The Bleeding of Legal Rules Between Rights and Limits, in the Age of Migration Flows and the Crisis of the Nations

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Abstract

This paper assumes that the modern migratory flows, together with the enormous circulation of people and rules, still involve the 'bleeding' of alien principles and practices on the canvas of the host legal system. Accordingly the paper investigates the 'limits' beyond which the order ends up responding to the protection of its integrity and within which the same hosting system welcomes and transpires the 'discoloration' or contamination, evaluating the responses to the bleeding of 'alien' rules and assessing the degree of systematic coherence and 'holding'.

The paper looks at what happens in the legal system of the hosting society, namely to the 'reaction' to an 'imposition' or to the grafting of models incoming from a given society or social group. These cases of 'circulation not institutionalized' end up not so much with 'staining', but rather with the 'bleeding' of the original normative pattern, which may not return 'immaculate' and homogeneous as before. The paper also seeks to understand why some rules are accepted while others rejected; whether there is an 'instrument' other than the well-known economic analysis of the law that may measure the phenomenon; to what extent it is possible for the host system to 'react', to 'inhibit', or at least to 'limit' the 'bleeding' effect without renouncing to the respect of rights and freedoms recognised to all the people.

I. Introduction: Movement and Enforcement of Legal Models and Social Changes

At the times in which the traditional practice (*Sati*) of burning widows on the death of their deceased husband was still widespread in India, the British wondered how it was possible to ban or limit this phenomenon without violating the principle of recognition of local traditions and rules. The typically 'British' solution was found by the Governor Charles James Napier, who argued against the local complaints who merely demanded respect for their religious rules in the country:

> 'Be it so. This burning of widows is your custom; prepare the funeral pile. But my nation has also a custom. When men burn women alive we

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> hang them, and confiscate all their property. My carpenters should all therefore erect gibbets on which to hang all concerned when the widow is consumed. Let us all act according to national customs'.

This paper assumes that the modern migratory flows, together with the enormous circulation of people and rules, still involve the *bleeding* of alien principles and practices on the canvas of the host legal system. Accordingly the paper investigates the limits beyond which the order (and its socio-cultural tradition, or its national spirit) ends up responding to the protection of its integrity and within which the same hosting system welcomes and transpires the *discoloration* or contamination, evaluating the responses to the bleeding of alien rules and assessing the degree of systematic coherence and holding.

My starting point is to assume that the theories of circulation of models and of legal transplants are correct. But, in my opinion those theories look at an idea of circulation of models in some way dialoguing between legal formants and the powers of states, and largely dominated by the equalization between state-nation-law; in particular, this is true for the theory of imitation and transplant of an alien legal model operated by the political and legal institutions of a country.

Instead, the paper looks at what happens in the legal system of the hosting society, namely to the reaction to an imposition or to the grafting of models incoming from a given society or social group. It is argued that the possible change of the composition of a social group, even to a minimal extent, determines a circulation of models outside or regardless of their actual and formal reception by the institutions, a conclusion that recalls the insights of the well-known theory of chaos. In my opinion, these cases of 'circulation not (yet) institutionalized' end up not so much with *staining*, but rather with the *bleeding* of the original normative pattern, which may not return immaculate and homogeneous as before. The paper also seeks to understand why some rules are accepted while others rejected; whether there is an instrument other than the well-known economic analysis of the law that may measure the phenomenon; to what extent it is possible for the host system to react, to inhibit, or at least to limit the *bleeding* effect. In other words, the paper questions whether, how, and to what extent, the law and society of a given state can react to contamination, without renouncing to the respect of rights and freedoms recognised to all the people. This is an actual and serious problem with a high rate of systematic and logical contradiction (I am thinking of the French ban on wearing a veil or being dressed on the beach, but also of the abolition of the crucifix or the *Presepio* (Christmas crib), *Halal* slaughtering, the practices of infibulation, the combination of weddings, polygamy, or polyandry, and so on).

The terrain here is slippery, especially if approached from a purely juridical-regulatory point of view. There is, in fact, the risk of creating monsters, such as the forced adoptions of the children of dissidents in communist (but not

only) systems or the automatic deprivation of parental responsibility in the case of parents who are terrorists or members of the mafia. In this sense, the systematic coherence and the holding of a system are questioned as such issues are likely to generate clashes between the formal respect of rules and the denial of rights. In other words, we are dealing with the 'dark side of the law', that is the perverse and negative effect of the apparent respect of rules.

These contamination phenomena have always existed and to a certain extent they are also dealt with by the authors of the theories of legal transplant and circulation of models and more recently also of those of the sustainable diversity and reconciliation of legal traditions. However, the theoretical explanations to the reception of a model external to the receiving system are usually related to economic or political justifications.

It is often said that a model has been received for its prestige. While this is true, it is then necessary to assess whether the prestige of the model does not lie in the political strength (which also means economic and military) of the country from which the model is received. In Japan, for instance, both the constitutional and the commercial law systems follow the common law model, in particular the American system. It must be noted, too, that Japanese legal system has also been deeply influenced by the reception of models from civil law systems (French, Italian, German) and for this reason fully belongs to the Western Legal Tradition. These transplants, however, are rarely the consequence of a free choice following by the undisputed '*prestige*' of the model; I would say that here it has also been very evident the weight of the political and economic strength of a given country in relation to another one.

We have a lot of examples in this sense and last but not least also the cases of 'reticular polity' (as defined by Antonino Palumbo), ie the imposition of external rules by extra-national entities on sovereign systems that in fact ... are very little sovereign: this is the case of the rules imposed on Greece by an entity that is not legally recognized or recognizable (the so-called 'economic Troika' a informal body composed by representatives of the European Commission, the International Monetary Fund and the European Central Bank) whose 'advice (...) hardly can be refused' as said the protagonist of the beautiful film by Francis Ford Coppola, 'the Godfather'.

II. Purity versus Hybridization

The other aspect that I believe must be taken into account is the assumption (which is at the base of the theory of circulation of models and legal transplant but also at the base of sustainable diversity) that the models are to some extent unique and linked to a given legal tradition identifiable with a precise system connected with a state and therefore a nation. Patrick Glenn himself maintains that the juridical traditions evolve because of the circulation of ideas but each of

them remains solidly anchored to certain juridical values, so that in theory it should be possible to find an identifying nucleus of each tradition (assuming that the concept of juridical tradition can be precisely identified and defined).[1]

This is evident, too, if we look at all the classifications of juridical families in the doctrine: however while we speak of 'Roman-Germanic family' in reality we identify its ancestor in a single particular system ie French law, or rather, to be precise, in law of French People (the code Napoleon is in fact the 'Code of the French') and not in the 'Roman Law Tradition'.[2] But it is also evident even if we look at certain phenomena of reception of institutes, first of all, at the reception of the model of French codification: in the Kingdom of the two Sicilies first and in the Kingdom of Italy then, in fact, the Napoleonic code was literally translated, transplanting it into a reality quite different from that of imperial France.

Similarly, if we look at the common law area, it is easy to consider England and its legal system as the ancestor, but even if contemporary England seems to chase the United States, I find it rather difficult to think that its tradition is not based on values, concepts, and ideas that are typically British, so that Ugo Mattei[3] says that the rule of *stare decisis* is pure in the United States but no longer (and I would say that it has never been) in England.

Even in these cases, however, the model is acquired and imposed by a precise political institution or power and therefore by an elite, but not necessarily by the society that composes the state/nation. In these cases, too, it is assumed that the political institution represents the people as a whole and that there is a precise identification between institution-state and civil society. The public authority therefore speaks in the name and on behalf of society (I would say in the illusion generated by the theory of social contract), at least as far as the Western Legal Tradition is concerned, even if this delegation is also inherent in the Confucian thought of the sovereign's good job and so on, according to the different philosophies and beliefs. It never happened to me to read a study of a power or an institution that openly declares that it is operating for the evil of its own society.

By this I do not mean that the law is a superstructure, on the contrary. I

[1] For a strong criticism to the theory of Glenn see N.HD Foster, 'Introduction', in W. Twining et al, 'A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's Legal Traditions of the World' 1(1) *Journal of Comparative Law*, 100, 103 (2006): 'More generally, (Glenn) argues that the definition of a legal tradition in terms of a network of information is limited as regards law, and that the very concept of tradition as information is itself flawed'. W. Twining, 'Glenn on Tradition: An Overview', in Id et al, 'A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's Legal Traditions of the World' 1(1) *Journal of Comparative Law*, 107, 112-113 (2006), says that: 'Glenn is perhaps too dismissive of (the concepts of culture, system, legal family and civilisation), some of which are useful at different levels of generality' and that 'in order to transcend and compare legal traditions, Glenn needs an analytic concept of the "legal" '.

[2] More than in the law of Rome ... since there is a fine difference between the law of Rome kingdom compared to the republican and finally to the imperial law.

[3] U. Mattei, *Stare Decisis: il valore del precedente giudiziario negli Stati Uniti d'America* (Milano: Giuffrè, 2008).

would just like to observe that transplants of norms, circulation of models, flows of juridical traditions take place anyway. These often take place through the action of a public power, of an institution (of the state? the nation?) representing the society.

Accordingly Jürgen Habermas[4] says, the 'Nation' is born from a free social contract between 'peoples' (but what is a people?) that recognized themselves in a common Constitution so that even the concept of 'homeland' is modified and the 'patriotism' becomes 'constitutional': the Nation is therefore such from a political point of view while the Constitution contains a strong sense of belonging, a series of common institutions, a presumably constancy, and persistence over time etc.

However, this idea refers anyway to a power of a specific institution that apparently seems to be pure and identifiable.

In 'A theory of justice' of John Rawls,[5] for instance, the question of the protection of rights in a 'well-ordered society' is dealt with by using the old notion of the rule of law as an ideal type. In this sense, the rule of law requires the government to exercise its power in accordance with well-established and clearly written rules, regulations, and legal principles.

Even in Glenn's idea, each single 'legal tradition' (that is constituted also by also cultural, social, beliefs and myths) must be 'verbalized', in the sense that in order to be identified it is necessary to refer to precise political institutions representing and declaring it.

It is also necessary to declare the transflow of reciprocal influences without which it is difficult to understand whether and to what extent there has been mutual influence and, above all, 'peacefully sustainable' as Glenn himself maintains.

Among the main criticisms to Glenn, indeed, there is the accuse to be too theoretical and not to take into account the current state of western legal tradition and the reality of the facts. As stated by Nicholas HD Foster,

> 'anyone with knowledge of a field such as colonial law reception, law and development or Islamic finance, or indeed to anyone who has ever done a transaction with a major US law firm, the idea of a non-imperialist, multivalent and accepting Western law tradition seems unrealistically rosy'.[6]

Having said this, however, we must also admit that as long as we can isolate the legal system and everyone can boast a dose of 'own' autochthonous legal tradition (in Naples we have a nice way of saying that ...'even fleas have the cough', ie even those who are very small raise their voice assuming its diversity

[4] J. Habermas, *L'inclusione dell'altro. Studi di teoria politica* (Milano: Feltrinelli, 2013).

[5] J. Rawls, *A Theory of Justice* (Harvard MA: Harvard University Press, 1999).

[6] N.HD Foster, 'Kindling the Debate on Diversity: Chapter Ten of Legal Traditions of the World', in W. Twining et al, 'A Fresh Start for Comparative Legal Studies?' n 1 above, 175.

and originality) in reality I don't think we can say that today there really exists a 'pure' system. In my opinion, but it is also a matter of fact, we can say that all the legal systems are 'hybrids' in the sense that they have been contaminated by others, a bit like the 'cyborgs' that are not (entirely) robots but are also human depending on the amount of implants they have received.

As we have seen before, the models as English or French or Roman systems have lost their purity because, with a rebound effect, they have been influenced by the same systems that influenced them in a sort of loop (who is passionate about music knows very well that the rhythm and blues has influenced the Beatles and Rolling Stones that, in turn, ended up influencing the American rhythm and blues).

This is a historical and concrete fact to which no legal system escapes, as it is exemplified by, for instance, one can take a look at the history of the Italian law or English law. However, it must also be admitted that this phenomenon has increased in modern times by means of the disappearance of the *power* of states/nation. In reality, the phenomenon is twofold: on the one hand, there is the hybridization and contamination of all systems due to technological, political, economic and social changes; on the other hand, there is a real loss of decision-making and representative power of the nation that can no longer control its borders and exert its powers, not even the legislative one, in an absolute and sovereign way.

A few years ago, Professor Stefano Rodotà told us about the existence of a 'set of travel rights' ie the possibility for individuals to carry in their suitcases some rights wherever they went. This is a valid thesis and it is emblematic of the perception that the Western jurist has of the permeability or mobility of borders and of the relative impotence of state powers and also of the *futility* of national laws. To give an example, I think of the historical rule of 'territorial waters' that were once such because the nation concerned was 'physically' able to exercise its sovereignty by defending the coast with cannons, in the era of missiles it becomes ridiculous to think that six or twelve miles are an impassable limit. For this reason, nowadays, the respect of the territorial waters is a question of international politics. Phenomena like this one are today the more frequent than in the past: the Internet has literally skipped frontiers; technological development allows for an ease of movement that was previously unimaginable; the circulation of communication is also practically limitless; economic development and economic degrowth as local political choices create unexpected situations, above all uncontrolled and uncontrollable. There is enough to understand how, not only 'statutory law', but also the entire legal systems no longer have control over the recipients in a sort of 'orgy of globalization' that, rather than 'sustainable diversity' based on free choices, it seems forced hybridization due precisely to the crisis of the state/nation and the development of other (alternative and parallels) centres of power.

III. Hybridization and 'Bleeding'

On the one hand, what emerges from the above is the presence of various levels of 'power groups' and decision-making groups that work side by side and sometimes replace the legislative and executive powers; on the other hand, we experience a breakdown of the unity of the people and of autochthonous interests as well as values. These, instead, are relegated to the background of many legal systems and are destined to fade.

I have recently travelled to Vietnam and I was very impressed to see wedding parties in 'Western style' with American dances and music, huge shops for electronic products and any other goods, large buildings, the incredible number of people who used iPhone continuously: all this in a country that is defined by itself as 'communist'... and where the organs of the State are still organized in the original way. In fact, I cannot think that the central power of the State has accepted, by accordingly amending its laws, the American model, even if the latter has so strongly influenced the way of life and also the rules followed by Vietnamese society.

Here more than hybridization we witness what I have called the *bleeding* (*stingimento*), that is to say the draining effect, of alien rules, values, myths, and fashions on the canvas of the autochthonous system.

With respect to hybridization or transplantation, the bleeding effect is essentially independent from the effective recognition or import by the 'powers' of the state. As we have seen, it can be done with the adoption by a given population or society of alien myths, fashions, cultures, rites, customs, languages, and habits.

I have already said of Vietnam, but the world is full of such bleedings not necessarily translated into explicit legal rules.

I think of, for example, the use of English as a *lingua franca* (even here, in fact, we are speaking English. Let's do an experiment and see who can tell me how it translates 'come here' into Turkish? Or in Latin? Yet in English everyone knows how to say that. And how do you say 'contract' or 'property' in Turkish or Aramaic?). We can also think of the economic and credit mechanisms or of the 'contractual business practices', ie the 'common customary rules' that are followed by companies regardless of (and often even in contrast to) the norms of the legal system in which they operate.

Today the phenomenon of bleeding has one more form that follows the renewed consistency of migratory flows.

Migration is not infrequent in history (as is the barbarian invasions). Many modern countries are the result of great migrations. The United States, for example, are (or perhaps it's better to say they were) a country that has its strength in being a melting pot. Italians are also the result of the stratification of many invasions. Japan, if I am not mistaken, has developed as a result of a Chinese or Asian influence, even though it has sometimes proved to be suspicious of *gaijin*.

But, even here, beyond the transplantation of legal rules, there has been a bleeding of alien rules on an autochthonous canvas. If we look well, Britons too are 'sons of an invasion' and of the stratification of cultures and different ethnic groups. In other words, no one can claim to be pure.

In the case of contemporary migratory flows, however, there is an element of novelty as these flows involve the creation of enclaves that remain either apparently separated from the local social group or, tend to maintain their own cultural and legal habits. This is probably the consequence of the short life span of migration and of the difficulties in choosing the country where to settle.

Examples of the first case are the Chinese communities in Italy that have their own rules, rites, and customs, and that tend not to open up towards the host society (at least at an early stage).

Examples of the latter type are, again in Italy, the Islamic religious communities coming from sub-Saharan African countries or Asia, which often ended up staying in Italy only because they could not migrate to the countries of Northern Europe.

There are also the large communities that have consolidated their presence and which, despite a reasonable degree of integration, maintain their traditions and rules. In these cases, the *bleeding effect* is consequent and functional to the growing and consolidation of the alien group.

This phenomenon is even more clear at the level of micro-comparison. Here too, we have two possible alternatives: on the one hand, there is a bleeding or rather a 'declared' hybridization, filtered by the powers of the state (I think not only of the legislative power but also, and I would say above all, of the judicial and executive power of the states, ie the public administration).

The second alternative consists of the real bleeding, ie the presence of alien rules followed by a given community regardless of native rules that are, anyway, touched.

Let me give an example to clarify the concept: in Palermo, there is now a large Pakistani community of Islamic religion. Some of them have begun to engage in small business activities gaining some stability. Obviously these people, (regularly immigrated), rent premises, someone bought an apartment in a condominium, etc. Of course, to do their business, to purchase a house, to rent a room, to buy and resell goods, they must comply with the Italian legal provisions ruling these relationships. But alongside this, the relations within the community are often governed by the specific rules of that social group. If the owner of the rented premises is Pakistani as the tenant is, regardless of the Italian rules, the agreement is often regulated 'in the Islamic way'. This, in turn, creates a sort of parallel reality. Obviously, since it is not possible to keep these two realities separate forever, they end up meeting each other and so alien rules 'lose color' by bleeding on the canvas of local and indigenous norms.

Thus change the way in which (all) people negotiate, change the opening

hours, change the competition with large shopping malls of small family businesses, change the 'food' and product rules (I am thinking of the *Halal* slaughtering issue), change the cost of labour and the commitment to work.

It goes without saying that in this situation we should ask whether and to what extent the host legal system can tolerate the bleeding (by declaring hybridization and thus integrating its own system) or cannot use the 'bleach' to wash its regulatory pattern.

IV. Bleeding, Hybridization and Dynamics of Systems

As I said before, Glenn believes that a dialogue between systems based on mutual knowledge and tolerance is possible, even though he admits that each system has its own juridical 'tradition'. Apart from the criticism of this thesis and while admitting that there may be a coexistence of parallel systems, I strongly doubt that in this case, at the end of the day, there is not a minimal degree of *bleeding* or a deviation from the original purity of the regulatory pattern with the risk of its irritation or negative reaction.

When we try to understand why a legal transplant is a success, jurists draw the concept of efficiency from the economic analysis: the winning rule is the one that, by allowing the reduction of transaction costs, is the most efficient and convenient in the economic sense. I am not an economist and I am not very familiar with formulae and mathematics, but it does not seem to me that this type of analysis can be applied to all situations, especially when there are interests involved that are not purely economic. If it were so easy... in theory there should be no controversy.

In any case, it is difficult to understand the reason for the bearing of bleeding or hybridization or transplantation or the reasons for their rejection only on the basis of the alleged economic efficiency or inefficiency of the choice.

Who goes with the lame learns to lame or those who lie down with dogs get fleas, so having a daily attendance with a business economist colleague of mine and with ... my wife I did a kind of test: I asked both of them to tell me why our society should 'welcome' a foreign culture or a foreign rule. In fact, my question was more sneaky, because I had previously asked why, according to them, American music is so successful in Italy and why, so far, no one is subject to the Islamic prohibition (but once spread among Catholics) of listening to Rock and Roll.

The answer was almost identical: we follow an alien 'thing' if it is compatible with our habits but above all if we 'like' it (as my wife says) or improves our quality of life (as my colleague says) present or future (the Catholic promise of paradise for the poor, the Islamic promise of virgins; who knows what women think of it).

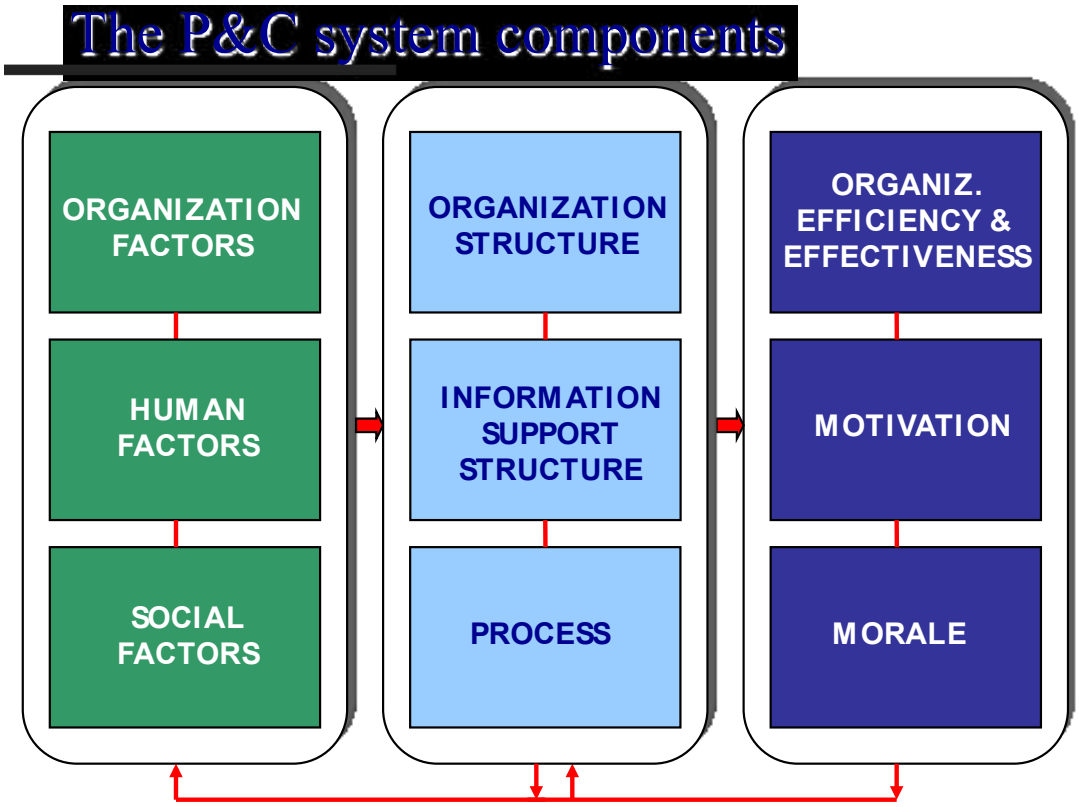
We reject what 'we don't like' or what we believe can worsen our quality of life.

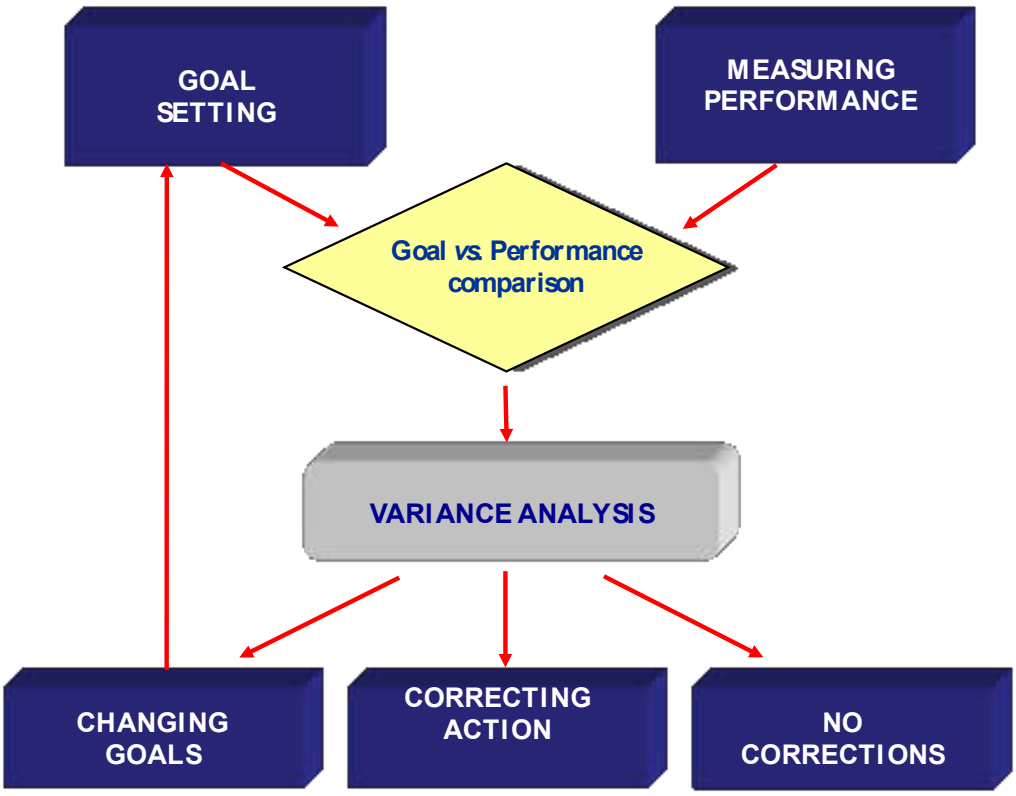
In this sense, 'the individual satisfaction' plays an important role in the

dynamics of systems and can help explain why we continue to use the 'discoloured' canvas instead of throwing it away or trying to clean it.

I have no more time to deepen this point, which requires particular knowledge of system dynamics analysis, but I would like to show you three slides that show the components of the planning and control system and an organizational system's model, from which it emerges clearly how the best results of a complex organization are obtained trying to achieve the individual satisfaction and the improvement of the quality of life individual and collective.

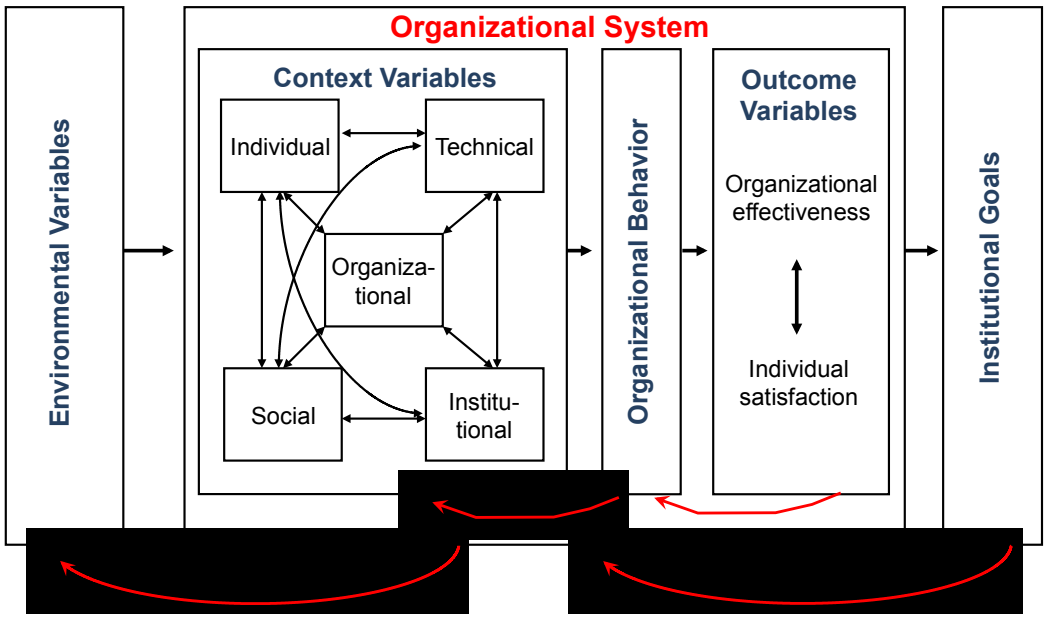
How and if really succeed... this is another problem.





An Organizational System's model

(adapted from Seiler, Systems Analysis and Organizational Behavior)



Obviously the dichotomy 'like/doesn't like' or 'improves/does not improve' the quality of life has to be seen in a relative and not absolute sense. There is no universal category of 'beautiful' and what I like, with my cultural background, maybe be disliked by another person. However, there are things that people love or are considered 'beautiful' in relation to a given social group. From a juridical perspective, the concept of legal tradition comes back powerfully but this time as seen from below and detached from the restrictive idea of one state/ one nation/one population/one law.

The social context is also a legal context and the cultural background (in a broader sense) of a society influences the behavior of individuals and their perception of the quality of life, regardless of whether they are citizens or subjects of this or that nation or state. The legal tradition is composed by values and behavior shared in a given historical moment by that social group, not by values imposed or granted from the top by a more or less strong power.

I do not want to deal here with an issue that would take a long time and which is, of course, debatable. However, I will limit myself to observing that it is in the right of private individuals, ie in the right of interpersonal relationships and not in public or constitutional or criminal law that we find strong, very strong common values (universal?): property, contract, responsibility, succession, family are all institutions that, in the obvious variability of forms and organizations, are shared by the people and independent from the presence of an authority or a central power that 'recognizes' them and impose their observance. The private law rule has the characteristic of spontaneity and bilaterality making it independent from authority as a product of the same subjects that respect it.

If we add to these shared institutions the variables due to the cultural models that each social group develops together with the so called 'values' ie the principles that allow to achieve the best quality of life (for that particular social group and in that given historical period) we will have a clearer idea of what is the 'legal tradition' or the system of shared rules of the society.

V. The Destiny of Bleeding. Public Order and Morality as Benchmarks

Having said that, we have some more elements to answer the question of whether and to what extent a system can accept the bleeding or should try to contain or remove it.

The key point is the coherence of the system. Coherence must be seen in two ways:

(a) endogenous consistency, ie coherence between the protection of recognised rights and the prohibitions or limitations imposed by the legislator on alien rules;

(b) exogenous consistency or 'assessment' of the degree of compatibility of alien rules with the principles of the hosting legal system.

If we stop only at the first aspect, the risk is that of the contradiction of the system. In this matter there are well known cases: I take up here the example of the French law which prohibits the 'ostentation of religious symbols' which in Italy we have, unfortunately, mimicked by ridiculous decisions forbidding the public exposition of the crucifix as the suppression of 'Merry Christmas' wishes in favour of a more politically correct 'Good Festive Season'. It is clear that there is here a systematic contradiction whereby, on the one hand, the legal system recognises and protects the right to profess one's religion and, on the other hand, prohibits the expression of one's beliefs through the use of religious symbols or, which I think is even worse, when requires not to wear a *burquini* on the beach.

In these cases, restrictive interpretations of laws are used to try to prevent a phenomenon, but they enter into blatant contradiction with the proclaimed principles and guaranteed rights.

Likewise, there is a strong risk of systematic contradiction in cases of deprivation of parental responsibility when parents are *Mafiosi* criminals or terrorists; the intention is (like in Italy nowadays) apparently good in the sense that the law (or better the courts), relying on best interest of the child, is concerned with 'taking away' the minor who is not yet trained and mature from an education to hatred or to bad acting. However, even here the contradiction is evident between the protection of the right-duty of parents to educate and to raise their children and the provision to do so according to what the law considers to be the child's best interest. With a very serious and concrete risk that construing literally the law it may be possible to justify the abduction of child of any political dissident or even of a simple system protester or a poor thief.

However, this is a typical flaw of civil law systems. Sometimes they are too much tied to the letter of the law and less capable than common law of looking at the 'heart' of problems and quickly adapting to social changes. And here we go into the second aspect, that of exogenous coherence.

Faced with the bleeding caused by alien rules, we can assess whether the new situation is in fact and concretely compatible with the principles of the legal system and therefore can be tolerated or incorporated within the legal system itself.

This phenomenon was widespread in the common law area but, as a result of the strong new migratory flows, it is now relevant in many civil law systems including the Italian one.

The case of the *Kafala* seems to me emblematic. According to Islam, parents, in agreement with each other, can entrust the child to someone who is able to care, instruct and maintain him in the event of their absence or impossibility. More recently, the child tends to be entrusted to a person residing in European countries in order to ask for 'reunification' and obtain an entry visa for the country of the caregiver.

France refuses to recognise *Kafala* because it considers the adoption as

strictly limited to the only hypotheses provided for by the law and therefore without looking at the 'purpose' for which both adoption and the *Kafala* aim. Furthermore French judges hold that in reality the *Kafala* is a way to circumvent immigration rules.

In the United Kingdom, judges, assessing the core of the institution and considering it essentially identical to the foster, found that the *Kafala* was in conformity with the law, upholding the request for reunification, rejecting it only when it was proved that it was an escamotage to obtain the entry visa and not a real custody.

In Italy, after conflicting decisions, the courts now hold the *Kafala* to be compatible with our legal system, as it corresponds in the substance to the adoption and therefore does not conflict with the principles of public order.

Other cases, especially of family law, are now widespread due to the number of migratory flows (I am thinking of the Romanian community, which represents one per cent of the population in Italy or the four million non-EU foreigners, ie ten per cent of the population).

The recent data on divorce between former spouses, when at least one of which is not Italian, show how widespread the phenomenon of the contamination between local and foreign rules is.

Similarly, in England it is possible to let the so-called 'Islamic courts' do on condition that the decisions taken by them are compatible with the general principles of English law.

We have reached the end of this long journey through which we had to run as Forrest Gump. The topic is complex and would require further in-depth and critical analysis.

In my opinion, however, a comparative conclusion can be made. As I said, the main problem with the rules is the assessment of compatibility or incompatibility with the legal system and the maintenance of the systematic coherence of the legal system itself.

If we look at the decisions or reactions of the French and Italian system (but I do not doubt that it is the same for all systems of the civil law area) it seems clear to me that the compatibility or incompatibility are assessed in terms of 'policy' rather than in terms of strict law, usually by using the 'negative' limit of public order.

If we look at the decisions and reactions of the English system, it seems to me that the assessment of compatibility or incompatibility is taken case by case and as matter of fact through the comparison made by judges (never monocratic and always of great experience) with the 'values' (of which the public order is only one of many elements) ie those principles of collective and social interest recognized by the communities: the sanctity of the person; the sanctity of property; national and social safety; social welfare; morality of the day; respect of tradition; the peaceful national and international coexistence; etc. Those values are not

'codified' but depend on social and historical changes.

I wonder if the English lesson is exportable at least in civil law systems. In my opinion, also in the civil law systems (and in the Italian one in particular), there are rooms for evaluating the tolerability of bleeding in order to ensure systematic consistency and, at the same time, adaptation to the new historical and social realities in accordance with the best quality of life for all associates. Indeed we too can refer to the 'general principles' in our legal system – as expressly stated by the Civil Code in Art 12 of the preliminary provisions – and we can in addition, refer not only to the public order but also to the concept of 'good custom or morality'.

Very briefly I remember here that public order has been defined as 'the set of fundamental juridical assets and of primary public interests on which is based the orderly and civil cohabitation in the national community' (Art 159, decreto legislativo 31 March 1998 no 112) and is seen in a negative sense, ie as a limit to any behaviour in contrast with the rules of the State. While 'good custom and morality', ie the set of principles and ethical-social values of a community,

> 'even more than public order and other elastic clauses of the legal system, requires a continuous contact between norms and the multiform variety of social life. So, far from having a unique, eternal and immutable content, the "good custom and morality" can be filled with correct contents only with reference to the historical-social-moral contingency of a community'.

In my opinion, it is precisely from the mixture of these three elements that it is possible for the interpreter to deduct in a more objective way what are the 'values' at the basis of society and of the legal system. Through them it is possible to assess whether and to what extent the alien rule bleeding the native normative pattern is or not compatible and therefore acceptable.

Like all closing clauses, the triad public order + morality + general principles of the order has a rubber nature that is sufficiently elastic to adapt to novelties but rigid enough to avoid alterations and contradictions.

I very well understand that even in these cases the assessment will always be an evaluation entrusted to an interpreter, a judge, a lawyer, a politician... with all the risks involved. However, I am confident that any system contains in itself the antidote to arbitrariness.

After all, as I say to my students, the most important rule in law is the '*Boskov*' (famous Serbian coach of many famous football teams) rule: game is over (penalty is) when the referee blows his whistle.

Ultimately, the most difficult but essential thing in law is to decide.