law and its institutions. Law can change its functions and even its modalities (Lacey 2013, 13). This requests a continuous revision of the conceptual contours

of the idea of law and a presumption against its invariable essentialism. The definition of social practices requires a dynamic approach aware of possible changes, even if without denying its continuity.

Schauer is aware of the limits of an essentialist classification. The problem is that he is in search of just one element like many other did before (primary and secondary rules, the rule of recognition, the internalization of rules by officials, or even coercion) and to eliminate whatever is not perfectly fitting with that definition. This approach reduces the capacity of explanation of all those other phenomena that clearly have to do with law but do not correspond to the model of state-law. The alternative is to look for a complex definition of law, able to integrate different dimensions of it. A definition of law includes different elements, and some of these elements can be found in different forms of law, even if not all together and if not in every case of law.

The point is that the choice of putting together more than one element obviously makes harder the definition of law, with the consequence that the contours of the idea of law lose sharpness. The distinction between definition and demarcation is convincing (Schauer 2013, 292). Partially against Leiter (2011), Schauer correctly admits that it is possible to define law even if not to demarcate it. He supports the analytical approach even if asserting that law margins are not sharp. But the central element is always the same (coercion) and the main model is constant (state-law). The reason on the background is – again – that the use of force needs a legitimation and only democratic institutions in the states are able to guarantee a legitimate power. But it raises again the suspect of working with an essentialist concept of law.

The presence of more elements in the definition of law has the effect of making hard its distinction/isolation from other proximate phenomena. But this is a problem only for a research that refuses the idea of law as a social practice. Social practices are interconnected.⁵ In other words, an inclusive method of definition makes hard the demarcation of law, whereas facilitates to manage with differentiation. When there is more than one element in law's definition, different features can characterize different forms of law. The problem then is how to get all the elements together. From the methodological perspective, the research of more elements of definition gives us more possibilities in the task of understanding the differentiation of law.

Maybe differentiation without demarcation mean that to be crucial for defining law are the relationships between those practices that we are trying to distinguish and not what distinguishes them. The question is then: what does it mean that law and morality (or economics or politics or science) are interconnected? Is possible to distinguish law from other

proximate phenomena without focussing on how law and those phenomena interact? The attention to interconnections more than distinctiveness is also certainly relevant in the field of legal philosophy. And this is a second methodological acquisition. Its implication is the renouncing to the search of sharpness between law and non-law. This is a main character of the process of law differentiation (as we could observe below), that tends to mix law with politics, economy, morality. For those who look for a strict dichotomy between what is law and what is not law, this acquisition would trouble sensibly.

According to Postema, jurisprudence must be built as a sociable science: both externally and internally. Jurisprudence is externally sociable because is open to interaction and partnership with other sciences. It is internally sociable because is inclined to see law in relation with other spheres of human interaction, according to a synechist attitude (2015, 23).

An important tassel of an adequate approach to define law is then to focus on the relationship between law and the main practices from which it tends to be distinguished. The first one is morality. On the contrary, it is curious that in defining law theorists tend to separate law from concepts like justice – considered as belonging to morality –, but in order to interpret law, or to justify the obedience to it and to exercise it, they appeal to justice. To belong to the club of legal positivists is necessary to affirm that law and morality are separated in the task of identifying and defining law. But many legal positivists accept naturally that in the task of interpreting law the connection is evident (Nino 1999, 66), and perhaps in constitutional states the separation thesis is impossible to be supported (Villa 2012). As well, in the task of justifying the duty of obedience to law, the appeal to justice is necessary (Raz 1979, 233-249). Furthermore, it is worth noticing too that taking part in the legal practice seems to require continuous references to justice. Every code of legal behaviour (for judges, lawyers, public officials) makes reference to justice as a guide for agent's participation in the legal practice and as the aim to pursue as legal practitioners. From this point of view, it is not intuitive to eliminate justice from the definition of law. Is convincing a theory of law that requires the exclusion of justice in defining law, but not for practicing it? If anything, it would be correct from the external point of view, but not from the internal point of view, that is paradoxically preferred. Law's non-insularity seems to be a character of the whole phenomenon and then of its definition.

Similar problems could concern law and politics, law and economy, law and science, and – as we will see – all these contaminations are often characteristic of non-state law. Law relates with all these social practices, because all of them work in the field of social interaction. And all these practices have legal implications. What distinguishes law from all these other social practices are not its means, but its ends, that are different from the ends of morality (happiness, decency), economics (utilities, profit), science (truth and progress), politics (a normative

identity, common interests). The definition of law does not deal mainly with force as coercion. It rather has to do with a sort of cooperation (different from, even if very next to politics) and justice. Schauer wants to save moral pluralism, and he tries to do that excluding justice from law. The domestic assumption with its reference to democratic legitimacy of the use of force is suited to become a good candidate for excluding appeals to justice. But this is not the only way. And it seems not to fit with the development of non-state law. In this perspective, other features of law different from force or coercion come up.

Now it is time to observe from a closer point of view the process of law differentiation that characterizes the current legal picture. Non-state law has become an important topic in constitutional law, in EU law, in international law, in private law, in commercial law, in taxation law. Its importance seems to point at becoming complementary to state law. And this complementarity could be relevant for law definition.

Soft law and non-state law are two terms in some way similar, insofar as both depend on what is considered a main form of law, its “hard” version, state law. Their “parasitic” definition depends on the domestic assumption and on the consequential preference for theories of law centred on coercion. The two couples then belong to the same paradigm biased towards state law, the only legitimate to the use of force. Nonetheless, non-state law and soft law are different since the first category includes also international law, both the international law of treaties (indirectly a form of state law) and customary law, and the law of international organizations, from the International Court of Justice to the World Trade Organization, passing by the United Nation General Assembly and many others, not necessarily depending on states. On the contrary, to say that every form of international law is a sort of soft law would not be acceptable, by international lawyers, in particular. There are two possible accounts of soft law. In the perspective of the domestic assumption, non-state law is considered a secondary form of law. In this sense, it can be defined as a sort of “soft” law, because non-produced-by-the-state. But there is another version of soft law, to be understood as law not enforceable, not legally binding but able to produce legal results. This time the adjective “soft” is not referred to the origin of the law (as in the case of non-state law), but to some other characteristics: not enforceability or lack of sanctions.

Not every form of soft law is international: the self-regulation of professional categories in the domestic and in the transnational contexts is an example of non-state law that is not necessarily international. What is true is that soft law is well understood in the perspective of

a non-state theory of law, i. e. in the perspective of a comprehension of law as a social product.⁶ But it is particularly interesting to observe how states deal with soft law. The very enigma is why states opt very often for soft law.⁷ It is a law that is neither hard law, nor mere political or moral statements. This “middle-of-the-road strategy” (Guzman-Meyer 2010, 180) is widely used in international law, but also in transnational (as it is easy to observe in the European Union) and in domestic contexts.

Describing soft law is very difficult. It includes a very diversified world of legal phenomena, hard to classify in a closed list. In this part of the contribute, I would offer a very schematic, short (and then insufficient) description of soft law, using some data emerging from those areas in which soft law has become to be studied in the last twenty years, first, with suspicion and reticence, then, since ten years, with more openness and expectation. Even the most sceptics on the point would agree that soft law is not simply a moral statement or politics. Soft law is in a middle way between hard law and the complete absence of commitment. In a first approximation, it consists in rules of conduct able to produce legal effects. Our aim here is to emphasize the characteristic of this legal phenomenon, in order to identify sensible theoretical questions in the task of defining law.

One important chapter of the development of soft law is the context of the global marketing regulations. It is a sector of enormous interest from the point of view of the differentiation of law. It is populated by non-state entities as NGOs and commercial actors, but it involves also the activity of the states through the acceptance and support of national courts and legislators. The so called New Lex Mercatoria, together with the Unidroit Principles by the International Chamber of Commerce, or the Lando Principles show how soft law is able to unifying a sector of activities like the global market, harmonizing systems with deep cultural and political differences.

Apart from the common material denominator (global commerce), soft law in this field can be identified for practicing the alternative method of dispute resolution of arbitral tribunals, with elected judges making decisions spontaneously executed by the parties, in competition with traditional state adjudication.⁸ This wide legal sector shows to be structured according not only

⁶ Law is linked then to any ordering of social relationships or social bodies, including the state, but not only the state. It is the thesis at the bottom of any institutional theory of law, from Gierke to Santi Romano. Anna Di Robilant (2006) identifies one of the two possible genealogies of soft law in theories of social law and legal pluralism.

⁷ As we will see, it is not correct to affirm that soft law is just a gentle concession of states, because this reading does not explain the variety of soft law and its pervasiveness.

⁸ Sometime the objection is that at the end of the day it is the state to give the final decision. But this does not mean that law does not exist until the final decision.

with external limits as those coming from international and domestic laws, but also according to self-regulations produced by corporations, NGOs, and other entities. It is worth noticing that its rules aim not only at preventing crimes or deceiving behaviours, but also to assure some ethical principles linked to the protection of third parts, some moral goods that can be considered public interests and not only private benefits of transactions. Among this network of rules, it is possible to identify the field of business ethics that indicates the rules for fair exchange, for establishing institutional and cultural frameworks for rules of commerce, for regulating corporations' activities (Marcoux 2008). As well, the soft law of the global market is committed to an increasing demand of accountability. It can be considered a sort of spontaneous law, with a strong link with morality, and without the features of exclusivity and territoriality typical of state-law (Marrella 2003).

Another important sector of developing soft law is the European Union. In order to simplify its complexity, some theorists (constitutional and EU lawyers, attracted in their professional approach by the problem of legal sources) distinguish soft law as pre-law, post-law and para-law (Senden 2004, 119). In the first group (pre-law) there are preparatory acts (green and white books, programmes, institutional statements) that have the aim of preparing or guiding other legal acts, like legislation and other regulations. It is a sort of law oriented to produce (more) formal law. In the second group (post-law) there are directives, guidelines, regulations, following legal decisions to be applied. It is law in application of (more) formal law. Both these two groups could be seen as clearly ordained to hard law and depending on it. But this is not sufficient to deny their legal character. A doctrine of sources would pretend to define unmistakably what belongs to law and what does not. On the contrary, the characterization of these two groups suggests that law is not ready-made. It does not come up straightaway once and forever. Law is a practice, and this means that law belongs to a continuous time, since law-making is an activity that requests different roles' effort and cooperation. This consideration recalls the difference between semantic and interpretive theories of law, in which the first one tries to grasp law as an object, well distinguished from other objects and from subjects making it. Interpretive theories – as it is well known – understand law as a practice in which plural subjects take part, and in which law-making is in some way a continuous progression (Dworkin 1986). The identification of what is law is not something to be reached following its pedigree, but also observing how it works in time.⁹

⁹ In the context of the domestic assumption is difficult to see this point, but legal systems characterized by a customary production of law were familiar with the element of continuous time because a customary rule has to show an ability of solving a problem of coordination in a long time. A good account of the nature of custom can be seen in Postema 2012. And a suggesting reflection on the nature time-oriented of law in Postema 2015, 15.

In the third group (para-law) there are a lot of different things, difficult to put together: resolutions, recommendations, advices, self-regulations, reports. This third group testifies first of all that soft law is not only pre-law and post-law. This group is the most diversified and controversial for different reasons. Their most evident common feature is that they do not come from the traditional formal procedures of state's law making, but from professional, economics, social or other sectorial categories producing law: independent authorities, international or transnational organizations, all subjects usually not legitimated to produce (formal) law in the context of a state model of law. From this point of view, what distinguishes soft law from hard law is the latter's formal character of sources. Soft law does not follow the traditional path of legislation, and this is obviously a problem, insofar as legislation assures the democratic control of decisions. It is also evident from this list that soft law tends to include among law-makers actors different from those traditionally legitimate to produce law. This raises important problems, because it seems to introduce not properly legal logics in law. Giving the voice to a frequent perplexity against soft law, Roberto Bin has qualified it as "no-law" (2009). He seems worried about the prevalence of the marketing logic over public methods. This kind of criticism depends on a rigid dichotomy between the state and the market as the two only forces in field. State-market dichotomy does not contemplate the idea of other different operative actors in the legal context. On the contrary, soft law is a manifestation of the existence of plural actors, all relevant for the legal field. In part, they can be put together under the category of civil society, but this answer is not completely correct. How to consider the independent authorities, for instance? This is one reason for considering controversial the public-private dichotomy.

Bin's criticism does not fit completely with the current picture of the law of the global market, as we have seen above, characterized (at least in part) by a strong commitment with morality. In addition, self-regulated professions and NGOs do not follow necessarily to the logic of market. This does not mean the denial of the idea that law has to have some specific sources – even if this is a myth for Critical Legal Studies' supporters – but rather that law making is a dynamic and complex activity in which a plurality of actors can take part.

Nevertheless, in the context of sources, soft law raises an important problem to the traditional asset of modern state, because it seems to corrode the principle of separation of powers. In many cases the problem arises from the fact that soft law is a law made by the executive power: both in international and in transnational domains the choice for soft law is justified by the fact that nonbinding agreements are easier to conclude and they can be settled by lower ranking officials and avoiding the long process of parliamentary approval. But this objection would be correct only if there exists just one and only method of legitimation, and if it coincides with that of modern democracies. From the point of view of international law, this thesis would

deny the legitimacy of a wide part of international law: everything that does not come from democratic states, i.e. the law produced and supported by nondemocratic countries, or even by customs. It is clear from this point of view how the unification of the central case of political communities (democratic states) and the central case of law (state law) has made hard the understanding of the legal phenomenon in its differentiation, because of the restraining of the concept of legitimacy. From this point of view, the exam of soft law would impose to renounce to the exclusivity of the pedigree criterion, linked to a certain form of understanding legitimacy as an input (the source democracy). It is not only from where law comes to be crucial (its origins), or even how law comes to existence (formal procedures). Legitimacy is not only to be assumed as a starting position, but it is related also to the outcomes of the exercise of any power (Nussbaum 2006, 83). Once established that law is not only produced by the state, different forms of legitimacy must be taken in consideration, and here principles such as transparency, publicity, the “giving reasons requirement” (art. 253 Treaty on European Union), the principle of equality and proportionality, become crucial, as part of a more general and alternative accountability requested (Cohen-Sabel 1997). The current demand on legitimacy cover a wider scope than in the past. It is linked to any institution or subject exercising power (from professional and economic categories to independent authorities), and not only to states and their use of public force. For its social link, even though problematically, soft law seems to manifest the ability of building a sort of democratic legitimacy from the bottom (Pariotti 2009). This challenges the doctrine of sources of law as an exclusive way of legitimation. It intersects the problem of the evolution of multilevel constitutionalism that understands legal systems in relation with others according to the model of a network and not a pyramid. The ordering of the network has to be built from the bottom and it has to be erected in search of the consistency not more formalistic but regarding its content and its values.

In the context of the building of the European Union soft law has become (paradoxically, considering its softness) a “powerful” instrument of harmonization. Starting from the article 249 Treaty of European Union, that includes in its list nonbinding sources of law (sic!), soft law has increased its importance in the task of improving a certain kind of cooperation within the European Union, what can be called the social and political integration. Soft law has been used as a tool for equilibrating the political and social integration with the economics regulations (usually established through hard law methods). The recourse to soft law seems to be justified by the difficulty of the political and social integration, an ambitious task that involves sensible topics as sovereignty and the respect for constitutional traditions. In this field, soft law has showed its ability of producing effectiveness on the basis of what it is worth pursuing and not because of raw force. In this direction, the European Court of Justice has confirmed the legitimacy of soft law precisely because it proves to be able to produce those desirable effects of coordination. After the Grimaldi Case (Case C-322/88 Grimaldi [1989] ECR

I-4407) national courts are obliged to include soft law as a relevant element of interpretation. This approach to soft law emphasizes its importance in the context of the activity of interpretation, and then it can be considered a sort of indirect legal effect of EU law on the judiciary (Senden 2004, 384). From this point of view, judges are then involved in the task of EU integration. In the absence of a duty supported by raw force, the duty of consistent interpretation can be only explained on the basis of the institutional loyalty of judges and their commitments in building the EU common legal framework.¹⁰ But this is not an exclusive European development. In the context of the American Convention on Human Rights, domestic courts have the duty of interpreting internal norms in accordance with the Convention, avoiding if possible domestic questions of constitutional legitimacy. It is called “control de convencionalidad” (Almonacid Arellano vs. Chile, Corte Interamericana de Derechos Humanos, 26 septiembre 2006, Serie C No. 154, §§123-125).

It is not a case that another important element for the spreading of soft law is the human rights practice. As it is well known, some important international documents – as the Universal Declaration of Human Rights (1948) or the Charter of Fundamental Rights of European Union (2000) – have been defined from the beginning as “soft law.” In this case, this character coincides with the lack of an apparatus of enforcement and/or with the idea of a nonbinding law. At the beginning, those documents were not recognized as mandatory, even if they were wanted by the states, and then legitimated by them. As it is well known, after the Universal Declaration the international community signed two treaties on Human Rights, the Covenant of Civil and Political Rights and the Covenant of Social, Cultural and Economics Rights (1966-1976), considered properly “hard law.” Nevertheless, no one can deny the importance of the Universal Declaration in international law since that moment, and the same can be said for the European Charter or Nice Charter of Fundamental Rights in the first phase of existence. And this notwithstanding that both documents were accompanied in their promulgation by the formal statement of its nonbinding status.¹¹ As it is well known, the Universal Declaration has been considered binding for the states by the UN Assembly and used for accusing states of violations of the duties adopted in it. The Charter of Fundamental Rights – as it is well known – is now included in the Lisbon Treaty, but it has been the protagonist of many decisions in different European Courts before that formal recognition (Azzena 1998).

A possible explanation of the role of soft law from this perspective is to consider it as an epistemological source or an interpretation aid (Senden 2004, 393): soft law helps to identify

¹⁰ It is not only a judges’ duty. It entails a mutual duty of loyal and sincere cooperation between member states and their institutions, between the Community institutions, between the state powers, between the member states and the Community institutions (Senden 2014, 77).

¹¹ In order to explain the role of the Universal Declaration, it has been proposed the idea of the initial act of an international custom (Zanghì 2002).

what law imposes. But this does not solve the puzzle: how and why a nonbinding law could help to understand what is binding law? It seems again that it is not a question of raw force.

All these important phenomena are related to human rights. The protection of human rights is a common aim to be realized in the international and in the domestic domain. From this point of view, instead of thinking of soft law as a imperfect form of law, it appears to be a kind of law particularly linked to its ends, and for this reason particularly effective. But in this case, the law closer to law's ends becomes more important than the law farer from them.¹²

As we have said, in the international context, states prefer soft law in many cases, and not only in the context of human rights. In this last case, the choice for soft law can be explained in the light of the interference that human rights law means in the domestic affairs of the states, traditionally precluded. Soft mechanisms of enforcement fit with human rights law: committees and soft practices for monitoring compliance of states, like the Human Rights Committee and the Human Rights Council (after the 2006 reform), under the International Covenant on Civil and Political Rights, with its practice of Universal Periodic Review. At first sight, it seems that the choice for soft law is harmful for the enforcement of human rights: states are requested just to send self-reports, and the Committee/Council cannot produce binding acts. But the result is surprising: states comply with these soft prescriptions, send verisimilar reports, and try to be part of those common organs. The outcome is that these organs confront states reports with other sources, hear individual compliance, and comment state compliance establishing what is a violation of human rights. Their performance influence states' behaviour at least from the point of view of establishing what has to be considered as a human rights violation, and this is not a trivial matter. Soft law is building a legal practice of protection of human rights.

Over the past twenty years international lawyers have tried to offer an explanation of the "mystery" of soft law, i. e. "why states would enter into a consensual exchange of promises that represents the culmination of negotiations on an issue, but at the same time declare these promises to be nonbinding" (Guzman-Meyer 2010, 175).¹³

The first answer is that soft law facilitates the solution of problems of coordination, and this is easy to accept after our schematic account. The recourse to a NGO not under the control of

¹² For those familiar with the human rights and natural rights question, the puzzle of soft law can be seen on the background of the famous Hart vs. Bentham debate about natural rights status: are they children (Bentham 2002) or fathers of law (Hart 1984).

¹³ We cannot face this problem here. But we can use the outcomes of the research by Guzman and Meyers for two reasons. The first is that their approach it is complete and convincing, the second is that it is not a conclusive theory in the sense that it does not propose just one explanation, but more than one, and this permits to observe different aspects of the problem. They propose four explanations for the mystery above indicated, each of them able to emphasize different aspects of law that would be crucial for its definition.

states (the International Olympic Committee) for establishing the location of Olympic Games offers a solution to a problem of plural expectations. It nonetheless discourages those who are not selected of organizing competing sport events.

Another reason for choosing soft law is related to the possibility of diminishing loss in case of violation. As it is well known, even if there is no institution able to order compensation or to impose a penalties in cases of violations of international agreements, when a state enters in a binding agreement has nonetheless to consider the costs of its violations in terms of reputation in future agreements, retaliation, and reciprocity (the other part stops performing the content of the violated agreement). Retaliation and reciprocity seems to operate in the same way in hard and soft law. But reputation does not. The reason is that the ability of states in caring their interests in the international domain depends on the trust that they deserve when they promise to comply. A loss of reputation is then a really big cost for the states because they become not more credible in the context of necessary coordination. Being a treaty the most solemn promise, the loss in reputation is the largest one. In this sense, states could prefer a soft law agreement rather than hard law. But, paradoxically, soft law is chosen because of the aim of keeping cooperating, and the result of soft law agreements is that they increase states compliance. States do not renounce to enter in agreements with other states and try not to lose the reputation as trustful parties, able to respect agreements, even if soft ones.

The consideration of the mechanism of cost violation is a good topic for observing an interesting (but secondary) characteristic of soft law, i. e. that it does not necessarily lack sanctions. Doing another example, the practice of “naming and shaming” by trading organizations against those not respecting their rules or by Human Rights NGO’s against states are negative consequences easily defined as penalties, and characterized by an important deterrent ability. But sanctions in soft law consist mainly in the loss of cooperative agency, in a sort of exclusion from the community of agents involved in coordination. From the point of view of soft law, then, we can draw a distinction between enforcement and sanctionability. The force of law depends on being law able to perform the end of cooperation. Sanctionability consists in negative consequences related to violations. This conclusion allows us to introduce the idea that soft law is not a law without force even in the traditional meaning.

A third reason for preferring soft law can be that it permits an easier way of amending rules: the more formal is the agreement, the more difficult is to activate a reform, and this is easy to understand in the context of a challenging international scenario. Soft law is then a form of law flexible and able to adapt to ends pursued.

A fourth explanation derives from the idea that soft law create deeper cooperation through the shaping of expectations of what constitutes compliance with binding rules. This idea is

consonant with the thesis of the interpretation aid recalled before. It argues starting from the fact that states have created some institutions – the International Court of Justice, the Human Rights Council, The International Criminal Court – without the power of producing binding rules, and, nonetheless, dealing with binding rules. As it is well known, without the consent of the states these organs cannot operate. According to Guzman and Meyers, the activity of all these and other institutions nonetheless integrate a sort of international common law. It is true that the tribunals’ and committee’s decisions normally will not be binding. But their decisions are part of the comprehension of what means compliance with international law. The International Court of Justice gives advisory opinions to UN General Assembly and it is arbiter in customary law. The Human Rights Council’s reports inform about compliance and violation of human rights. The International Criminal Court contributes to identify crimes against humanity. In this light, soft law can be defined as all “those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct” (Guzman-Meyer 2010, 174).

Even if in a very schematic way, this picture presents a legal practice able to assume different tunes, from raw force by states to something similar to a compelling rational persuasion. The common aim of all these strategies and practices is their finality: to assure cooperation.¹⁴ This end needs voluntary and not voluntary compliance. And sometime soft law seems to obtain compliance better than hard law. From the point of view of effectiveness, then, soft law shows some advantage. On the contrary, a high rate of ineffectiveness could make state law useless, even if able to count on raw force. Which law is more successful? In some way, the frustration of the aim for which it exists can be certainly seen as a negative consequence.

Law is not only about engagement with values tout court, but rather about those values needed for cooperation in the context of a reasonable pluralism. Cooperation is not against our moral autonomy, as the anarchist argument seems to suggest. It is not coercion to rescue pluralism, but rather the compatibility between our moral autonomy and what we decide to accept in order to co-operate or coordinate our actions. Cooperation is a function of law, sometimes voluntary, sometimes supported by force, but always enforced as a rational need. In this perspective coercion is just a secondary element for the definition of law. It is not a fact, but a possibility. How to explain otherwise the voluntary compliance of states to agreements that

¹⁴ I have used cooperation and coordination as synonymous, and I apologize for it. The reason is the belief that cooperation in the legal context is both an activity involving a common engagement and a strategic practice.

limit states freedom and the possibility of pursuing their interests? Or how to explain successful forms of self-regulations? Or the mutual duty of loyal cooperation of institutions?

On the background of all these problems it is the issue of constitutional evolution of states. The primacy of the constitution over the state puts state law (with its raw force) at the same level of non-state law and soft law: state is one of the tools for implementing constitutional goals and values. The same process explains the change in international law represented by the peremptory norms not subjected to states will and directed to protect some common values (protection of rights, equality and justice, environmental sustainability). All these changes seem to point to a non-formalistic turn of law. The anti-formalistic turn challenges also the concept of legitimacy, that it is not only linked to the starting conditions of law, but also to its exercise.

Historical and sociological remarks teach us that law is in evolution, and legal philosophy has to be too. The rate of changes in law needs a constant openness to revising the conceptual contours of our ideas on it. We need classificatory schemes, but together with an overview of institutional developments. But, mainly, in order to understand law, we must understand its goals, that are relevant for the definition of law. On the contrary, a dominant methodology maintains a formalistic reading: not what law makes, but how it makes it; not what law commands, but how it commands. Following this logic, the result is the expulsion from law definition of the reasons of its existence, with the consequence of making difficult to understand law as it is.

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