

Comments:

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Revolution Through Law in the Economic Sphere

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I- Introduction

In the history of human kind, revolutions have always been necessary to change the Law, the model of social stability. And they have always done it. An example of this is found in the three great Western Revolutions: the French, Russian and American Revolutions¹. In all of these cases and in many others, social, political and economic change were only possible because of the takeover and radical transformation of the State. The also radical transformation in the Law that occurred during these periods was a direct consequence of the transformation of the State.

From this simple historical verification arises one question: wouldn't the Law be capable of modifying or allowing the radical modification of a society? The Law would be always subject to a political determinism or an economic superstructure. Would its transformation always be a product of changes in other spheres and never the cause of such changes? Thus, would the Law be predestined to be really the depository of tradition and the instrument of assurance and permanence of a society?

History provides conflicting answers to these questions. Logical reasoning and common sense appear to point out that these characteristics are not necessary.

On the other hand, there is not much doubt that one of the great characteristics of western legal tradition is exactly the fact that it has been capable of overlapping the political sphere². The reason for that is found in a simple historical fact: the establishment of individual liberties, individual protections against all others, including and especially against the State.

This single historical fact has been of great importance to the Law. From this moment a great catalyst of the transformation in the political sphere and of civil liberties appeared -the possibility of free consciousness and free choice. This has been an essential legal

¹ With respect to this matter, see the essential work of H. Berman, *Law and revolution –the formation of the western legal tradition*, Cambridge, Harvard University Press, 1997, p. 20.

² See *Law and revolution –the formation of the western legal tradition*, cit, p. 21.

transformation that allowed other transformations. The freedom of consciousness and choice, imposed on all and on the State, has caused profound social changes such as the human rights movements in the United States during the 50's and the 60's, the political, social and racial changes in South Africa during the 90's, and the gradual reintroduction of democracies in Latin America during the 70's and 80's. In any of these movements there is no doubt that the initial and central element was the granting or restitution to all citizens of the fundamental freedoms of consciousness and choice, fundamental rights to be respected by everyone, including the State. In all cases, this fundamental legal change has been one of the central elements that drove radical social and political changes, truly revolutionary (at least in the political sphere and of civil liberties).

Contrarily, this has never occurred in the economic sphere. The changing influence of the Law in the economic sphere is incomparably smaller than in the political sphere and of civil liberties. The Law continues to be subject to economic determinism. The existing examples of the influence of the Law in economic reality are ephemeral and sooner or later the construction of legal texts driven by a changing intent ends up surrendering to economic determinants. A good example of that is the Sherman Act, which was quite innovative and even revolutionary in its origin³. In one century it was reduced and almost lost its enforcement, superseded by predominant economic theories.

The reason for this lack of harmony among the effects of the Law over the political and economic spheres is in the content of the respective rules. While legal rules in the political sphere are procedural, providing the choice to all and consequently social change, legal rules in the economic sphere are deterministic, being usually mere instruments of economic policy. Economic Law has never been capable of establishing freedom of consciousness and choice in the economic field; such rules are the only ones that truly have autonomous changing potential, since they are the only ones that allow that the changes be introduced by the society itself and not by the State.

What has been said above can be expressed in another way: political democracy exists in several western societies. This makes political changes in society possible, and for this the Law has greatly contributed. On the other hand, the social experiences in which there has been economic democracy are rare and historically ephemeral. And for this the Law must be called upon to give its contribution. Note that this statement gains strength nowadays, due to the fact that the State and the political sphere are increasingly less capable of influencing the economic sphere – on the contrary, the State and the political sphere are more and more influenced and pressured by the economic sphere. Political democracy is therefore less and less capable of generating economic change.

Later in this study we will try to formulate the concept of economic democracy and the preconditions to the effective existence of freedom of consciousness and choice in the economic field. What we intend is not (and could not be) to define the paths for a revolution or economic change. Our idea is solely to formulate conditions and principles for the Law to allow

³ With respect to the social and political history of the Sherman Act, see the work of H. Thorelli, *The Federal Antitrust Policy*, Londo, Geroge Allen and Unwin Ltd, 1955.

and filter the economic changes desired by society. For this reason, the rules of economic democracy are originally procedural (although they may not be characterized as such).

It is essential to provide the Law with this changing potential in the economic field. Only a legal system capable of constantly incorporating changes in a society's fundamental economic values can carry forth a constant and silent revolution, capable of avoiding abrupt and bloody revolutions.

II – The Traditional Economic Conception of Development and its criticism

It is unnecessary to repeat that recently economic theory has been excessively influenced by Anglo-Saxon economic theory sources. The most serious consequence of that can be found precisely in the branches of economic theory that must deal with problems extraneous to the economic issues of the Anglo-Saxon world. The theory of economic development is an excellent example.

Considered to be a minor issue if compared to the discussion about the efficient and productive functioning of the market (a typical issue of developed economies), economic development is generally discussed only in macroeconomic theory, and is normally understood as a necessary consequence of the natural functioning of the market under the neoclassic models⁴. The theoretical reason for that is found, among others, in the stagnation and conformism of the theory of social choice in the 20th Century with Pareto's Theorem, according to which the best result to society is obtained by means of the increase in total wealth, without any redistributive considerations. With this being the result, there is no reason to disbelieve in the market's capacity to solve all economic problems, including the economic development problem.

It is interesting to point out that even the economic debate that criticizes neoclassicism in these countries, respects and follows the neoclassical premises. This does not eliminate its relevance in discussions about economic development, but undoubtedly widens the distance of such discussions and the underdeveloped economic and social reality to which it shall be applied.

In the dominant economic literature it is possible to identify three different groups that criticize neoclassicism to some degree.

The first group criticizes the model, but not the postulates nor the method of the neoclassic theory. The members of this group are called the theoreticians of the market imperfections. The objective of these theoreticians is neither to deny the market nor the method of its analysis. They seek solely to identify market failures at macro and micro economic levels

⁴ An eloquent example of such trend is found in the work of T. Schultz about poverty and the economic development theory, whereby the author tries to explain it based on the traditional neoclassical analysis; this work has been awarded the Nobel Prize – T. Schultz, *The economics of being poor*, Cambridge, Blackwell, 1993.

in order to avoid or eliminate them. Despite the growing number of these theoreticians, they cannot be considered a real methodological dissent from the neoclassic school⁵.

The second group, with a growing influence, is the one that, again without denying the neoclassical postulates and method, seeks to identify new fields of study regarding issues that hinder the well functioning of the market. It is the well known school called the new institutional economy. The field of study chosen by this school is the one of social institutions. Despite the undeniable importance and originality of their studies, the members of this school continue to observe the neoclassical method. This is due to the fact that the main objective of the studies of the institutions is to reduce the so called transaction costs, allowing market transactions to flow more naturally. Within this group, D. North stands out, linking economic development to the development of the institutions⁶.

The third and last group is formed by economists who, working individually, have dedicated themselves to themes involving the issues of poverty and economic development. These economists seek to emphasize the importance of values within the economic theory. The most relevant work of this group is undoubtedly the work of A. Sen, who questions the dominant social choice theory, doubting the possibility of defining the social optimum exclusively by the increase in total wealth and defending an ethical review of the concept of economic rationality⁷.

Both the theories of North and Sen emphasize important points, which must be considered in any discussion regarding economic development. However, both theories commit the mistake of seeking a unitary explanation in space and time for the economic development phenomena, and therefore, under various nuances, of suggesting unitary solutions for economic development.

Due in part to the brilliant contribution of these two authors, today there is no more doubt that the economic development processes depend on institutions and values. The relevant question that remains unanswered by these authors is what direction these values and institutions must point to. North, after analyzing the various forms by which institutions conform, modify and determine economic behavior, suggests as a model, institutions that reduce information and transaction costs, therefore remaining imprisoned to the environment (neoclassical) in which he acquired his economic education⁸. Sen clearly moves away from this tradition, seeking to insert ethical values in economic thought. He however does not worry, considering the fact that he is an economist, to discuss in depth the specific values that must direct economic development⁹.

⁵ Among them, see G. Akerlof, "The market for lemons: quantitative uncertainty and the market mechanism" in *Quarterly Journal of Economics*, n. 84, p. 480.

⁶ See *Institutions, institutional change and economic performance*, Cambridge, Cambridge University Press, 1990.

⁷ We could mention various works of A. Sen. With respect to rationality and morality, we point out *On ethics and economics*, Oxford, Blackwell, 1992, as well as the recent work *Choice, ordering and morality* in "Choice, welfare and measurement", Oxford, Blackwell, 1997, p. 74.

⁸ See D. North, *Institutions*, cit, p. 27.

⁹ Both works mentioned above demonstrate a quite evident concern of the author in developing a method for the inclusion of moral thinking in the evaluation of the individual utilities. For this reason, his concept of ethics and

The main concern of this study, considering that it is a legal study, is to define such values. However, in order to defend its primacy, this study considers slightly different postulates from those considered by the famous economists mentioned above. As long as it is believed that the basis for social organization is the Law, thus founded in values, and not economics, founded in deeds and results, one conclusion is necessary. Economic development, before being a value of growth or even a group of institutions that enable a certain result, is a process of the society's self-knowledge. In this process the society discovers its own values and preferences applied to the economic field. Under this point of view, developed societies are those who know well their own economic preferences. Therefore, to give importance to values does not mean to substitute the determinism of results of the economic theory by a determinism of pre-established values. It means to give importance to the discussion about the specific forms for each society of self-knowledge and self-definition of the institutions and values considered to be the most appropriate for its economic and social development.

What is being said, synthetically, is that in the same way political processes have as basic values, those which allow the knowledge of the voters' will, economic processes shall have as basic values, those which allow the knowledge of the economic preferences of the agents. For that, it is necessary to introduce in the system two other basic characteristics (institutions or values). In the first place, it is necessary to guarantee that all citizens are capable of expressing their economic preferences. It is thus necessary to eliminate exclusion from the economic process. In the second place, it is necessary to guarantee the means for transmitting these economic preferences. It is hence necessary to eliminate values or institutions that hinder the transmission of economic preferences.

As defined above, the concept of economic development is identified with a process of social knowledge that leads to the greatest possible social inclusion, therefore characterizing itself as something that could be described as economic democracy. One question could follow: why place the existence of economic democracy as above described, in the center of the concept of economic development?

To answer this question, it is important to previously point out that the idea that political democracy necessarily leads to economic democracy is absolutely false. The increasingly weaker State is less and less capable of transmitting to the market, through its direct actions, the voters' preferences in the economic field. The economic sphere is less and less controlled by the political sphere, which, on the contrary, is more and more controlled by the economic sphere.

If this is so, it is therefore necessary to think about principles and values that enable the control of the economic sphere without having to necessarily depend on the influence of the political sphere. This can only be made if the economic sphere by itself becomes capable to identify its problems and change its destinies. This, in its turn, can only be achieved with the presence of the principle of economic democracy whereby all citizens know their preferences

moral is simplified, consisting basically in the refusal of the exclusive search for self-interest as a criteria to evaluate individual utilities – see A. Sen, *On ethics and economics*, cit, p. 88-89.

and have an equal “right of vote” in the economic field. This is all that does not happen in underdeveloped economies. This is all that law, through the regulation of the economic activity, must seek to achieve.

However, this is not enough. These observations reveal another extremely important element, which is the necessity of economic regulation concerned with the preservation of the economic values peculiar to a certain State or nation. This is another consequence of the concern with values and another fundamental divergence with traditional economic analysis. There are no unique economic results that shall be pursued and are the most positive anywhere in the world. Different economic objectives can lead to social development, as long as they follow a social choice made with economic democracy, and therefore, as long as the best social and economic alternatives are widely known.

Thus, the conclusion is that the knowledge of the best economic choice of society is a fundamental value for the process of economic development. For this reason, the theory of the social choice must be revived, though under an absolutely new focus. It is necessary to defend an absolute relativism of economic results and carry on an effort to discover the particular values of a society that enable the acquisition of knowledge and transformation. There is thus a switch from an economic determinism to a legal relativism based on values of economic democracy.

Having established such proposal, the first step to any study about economic development is to find out problems, structures and specific values of the societies being studied. In view of that, the first step of this study will be to revisit studies about underdevelopment originated in the underdeveloped world. This topic will thus be essentially analytical, being limited to the study of the specific economic reasons for underdevelopment and the obstacles to development. Contrary to the neoclassic analysis, this analysis does not intend to have any preceptive force.

Following that, based on socially accepted values, this study will suggest the fundamentals for a legal construction capable of allowing a wide knowledge of social preferences. Such legal construction, will in its turn, help to justify the adoption of economic democracy principles as the basis for economic development.

III – The Alternative Ideas about Economic Development

The analysis of underdeveloped economies and their structural problems is one of the areas of Economics Science in which the Latin American contribution has been one of the greatest, clearest and most original. The Latin American schools bring forth explanations which strongly rival the traditional explanations for underdevelopment.

Several and important are the reports about the Latin American economic development thought in the 20th Century¹⁰. With certain variations, all of them converge on the identification of two main lines of Latin American economic development thought. On one side there is the economic line, characterized by the historical structuralism of the Economic Commission for Latin America and the Caribbean (“CEPAL”). On the other side there is the sociological line, characterized by the political orientation of the dependency theory. The third line is the already mentioned Anglo Saxon line, which views the discussion about economic development as a subtopic of the discussion about institutions.

As an introduction, it is more relevant to describe the basis and applicability of each economic development line of thought than to get into details about each one. These aspects are extremely elucidative of the content of the economic development lines of thought.

The first line of thought has become a symbol of the CEPAL oriented thought, separating it from the currently dominant neoclassical line of thought. Its basis and greatest peculiarity consists of the belief in the existence of structural differences between developed and underdeveloped economies. Such differences result from the process of historical evolution of the international economy and make the underdevelopment problems peculiar. For this reason, according to its supporters, it is impossible to imagine that the same economic theory applicable to developed countries is adaptable to underdeveloped countries. The underdevelopment is not a phase of economic development, but rather a structure determined by the industrial development process of the capitalist system¹¹.

¹⁰ As an example, we refer to two works organized by R. Bielschowsky, *Pensamento econômico brasileiro – o ciclo ideológico do desenvolvimentismo*, Rio de Janeiro, Editora Contraponto, 3ª edição, 1996 and the collection, *Cinqüenta anos de pensamento na CEPAL*, Rio de Janeiro, Record, 2000.

¹¹ Among the various formulations of the CEPAL thought, we point out the works of R. Prebisch and C. Furtado, respectively “O desenvolvimento econômico na América Latina e alguns de seus problemas principais” in *Cinqüenta anos de pensamento na CEPAL*, cit, p. 69, and “Desenvolvimento e subdesenvolvimento”, in *Cinqüenta anos de pensamento na CEPAL*, cit, p. 239, and Furtado’s masterpiece *Formação econômica do Brasil*, São Paulo, Companhia Editora Nacional, 1986. With an extremely accurate historical analysis and a correct perception of the structural obstacles of economic development, Furtado develops a determinism that marks his work. Convinced of the impossibility to overcome the international determinant factors of underdevelopment, Furtado develops a certain pessimism, apparently attributing to the nations not benefited by the international exchange system, an eternal secondary role in the world economy. The Historical Structural School has had important supporters despite the fact that, although following the economic development theory in general, it has been left aside in favor of the neoclassical theory (and its variations) by the economic academic field (including the Brazilian academic field). Only to mention two direct supporters of Furtado, see M. Conceição Tavares, *Acumulação de capital e industrialização no Brasil*, Campinas, Editora Unicamp, 1974 and J. M. Cardoso de Mello, *O capitalismo tardio*, São Paulo, Brasiliense, 1982. These two authors emphasize the role of the internal historical evolution of the forces of power in the economic development (or underdevelopment) process. It is important to point out that such line of thought is directly the opposite of North’s explanation of economic development. North, actually, does not consider economic development as a specific field of study. It is rather a sub-product of the study of institutions. Therefore, he severely criticizes both the CEPAL oriented thought and the dependency theory, stating that these theories, by emphasizing the specificity of the underdevelopment models and by seeking models to eliminate structural traces of

Note that this statement, the nature of which is strongly determinist, is a reflex of the economics oriented origin of the theory. The supporters of the economic line of thought, although ideologically set apart from the neoclassicists and considerably more attentive to reality, share with the neoclassicists the belief in the logical schemes of economic reasoning. This is the reason for the determinism and pessimism in relation to the immutability of the economic structures (historically determined and invariable).

The second line of thought arises from the criticism of the pessimism of the economic line of thought. It is the so called dependency theory, which seeks to identify the internal political factors determinant of the dependency (the term used instead of underdevelopment). With that, what is sought is the surpassing of the economic development theory's determinism. The problem is that the economic determinism is replaced by a strong political decisionism, since the strong influence of the local power relations over the dependency models is defended. This made possible that a theory inspired in the Marxist History Theory and its evaluation of the relation structure - superstructure ended when withdrawn from its historical context, allowing, for example, a strong neo-liberal rush of the Brazilian State¹². It is not worth questioning and maybe incorrect to state that the theory was already neo-liberal in its elaboration. What matters is that the political decisionism in which it is based, allows the most diverse applications, and that there is no support or connection to basic values, a direct consequence of the political decisionism pursued by it.

IV- Elements of Economic Analysis Useful for the Legal Construction

The debate among determinists who support the underdevelopment theory, decisionists who support the dependency theory, and institutionalists, all seeking in opposite poles and with opposite methodologies the same objective (economic development), exposes the inexistence of an economic development legal model.

dependency, several times end up supporting institutions that intensify structural differences – cfr. D. North, *Institutions*, cit, p. 99 –100. As will be seen later in this study, this statement has a bit of truth. It refers, however, to the moment of institutional construction of these theories. It so happens that this is not, and it could not be, the point of interest of these theories for the present study. The role of economic analysis, as frequently reiterated, is analyzing the reality. It is the analytical and not the constructive element of the CEPAL oriented and of the dependency theory schools that will from now on be used in this study. The construction that will be made based on this economic data will have values forming its foundation, being therefore mainly a legal construction.

¹² Here the main reference is undoubtedly the work of F. H. Cardoso and E. Faletto, “Dependência e desenvolvimento na América Latina”, in *Cinquenta anos de pensamento na Cepal*, cit, vol. II p. 495, the relation between the decisionist optimism of the idea of associated dependent development and the neo-liberal drive of the Brazilian State, actually directed by one of the authors of this famous study, is not casual and is well illustrated in J. Fiori, “De volta à questão da riqueza de algumas nações”, in *Estados e moedas no desenvolvimento das nações*, Rio de Janeiro, Editora Vozes, 1999, p. 11 (33).

Only the introduction of values can corrode the determinist pessimism, illuminate the total relativism of the decisionists and undermine the institutionalists' belief in economic results. On the other hand, any consistent legal theory on economic development cannot disregard these important movements and their studies about underdevelopment, dependency and institutions. It has, on the contrary, a lot to do with these movements and studies with regard to method and analysis of the reality. There is, hence, a virtuous relation between the economic and legal analysis.

Some conclusions can be drawn from the historical structural analysis of the CEPAL oriented theory. The most important is the following: a serious obstacle to economic development in underdeveloped countries is the high degree of concentration of economic power. This causes the flows of capital to remain closed within a certain economic sector, without spreading through the economy, without generating the consumption multiplying effect and therefore not allowing economic development.

As for the conclusion to be drawn from the dependency theory, it is drawn by *autonomasia*. The demonstration of the connection between the political forces of the underdeveloped countries and the interests of the hegemonic countries vanishes when the theory, as already stated, falls into total political decisionism. The economic moral and ethical relativism of the decisions based on it brings fatal consequences to the economic order. However, the analytical data of the dependency theory are extremely useful for legal construction. Particularly, the idea that associated dependent development applied to countries characterized by an enormous concentration of economic power, leads to an immense capacity of influence of this power over decisions regarding regulatory guidance. Political decisionism associated with economic power creates an enormous risk of the capturing of the political and legal spheres by economic power. It is thus necessary to have a clear definition of a social value base capable of limiting this risk.

Finally, from the institutional theory, it is possible to withdraw an important lesson. The rules for living in society, formally or informally imposed, are extremely relevant for the process of economic development. They shall also be studied from this point of view. Again, it is necessary to stress that this does not mean that the institutional construction must be built around a pre-determined economic result to be obtained through these institutions. As opposed to that, the search for economic knowledge will be the central objective.

V – The Legal Concept of Economic Development

a) The need for procedural rules regarding economic matters

With their differentiated analysis of reality, the economic development theories require a legal construction that is also adapted to the specific reality of underdevelopment.

This specific reality requires the compelled dissemination of economic knowledge because it has not developed such mechanisms. A common characteristic of almost all underdeveloped economies is an extreme concentration of economic power. Economic power limits the expression of preferences and limits both a societies ability to change and to grow. To

change, because no change is possible without knowledge of the problems and of the objectives that the society as a whole wants to seek. And to grow because, as previously seen, the existence of centers based on demand (consumers) that act as propellers of economic development is incompatible with the concentration of economic knowledge.

It is therefore understood that in these economies, economic development can only be obtained by the dissemination of economic knowledge. The formation of economic knowledge is already naturally diffuse in society. Consequently, it is the excessive concentration of economic knowledge that leads to serious allocation inefficiencies. It is this reason, and not the so accentuated (lack of) typical market efficiencies, that is responsible for the poor economic results of centralized economies.

Once this verification is confronted with the existence of the absolute structural concentration of economic power in these economies, the secret for economic development is exactly to discover a method to eliminate the structural imperfections by means of fostering the dissemination of economic knowledge. Since these structural imperfections originated from the inexistence of the process of economic knowledge formation and of proper social choice, that must be the main objective of an economic development legal theory.

In order to understand how important it is to disseminate economic knowledge among individuals in a society, it is necessary to briefly follow a critical evolutionary line in relation to the typical State economic intervention in the 20th century and of the economic theories that attempt to create a concept for and justify such intervention.

The typical 20th century State intervention was based on the principle of concentration of economic knowledge. Not only the results of the application of the Marxist theory but also the consequences of the Neoclassical ideas have shown this to be imperfect in theory and ineffective in practice. Imperfect because both theories found their basis in postulates that do not exist in real life. Such is the case of the fundamental role attributed by the Marxists to the “work” factor in the capitalist production process, and the famous hypothesis of the Neoclassic definition of a perfect competitive market, which is absolutely inexistent in real life. Ineffective in practice were both theories, respectively for the lack of effectiveness in coordinating the State action and the limits of such action, and the total incapability of control of the economic power and the reduction of the inequalities caused by it.

The problems and incoherence of these theories allow the kind of criticism made by F. Hayek. This author states nothing more than the obvious: economic knowledge is practical by nature, and the best knowledge is acquired individually through the process of choice, i.e., through the effective existence of competition¹³. Consequently, the pretension to isolate and theorize economic knowledge leads to inconvenient results¹⁴.

¹³ *Individualism and Economic Order*. Chicago, The University of Chicago Press, 1948.

¹⁴ It is important to state the famous observation of F. Hayek about this subject: “The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic

This criticism, valuable to the economic aspect of the discussion, requires a revision of the rule of law in society. Law must allow the flow of and offer transmission channels for economic knowledge acquired in a diffuse way in society¹⁵. And Law is particularly capable of creating such channels since it conceives knowledge in a way that is profoundly different from the Social Sciences. While for the Social Sciences knowledge is eminently empirical, for the Law it is the consequence of the application of societal values.

To state that knowledge is based in societal values is nothing more than to affirm that the values of a certain society can and do influence dramatically the knowledge we have of it. If, as stated by the doctrine, there is no empty rule without a pretension or interest to protect¹⁶, then in other words, without a value behind it, the society we *know*, when obeying these rules, does nothing but to translate these values. Thus, the society we see is a representation of democratically established social values¹⁷.

problem of society is thus not merely a problem of how to allocate “given” resources – if “given” is taken to mean, given to a single mind which deliberately solves the problem set by these “data”. It is rather a problem of how to secure the best use of the resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of utilization of knowledge which is not given to anyone in totality.” – “The use of knowledge in society” in *Individualism and economic order*, London, 1948, p. 77-78, also see footnote 19 herein.

¹⁵ This is the main postulate of Hayek’s theory of knowledge. For him, it is a mistake to believe that knowledge can be centralized or theorized, because it is essentially practical and individual. This criticism to the abstract thinking in the economic field probably has its philosophical inspiration in the criticism to Kant’s pure reasoning, especially its conception of synthetic thought, which is creative, capable of adding knowledge. This form of knowledge is, in Kant’s conception, essentially experimental and therefore practical and inductive. – see I. Kant, *The critique of pure reason*, Chicago, Encyclopedia Britannica, 1996, vol. 39, p. 14. It is important to understand that although its utilization has been eminently libertarian, directed to undermine the State’s actuation in the economy (due to the strong ideological slope of the work of Hayek), its main utility can be exactly the opposite, i.e., grant subsidies to the State’s intervention in the economy. Due to the fact that this intervention has to take into account the individual economic preferences, it can and must seek the achievement of an economic democracy. From there, we have the relation of this concept to the theory of economic knowledge discussed herein.

¹⁶ V. G. Calabresi, “The pointlessness of Pareto: carrying Coase further”, *Yale Law Journal* 100/1.211, 1991.

¹⁷ From the surpassing of the Marxist and Neoclassical determinism, the historical element remains as the only necessary explanation for the legal formation of values. This historical element does not establish the Law positively, but it drastically influences the Law. There are two relevant characteristics that differentiate it from other attempts at explaining the formation of the legal rules. In the first place, it does not require a State legislator oriented by illuminist principles, as proposed by the supporters of natural law. It is close to, but does not identify itself with the German Pandectistic Historical School. This path in Law is not a product of the State legislator, it is part of a broader structure, originated from the collective unconscious of the people (“aus dem kollektive Unbewusstseins der Völker zu erblühen” – V. F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, Göttingen, Vandenhoeck & Ruprecht, 1967, p. 358). This undetermined element is exactly the action of the individuals and especially that of organized groups in the formation of the Law. It is the formation of Law from diffuse initiatives, which are a lot more capable to identify and collect the social values than a central administration.

The democratic formation of values and rules must be collective. “Collective” does not necessarily mean an involvement of the State. It can refer to larger or smaller groups of people. This does not mean that this knowledge is theoretical, not originated from practice, or artificial. The Roman *Digesto*, the most durable and influential legal masterpiece of the history of Humanity, is nothing but a structured collection of cases¹⁸.

The importance of the relationship between values and knowledge of society is quite clear in the economic field. The protection of competition leads to the discovery of the true product utility and of the best options for the consumer. The value “competition” therefore has a double influence over reality – first shaping it and subsequently allowing the knowledge of it.

This last sentence creates an apparent perplexity. The inverse seems to be the normal process – know first and then shape. It is not that way in the economic sphere. The legal rule is eminently instrumental. The affirmation of the possibility of choice as a fundamental value (molding) assures the most abundant amount of information for the consumer. Then the consumer, by itself, will find the most adequate solution to his or her necessities.

Applied generically, this affirmation of the cognitive power of Law implicates in a transformation of the Law itself. Such transformation is necessary because the Law has an important cognitive role. A legal system that intends to enable society to correct itself needs to allow this society to know itself.

In a legal system thought of this way, the legal rules necessarily change their nature. It is not possible that the rules of the old Liberal State prevail. The legal system is primarily formed of institutional and procedural rules. The institutional change is therefore obtained not by a political experimentalism empty of values and of political discussion, but by a well structured and debated group of institutional values and rules.

The institutional and procedural rules have in them values that are democratically established and debated. Nevertheless, they do not pre-define the most convenient solution. At the same time that they provide stability to the system and guarantees to the citizens, they allow social and institutional experimentalism. The Law thought of this way leads to – and does not result from – the fairest solution. It is at one time a more secure system – since it has secure institutions – and more flexible, as it allows its self-improvement.

The process of dissemination of economic knowledge does not exhaust itself with the dilution of economic power. This dilution only allows the formation of economic knowledge in a diffused way, which is its natural tendency. It avoids, therefore, the existence of a serious dichotomy between the natural methods of formation of economic knowledge and the legal and economic structures that shall institutionalize it.

¹⁸ The Historical School of Law intends to retrieve this individual historical value (not in its State sense) (accordingly, see, F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, cit, p. 348).

It is also necessary to assure that the economic knowledge flows and is transmitted to the regulatory and planning agents. For this reason it is necessary that the various social groups involved in the rendering of some kind of service participate in the process of elaboration of its regulation. These groups contribute with knowledge and information that are essential for the elaboration of regulation. This procedural and regulatory principle is not incompatible with the establishment of general regulatory objectives (such as redistribution and competition). In the first place, this is because all converge to the sense of participation of all citizens (without exclusion) in the economic process. But, besides that, because of the fact that the legal institutional principles are general. Economic knowledge (diffuse) is most necessary in its fulfillment and concretization.

From these considerations, arise one important concern. It is the concern with the principles that shall allow the dilution of economic knowledge. There are basically three principles, all at the same time an instrument and a consequence of the dissemination of the economic knowledge defended above.

The first principle is undoubtedly the redistributive principle. The most outstanding and incontestable result of the historical structural analysis is the certitude that in underdeveloped countries, changes in demand and not changes in the production process are the great propellers of economic growth. Consequently, there is no justification to center the basis for regulatory philosophy in efficiency. The regulatory philosophy shall be primarily destined to redistribution, the only form of expanding, in a structured and linear way, the society's consumption. By doing this, it eliminates the allocative inefficiencies of the economic knowledge concentration since it expands the basis for the collection of data about individual preferences. Redistribution is maybe the most important instrumental principle for the diffusion of economic knowledge, since it is the only one capable of guaranteeing a real economic democracy.

It is obvious, and almost deserves no mention, that much more than a mere instrument for economic development, the idea of redistribution is part of the concept of economic development itself¹⁹. It is philosophically unthinkable and historically wrong to imagine that it is possible to dissociate economic development and the distribution of its results.

The same must be said in relation to the second principle. This principle is the dilution of the centers of economic and political power, and the consequent dissemination of information and knowledge throughout the whole society. Recognized as the great core of dependency for the supporters of the dependency theory, due to the connection of the centers of political power of underdeveloped countries with the power of developed countries²⁰, and for the supporters of the CEPAL oriented theory due to the structural tendency of the sustenance and concentration of wealth in the sectors related to economic power, without dissemination through

¹⁹ Nowadays, in economic studies and even in statistics, there is a generalized adoption of income distribution as a criteria to measure economic development – see M. Wolfe, “Abordagens do desenvolvimento: de quem e para quê?”, in *Cinqüenta anos de pensamento da Cepal*, cit, p. 715).

²⁰ F. H. Cardoso and E. Faletto, “Dependência e desenvolvimento na América Latina”, cit, p. 511.

the economy and without the production of the multiplying effect²¹, the definition of the centers of economic power undertakes a central value in any economic development policy.

Finally, the third principle is the incentive to cooperation. There seems to be no doubt that, for the economic sphere to be able to control itself with a certain degree of independence from the political sphere, it is necessary to introduce cooperation principles in the economic sphere and eliminate the exaggerated individualism. Moreover, cooperative structures also have a positive effect over the process of dissemination of knowledge to the extent that they allow direct interpersonal comparisons of utility, as will be seen.

Although this comparison oversimplifies the meaning of the principles, it can be said that redistribution, erosion of economic power and cooperation are as useful and necessary to development and economic democracy as respectively the universal principles of the right to vote, of one person one vote and of wide political information, are important for constitutional and political democracy. Seen in the light of economic democracy, these principles also change. They are not values in themselves but relevant for their capability to enhance the diffusion of economic knowledge.

b) *Procedural values vs. material values in economic matters*

The discussion above obviously brings about a more general discussion about the convenience of substituting a discussion about material values for a discussion about procedural ones.

Actually, what we are doing when we reject the economic result oriented theories is to reject values that are beyond it (as the absolute prevalence of result and efficiency oriented behaviour, that is the basis for the Pareto theorem) and try to replace it by a procedural rule, that allows individuals to acquire knowledge, decide and have their decisions respected in the economic arena.

Such a preference can raise two questions that must be answered. First, is the choice for proceduralism, a choice of value in itself? If so, how is it different from a material choice of value? Second, is the procedural solution in economic matters really to be compared to the one on political matters, and hence be called economic democracy?

The answer to the first question is somewhat easier than the answer to the second. There is no doubt that proceduralism contains a choice of value, that is however, profoundly different from material values. Rigorously speaking for a procedural solution to be logically admitted, just two requirements must be present: first, there must be agreement on the decision process and there must be agreement on the desirability of everyday decisions²². The latter is the value involved, i.e., the preference for deciding. It is clear that such a value is profoundly different from material values, since it does not define *ex-ante* and without a careful process of knowledge formation, the aims or results that an economic system should look for.

²¹ In this sense, see C. Furtado, *Formação econômica do Brasil*, cit, p. 78 and 151.

²² s. K. Arrow, *Social choice and individual values*, 2nd edition, New Haven, Yale University Press, 1963, p. 91.

The closer example of the desirability of such a solution is the almost universal agreement, non-influenced by ideological position, on the desirability of democracy in the political arena. That brings us directly to the second question, regarding the comparison between political democracy and the concept of economic democracy proposed here.

The problem here seems to stand in the general possibility theorem formulated by Arrow more than fifty years ago and that is still very influential in social choice theory. According to it, interpersonal comparison of utility are not possible, because we cannot compare subjective sets of preferences.²³

The problem brought about by such proposition is that there are no objective parameters for the exercise of choice. Therefore choice, being subjective, is not comparable. Consequently, no comparison can be made between economic and political democracy, since with respect to the latter, the comparison of choices is fundamental.

The only way out of this problem is to predefine a set of values. That is the reason why Sen's proposed way to rediscuss social choice theory is exactly to bring values to economic reasoning²⁴, escaping from the impossibility identified by Arrow. If values are uniform, then choices can be compared. The problem is that, as mentioned before, a predefinition of values, risks to be so dictatorial or unilateral as the criticized predefinition of economic results.

This last statement clearly reinforces the need for a procedural solution. As will be seen that solution will have not only to deal with the process of decision but also, exactly as in the political democracy to present to individuals, sets of possible choices (eg. cooperation vs. individual behaviour). Those sets of choices would have to be general enough in order not to imply an indirect choice of material values (that is why cooperation vs. individual behaviour will be taken as one example). This conclusion sets the stage for the comparison between economic democracy and political democracy: both require the existence of choice and the predefinition of the alternatives is necessary to permit objective comparisons of preferences and, therefore, social decision.

VI- The Economic Development Legal Principles

a) Development and Redistribution

If, with an exaggerated pretension and without adhesion to originality, someone attempted to establish a historical path of the intervention of the State in the economic domain in modern times (adopting as the starting point the reaffirmation of the State power in the French Revolution), this person could have done it as follows. In the beginning and for more than one hundred years, all beliefs were in the Liberal State, whose only duty was to protect the economic and political freedom of individuals. This excessively liberal State is opposed by the State of the Keynesian Era and the State of Revolutionary Communism. In different ways, these two States

²³ Cfr. K. Arrow, *Social choice and individual values*, cit, p. 59.

²⁴ s. A. Sen, *On ethics and economics*, cit., p. 78-79.

intended to be the great managers of the economic system. It is not by chance that both movements mentioned above are macroeconomic. During this period, which lasted more than eighty years, there is an actual conception of the State as the highest manager, superior to and distant from the economic system.

The current era, apart from the initial accommodations of difficult perceptions to observers who live the history reported by themselves, shall have another characteristic. There seems to be a consensus that the State, as distant and abstract manager, does not perform its duties satisfactorily. This does not mean that it is necessary to reduce its presence or dismiss it of its duty.

It involves the attribution to the State of another task, which is maybe more onerous. Instead of undertaking the abstract and macroeconomic management of society, the State must do something that the individual and the market will never do. The State must redistribute. It is the redistribution that must be identified as the great task of the new State. The State must therefore base its management (including that of the economic field) in values and not in economic objectives.

Because of the management problems identified above, the redistribution is far from being an exclusive task of Tax Law, as believed in the old conceptions of State (and as it is still largely believed). The redistributive task of Tax Law will always be present, especially to fulfill the needs of those sectors which generate social externalities (health, education, etc.), the responsibility for which must always be that of the State.

But this objective cannot be exclusive of Tax Law. If the problem concerns management, any management manual (public or private) indicates that the more proximity to the problem and specialization of management there is, the more efficiency there will be. Such specialization can only be obtained through a redistribution within the sectors of the economy and not merely through a macroeconomic redistribution. Thus, the redistributive objective is also a form of providing efficiency to the State.

What occurs is that this type of redistribution can only happen if it is also an objective of economic regulation. What is frequently unnoticed is that this type of distribution can be done in various ways. Some of the most effective ways combine sectorial tax instruments with regulatory measures.

The redistribution can be direct, as it takes place, for example, when the regulation requires that larger producers or monopolists extend their services to consumers (or potential consumers) who normally do not have access to their services. This is what has been lately called universalizing services.

The universal service is generally non-profitable, since it implicates the extension of the service network to consumers located far away with no purchasing power. On the other hand, a private entity will be unwilling to expand its services simply because of the positive social externalities it may present. Consequently, there are characteristics that cause it to

resemble the problems that led to the identification of the economic sectors that could not be regulated, where the direct intervention of the State is necessary.

Not for any other reason, as will be demonstrated, the main proposals for the solution of the universal supply problem are based exactly in State or “State like” solutions. The creation of a series of parafiscal contributions is typical of this kind of solution.

Such kind of contribution, in one of its most effective forms, can have important positive social externalities. It can – and must – contribute to reestablish the equilibrium of sectors that in special market conditions, generate additional benefits for certain economic agents, potentially causing damage to the other competitors and to consumers. This is exactly what happens in most of the sectors in which there is a need for the regulation of monopolies formed from networks. The owner of the rights over the network starts out with an enormous initial advantage. This advantage can generate extraordinary profits. These profits can be compensated not only by the direct obligation of providing services to consumers with no purchasing power but also by the enforcement of a contribution of a redistributive nature.

However, one should notice – and this is important to point out – that the beneficiary of these rules is primarily the consumer. The universal service serves the consumer. It does not have as a primary objective, the reestablishment of the equilibrium of competitors’ relations, although it may generate the positive effect of compensating for the competitive advantages existing in favor of the owners of the networks. If this is so, this contribution must not be transferred to the same consumer or competitor.

This is only one of the many forms of sectorial redistributive policies that can be implemented. Truthfully, the universal service is part of the broader gender of public subsidy policies applied among consumers of low and high income. Criticized by Antitrust Law Literature as a form of abuse, the discrimination among consumers is absolutely acceptable as a redistributive policy as long as it is enforced by regulatory means as a form of sectorial subsidy.

b) Economic Development and the dilution of market power centers

The second but no less important basis for the legal support of economic development regulation is the belief in the necessity to dilute market power centers.

For the acquisition of economic knowledge, it is essential to have an institutional view of the economic process. It is necessary to guarantee the dilution of the economic power of individuals to prevent some individuals or enterprises from concentrating economic knowledge and imposing their values on others (as happens with monopolies).

As already seen, the incentive to economic development is fundamental to structurally underdeveloped economies, and such incentive is only possible with the fight against the structural conditions of economy that favor the concentration of power, and therefore the impossibility of governing the economic system.

The relationship between the structures in the CEPAL economic development thought and the antitrust structuralism (such as the one of the Harvard School of Antitrust Law during the 60's) is a lot more than linguistic. It corresponds to a common understanding of the need to contrast (with legal antidotes) respectively macro and microeconomic negative trends, which have structural bases on the respective economies or sectors.

For this purpose, the legal basis for regulation is exactly in establishing procedures for the economic activity. The idea is similar to the one of the most progressive lines of thought of legal relativism, which, when facing the problem of finding the fundamental basis for the legal rule and being willing to avoid the discussion in strictly political terms, respond by defending the procedural rule, directed to find a fair legal rule²⁵, and, therefore, open up the doors for the development of the due process clause²⁶.

This change in the scope of concern – from the search of a predetermined and pre-legal objective to the effective assurance of the fairness and loyalty of the integration of the various economic agents in the market and of the material equality in competition – is a response to the issue of the fundamental basis of regulation (the economic due process clause).

As an institutional guarantee of the fairness and equilibrium of the economic interaction process, the regulation gains an autonomous justification. The reason is that there is no longer a pre-legal or ultra-legal fundamental basis for regulation. Its justification becomes only the one of creating a material legal equality rather than merely a formal legal equality among all of the economic agents, and assuring the fairness of their conduct in the market.

c) Economic Development and Cooperation

The third basic principle of a legal economic development theory is the cooperative idea.

²⁵ The progressist realists divide themselves into two groups: the so called Yale School and the Harvard School. The first one sees the action of the Judiciary as a political valuing of opposite interests (therefore retrieving ideas of the jurisprudence of interests) (see H. Sasswell and M. McDougal, “Legal education and public policy: professional training in the public interest”, *Yale Law Journal* 52/203, 1943; also see B. Ackerman, *Reconstructing American Law*, Cambridge, Harvard University Press, 1984). The second and most original group sees the problem of the enforcement of Law as a discussion of which institution is the most capable of enforcing it (see H. Hart and Albert Sacks, *The Legal Process*, New Haven, Tentative Edition, 1958). The modern development of the progressist realism in a certain way, combines the two concepts, seeking to identify how a court decision can influence public institutions and the levels of power of the market economy, improving such institutions and levels of power (see O. Fiss, “The Social and Political Foundations of Adjudication”, in *Law and Human Behavior*, v. 6, n. 2, 1982, p. 121).

²⁶ In Civil Procedure, the central objective of the *due process clause*, the adversary proceeding principle (*princípio do contraditório*), is nothing but a form of assuring the participation of the parties in the proceeding that leads a third party and the judge to a fairer decision. With respect to this subject, see the essential article of C. R. Dinamarco, “O princípio do contraditório e sua dupla destinação”, in *Fundamentos do Processo Civil Moderno*, t. I, São Paulo, Malheiros Editores, 2000, p. 124). In the same way, competition is the guarantee of a reply, of a participation of all economic agents that assures the taking of a more uniform decision by the consumers.

The economic democracy notion, as described up to this point, allowed the extension of the need to spread economic knowledge throughout society so that everyone can make his or her choices. In order to do so, the importance of the redistributive principle was demonstrated, a principle that allows the participants to be included in the economic choice process and the principle of diluting the centers of economic power. On the other hand a necessary consequence of the idea of dissemination of economic knowledge is the dilution of the market power center that tends to concentrate knowledge.

It so happens that these principles only guarantee that all of the economic agents are able to make free choices (which social exclusion and concentration of economic power evidently do not allow). The possibility for agents to compare individual choices with social choices is also necessary. As it will be seen, this is only possible through cooperation.

c.1) Cooperation as an Individual Choice

The issue of the individual decision vs. social decision is something that has been tormenting human minds for centuries. How and under what circumstances is it possible to make an individual cooperate with his/her peers naturally and voluntarily?

We will attempt to demonstrate below that the answer to this question does not depend on the adoption of optimistic or pessimistic beliefs with regard to human nature. With effect, it is demonstrated that the existence of cooperation, or lack thereof, is a direct result of the existence of conditions (and institutions) that allow it to develop. It is not by chance that the response that has been given most recently and that is particularly interesting for this work, is that the existence of cooperation basically depends on a problem of information.

c.2) Conditions for Cooperation

The most interesting and most simple expression of the individualism – cooperativism dilemma – is in the well-known prisoner’s dilemma²⁷. The basic conflict therein is the individual decision and the collective interest decision. The perplexity that results from it is the inability of the parties to cooperate in order to reach a solution that is best for the group of players considered.

It is interesting to observe that the cooperative solution is not reached simply because of the impossibility to obtain information on the expected behavior of the other party and as a result of the consequent defensive behavior of one in relation to the other agent.

The careful study of the prisoner’s dilemma and the modern studies on cooperation through the game theory allow²⁸ some basic conclusions to be reached. There are three minimum conditions for successful cooperative solutions: a small number of participants, the existence of information on the behavior of the others and the existence of an ongoing relationship between the agents.

It is demonstrated that, always thinking from a strictly individual point of view, a specific economic agent will have a much higher tendency to cooperate, given the greater the importance of the “next rounds” of the game. To put this affirmation in more specific terms – it is obvious: the greater the importance of the future relationship with the other party, the higher the tendency to cooperate.

²⁷ The prisoner dilemma was one of the first theoretical models based on which the modern Game Theory has structured itself. Imagine two prisoners about to be interrogated for having committed the same crime; and suppose that each one of them is told that if he confesses and informs against the other, he will be forgiven and the other will be charged with the maximum penalty (for instance 20 years), while if both confess and inform against each other, both will be charged with the basic penalty for the crime (for instance 10 years). On the other hand, if none of the prisoners confess, each will be charged with a penalty of 5 years for the smallest crime (for instance, the only one that is possible to be proved without confession). The individual strategic behavior leads both prisoners to confess. This is certainly the best individual strategy, because no matter what behavior the other player (prisoner) has, the most convenient behavior will always be to confess (because if the other does not confess, the first player will be free, and if the other confesses, the first player will avoid being charged with the maximum penalty). What occurs is that in this case, the individual strategies represent for the prisoners, a worse option than the behavior that pursues the maximizing of the collective utility (which would occur if only one of the prisoners confessed); with respect to the prisoner’s dilemma, see D. Baird, C. Gertner, R. Pickner, *Game theory and the law*, Cambridge-Massachusetts-London, Harvard University Press, 1994, p. 48-49.

²⁸ The main study is undoubtedly the one of R. Axelrod, *The evolution of cooperation*, New York, Basic Books, 1984. The main scope of the referred work is the analysis of the prisoner’s dilemma. From this simple game it tries to determine the conditions for cooperation and the behavior that can best lead to cooperation. For that, a game among various mathematicians, economists and specialists in game theory was made. The result was the victory of the strategy known as “tit for tat”, which is the one that a player cooperates in the first round and follows the behavior of the other players (i.e. adopts reciprocity) in the rest of the other rounds. The reciprocity of behavior therefore becomes the center of its theory formulation. After observing this result, the author concludes that there is an effective possibility of cooperation and then discusses the requirements for its verification.

It so happens that all of these conditions are rarely and increasingly less observable in the real world. The reality is increasingly great numbers and impersonal relationships – that tend to occur once and not again. The widely discussed and unsuccessful globalization only emphasizes this tendency and, therefore, the tendency towards individualism in social relationships.

The conclusion, therefore, is the need for institutions and values that stimulate and allow cooperation²⁹.

There are many examples throughout history that demonstrate the effectiveness and even the simplicity of this type of institution. Perhaps the most eloquent and most important of them is the increase of trade in Medieval Europe, that required that the levels of reciprocal confidence be re-established in a reality of great distances and little information. A great part of this rebirth could be attributed to the legal and ethical rules that raised the level of information by creating standard accounting criteria and codes of conduct for the merchants³⁰.

It is interesting to note, and here is more proof of the relevance of the value of knowledge and information in society, that the institutions required for cooperation are only those necessary to create the conditions for it to exist. When these conditions are created, the compliance with the economic decisions indicated thereby occurs naturally and without coercion, the majority of the time. Historical analysis shows that solutions adopted through a cooperative method bring with them a much higher level of voluntary compliance, without the intervention of third parties³¹. Thus, well-prepared rules that create a cooperative environment end up being complied with and the non-compliance controlled and policed by the participants of the relationship themselves. It is specifically this self-fulfillment of rules that makes it possible to affirm that, in the presence of values and institutions that allow cooperation, it comes naturally. This conclusion is important to establish the role of Law in the incentive to cooperate.

c.3) The Role of Law in the Drive for Cooperation

In light of the foregoing, it is evident that the most important institutional duty with regard to cooperation is the creation of a good environment for it.

There are two significantly clear reasons that allow us to come to such a decisive conclusion. First, as already seen, cooperation, different from individual behavior, does not occur naturally in society. There is no Hobbesian concept of human nature in this statement, but simply the recognition that there are social conditions that make such behavior difficult. This condition is basically the fear of the strategic behavior of the other party. If this is so, and it seems to be, at the least, a reasonable presumption, then the Law simply needs to create the conditions to eliminate this fear for cooperation to grow.

²⁹ With respect to this matter, see D. North, *Institutions, institutional change and economic performance*, cit, p. 15-16.

³⁰ P. Milgrom, D. North and B. Weingast, “The role of institutions in the revival of trade: the Law Merchant, Private Judges and the Champagne Fairs”, in *Economics and politics*, n. 2 (1990) p. 1-23.

³¹ With respect to this matter, see D. North, *Institutions, institutional change and economic performance*, cit, p. 38.

However, there is another reason to emphasize the role of the Law in creating conditions for cooperation. As previously pointed out, this work is not intended to replace economic determinism with legal determinism that comes from pre-determined values. The intention here is only to allow these values to be shaped by the contributions of the whole society. And from there, the search for values that would allow social self-knowledge, like redistribution and the dissemination of economic knowledge. This applies also for cooperation. To think in a way to obtain it is fundamental for economic development, to the extent that it opens a new alternative for social and economic behavior, eliminating the chains that bind the individual to selfish behavior.

A consequence of this is that, for the Law, cooperation should not be and is not an absolute value. In those situations in which cooperation does not act as an instrument of social knowledge, but as a form of stratification of decisions and concentration of economic knowledge, as it occurs in cartels, it must be and is rigorously restrained.

It is the indisputable duty of the Law to allow it to develop in another way, as an alternative to individual behavior. It offers one more alternative in the economic field, increasing economic choices.

In summary, what should be said is that, given the social and supra-individual conditions of human behavior (doubts regarding the behavior of the other, reciprocity, strategic behaviour, etc.), cooperation is not a viable alternative for social interaction if no incentive is given by the legal system.

On the other hand, upon creation of the instruments that allow social interaction based on cooperation, it is reasonable to believe, for the reasons mentioned above, that it would come naturally.

c.4) Regulatory Characteristics

It is first necessary to note that the presence of cooperation in the regulated sectors is fundamental for development. On one hand, it ensures a much higher degree of effectiveness for the rules and decisions of the regulatory agent. But much more than that, as the prisoner's dilemma seems to demonstrate, it ensures that the parties (herein understood as the regulatory agent, all of the regulated agents and all users of the services) can discover the most socially advantageous behavior (even though less individually advantageous).

The tendency for self-fulfillment of the decisions also influences another essential debate on the matter of the regulation theory. It is the controversial discussion of regulatory matters considering the advantages and disadvantages of self-regulation.

The study of cooperation undoubtedly suggests caution with regard to the autonomous self-regulatory experiences. As known, the basis and foundation of self-regulation is the self-fulfillment of the rules by its members. On the other hand, the said self-fulfillment depends on the existence of institutional preconditions (regulatory). Thus, the more successful

the attempt at self-regulation is, the more it is part of a strong regulation, since it is clear that this regulation is capable of creating conditions for cooperation. The reasonably successful experience of the capital markets in the conjunction of regulation and self-regulation is an interesting demonstration of this tendency.

The second significantly important general regulatory characteristic is the ability to differentiate between the socially positive stimulus of cooperation, i.e., those that allow the self-fulfillment of rules and create availability, in the agents, to search for supra-individual interests, and those contrary to public interest, i.e., the cooperation intended to reinforce positions of economic power and abuse the consumer. The difference is found in the relation of cooperation with the acquisition of economic knowledge. If this relation is understood, it is easy, on one hand, to understand that the stimulus for so called “positive” cooperation occurs through the incentive for the full exchange of information between economic agents (companies and consumers). As already seen, the existence of information is an essential condition for cooperation. On the other hand, it is also the most legitimate and effective form of control of the existence of cartels by the consumers and by the regulatory agents.

Another fundamental element in distinguishing between positive and negative cooperation is whether or not it deals with market variables. In the first case, there is a high probability that the apparent cooperation really hides an attempt to exclude the other competitors and abuse the consumers. Here, the structure is thus exactly the opposite of what could allow the acquisition of economic knowledge, since this type of structure causes the concentration and theorization of knowledge, with foreseeable results. The behavior is exclusively in self-interest. The only distinguishing factor is that the self-interest is of a group and not of an individual.

Along this line of understanding of the significance of cooperation, the observation of the requirements for it to occur makes it clear when the cooperation, while illicit against the economic order (formation of a cartel), could occur without the necessity of a formal agreement, through simple parallel behavior³². This simple conclusion is still not understood by the majority of the antitrust authorities, causing significant damages to the economic system and to the consumer. It also contributes to the endemic concentration of the economic power, a factor that undoubtedly hinders development.

Also relevant is another of the minimum conditions for the existence of the cooperation: the need for continued interaction. How do we express this principle in regulatory terms without inducing on the other hand, the formation of cartels. The answer is more or less clear. It is advisable that the regulation discourages the speculating agents that may be interested in entering, making quick profits and then withdrawing, selling their participation at a profit. This type of agent typically has no commitment to continue a relationship, or in economic terms,

³² With respect to this matter, consider the eloquent lesson of R. Axelrod, *The evolution of cooperation*, cit, p. 180: “Cooperation certainly does not require formal agreements or even face-to-face negotiations. The fact that cooperation based upon reciprocity can emerge and prove stable suggests that antitrust activities should pay more attention to preventing the conditions that foster collusion than to searching for secret meetings among executives of competing firms”.

to continue “to the next round of the game”. Their incentive to cooperate, voluntarily meeting their obligations without adopting strategic behavior with regard to competitors, is minimal.

Last, but not least, the legal value of cooperation must be recognized and a conclusion taken therefrom. The economic theory itself (Game Theory) comes to this conclusion, although by different means. For the theoreticians of cooperative³³ games, the typical strategy that can cause cooperation requires that there is not much speculation on the rationality or justification for the behavior of the other party. The behavior must be as simple and understandable to the others as possible in order to create a cooperative environment. Therefore, we cannot rely too much on complex regulations from the abstract point of view, which try to use complex economic theories. The most simple theories, based on values and clearly identifiable ethical behavior are much more likely to cause a cooperative environment between regulatory officials and regulated agents.

c.5) Conclusion: Cooperation and the Economic Knowledge Theory

The prisoner’s dilemma brings with it probably the most important lesson that can be learned about cooperation. Successful strategies are successful in Darwin’s Theory of Evolution because they destroy the others. In the social reality, in the majority of the cases, successful strategies are successful because they cause the other market agents to behave the same way, learning the most appropriate way to act on the market in order to bring about potential joint benefits (social).

The legal theory of economic knowledge, therefore, makes a complete circle to go back and justify itself. Cooperation is the cause and consequence of the dissemination of economic knowledge.

Cooperation is a consequence of the dissemination of economic knowledge because, without such dissemination it is not possible to surpass behavior based on self-interest, be it individual or group (then the tendency to form cartels). The concentration of economic power and economic knowledge would eliminate the possibility of cooperation by making it unnecessary.

On the other hand, cooperation causes the dissemination of economic knowledge because it allows socially and individually useful comparisons, providing the agents with another alternative for social behavior.

VII – Conclusion: Economic Democracy and radical change

Everything that has been said above leads to a strong concentration of the legal theory of economic development herein proposed in the idea of economic knowledge. This concentration brings with it certain undoubted advantages, but, on the other hand, continues to be problematic.

³³ See R. Axelrod, *The evolution of cooperation*, cit, p. 120.

The advantages seem to result from the description itself of the evolution of the economic development theory. After emphasizing the specific structural problems of each economy that prevent development, the economic theories, trying to define and achieve specific results, always fail and will fail to find the objectives and specific needs of each social structure. A consequence of this is the growing conflicts of today between the needs of the developing countries, which is often impinged by the regulatory technique suggested to them.

On the other hand, it cannot be denied that the concentration on the problem of economic knowledge brings with it some of the typical problems of the so called instrumental solutions. This is the relative nature of conclusions. Taking the argument to the extreme, it could be said that, if the main objective is to discover the social values of a specific society in order to guarantee that all citizens participate in this decision, any choice would be allowable. Therefore, there would not be profound values to be protected. We would fall into the old logic trap so well identified by Bertrand Russel, according to whom, if everything were relative, there would be nothing (absolute) to which everything would be relative.

It so happens that, as it is common in this type of instrumental solution, the correction and democratization of the forms lead to the definition of valued objectives. This is what occurs as a rule with all participative solutions. Imagine, for example, the due process of law. Understood in its material sense, it requires increased participation in the process, which is a social value in and of itself.

The same can be said with regard to the values that seek to allow economic knowledge. Specifically because they require everyone's participation in the process, the elimination of exclusion and of the centers of power, and the possibility of choosing community values (cooperation) and not individual ones, they represent an option in and of themselves for social values. It is based on these basic values that the concept of economic democracy can therefore be defined.

Being so defined, the concept of economic democracy is quite clear in how it can contribute to radical social change. Among the non revolutionary alternatives, this seems to be actually the most viable way through which law can really interfere in the economic sphere and allow people economically to "vote" their desired change, i.e., have their economic choice, individual or collective, really considered.