The Resilience of Law: A Measure to Tackle the Ineffectiveness of Law

La resiliencia de la ley: una medida para afrontar la inefectividad de la ley

A resilência da lei: Uma medida para lidar com a ineficácia da lei

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Abstract

This article proposes a new idea about the so-called "resilience of laws," designed to protect the effectiveness of laws against any change, whether social, legal, political, economic, or otherwise. Laws may initially be effective but become ineffective afterwards, to the detriment of society, given the shock produced by those changes. As a result, the article imposes new expectations on legislators and judges, who should provide society with both effective and resilient laws. The resilience of laws comprises two features: i) static resilience, i.e., the ability of the law to resist the shock caused by a previous change, and ii) dynamic resilience, i.e., the capacity to recover the effectiveness of law once it has been shocked and to prevent a future scenario of ineffectiveness. The article explains how legislators and judges must consider previous challenging changes and shocks to prevent ineffectiveness in the future; this is aimed at having resistant laws against changes.

Keywords

Resilience of law; effectiveness of law; lawmakers; constitutional aspirations; judicial and legislative expectations.

Resumen

Este artículo propone una nueva idea sobre la conocida "resiliencia de la ley", que está diseñada para proteger la efectividad de las normas frente a cualquier cambio social, legal, político, económico, entre otros. Las normas pueden ser efectivas en principio, pero volverse inefectivas con posterioridad con ocasión del choque provocado por esos cambios, en detrimento de la sociedad. Como resultado, este artículo impone nuevas expectativas en legisladores y jueces en virtud de las cuales se espera que estos ofrezcan no solo leyes efectivas a la sociedad, sino también resilientes. La resiliencia de las leyes comprende dos aspectos: i) la resiliencia estática, como la habilidad de la ley de resistir el choque causado por un cambio previo; y ii) la resiliencia dinámica, como la capacidad de recuperar la efectividad de las leyes una vez han sido impactadas y la capacidad de prevenir un futuro escenario de inefectividad. El artículo explica la forma en que legisladores y jueces deben tener en consideración los cambios retadores y los choques previos para prevenir la inefectividad en el futuro por choques similares; esto tiene como objetivo tener leyes resistentes a los cambios.

Palabras clave

Resiliencia de la ley; efectividad de la ley; aspiraciones constitucionales; expectativas legislativas y judiciales.

Resumo

Este artigo propõe uma nova ideia sobre a conhecida "Resiliência da lei", que visa proteger a eficácia das normas contra qualquer mudança social, jurídica, política, econômica, entre outras. As normas podem ser efetivas inicialmente, mas depois se tornam ineficazes no choque causado por essas mudanças, em detrimento da sociedade. Como resultado, este artigo impõe novas expectativas aos legisladores e juízes, em virtude das quais se espera que eles não apenas ofereçam leis efetivas à sociedade, mas também leis resilientes. A resiliência das leis compreende dois aspectos: i) resiliência estática, como a capacidade da lei de resistir ao choque causado por uma mudança anterior; e ii) resiliência dinâmica como a capacidade de recuperar a eficácia das leis uma vez impactadas e a capacidade de prevenir um cenário futuro de ineficácia. O artigo explica como legisladores e juízes devem levar em conta mudanças desafiadoras e choques anteriores para evitar a ineficácia como resultado de choques futuros semelhantes; isso visa ter leis resistentes a mudanças.

Palavras-chave

Resiliência da lei; eficácia da lei; aspirações constitucionais; expectativas legislativas e judiciais.

Introduction[1]

The considerable increase in legal norms and the corresponding decrease in their value is acknowledged as an essential problem in law; some authors have called it the "inflation of the laws."[2] Accordingly, it seems that the remedy for every social ill, or the mechanism for achieving every social goal, is to make a law; yet, sometimes, the ills continue, and the goals are not attained.[2] The reason, whichever it is in every case, refers to the usual ineffectiveness of those norms. As a result, the "effectiveness of law" has been incorporated in international and domestic scenarios as a new[3] "general principle"[4]; its purpose is to safeguard legal certainty and guarantee the normal functioning of the legal system.[5]

Nevertheless, the problem with the effectiveness of law goes even beyond the reception, implementation, or voluntary compliance of new laws—which are some of the traditional and modern expectations. Laws may become ineffective, even if initially effective, due to changes in the social, political, legal, or economic context.[6] This is the reason for proposing the new notion of the

1 This article, although modified to be a publishable article, is a part of the fourth chapter of the Ph.D. thesis "The Resilience of the Law of Performance Bonds: An Emphasis on Colombia," submitted to the University of Manchester in 2015. The complementary part of the fourth chapter will be presented in a future article. The author identifies this article with Georg Wilhelm Friedrich Hegel's famous phrase: "We learn from history that we do not learn from history."
Ssulmane, Dace: *The Principle of Effectiveness – The Guarantee of Rule of Law in Europe?* European Integration and Baltic Sea Region: Diversity and Perspectives, European Regional Development Fund, 2011, pp. 237–239.

2 Allott, Anthony, *The Effectiveness of Laws,* 15 Val. U. L. Rev., N. 2, 1981, p. 230.

3 However, Professor René-Jean Dupuy stated that "effectiveness does not form a new principle of law; it is more ancient than law. It is a condition and justification of the norm's existence, which originates from the implementation or adoption of the law: in Ssulmane, op. cit., p. 236.

4 The effectiveness of law as a principle has been theoretically developed since "Allgemeine Staatslehre" in 1900 by G. Jellinek, although by then, he had not developed a theoretical terminology (Milano, 2005, p. 25). The principle of effectiveness of law was first developed as an international principle and later, started becoming an essential characteristic of domestic legislatures and judicial competence: in Ssulmane, op. cit., p. 234. For instance, the effectiveness of law is one of the general principles of the European Union law: in Addink, Henk: *Part II Good Governance: Specification by Principles – The Principle of Effectiveness* Good Governance: Concept and Context, Oxford University, 2019, p. 141–156.

5 A small number of scholars have shared the idea that, although effectiveness is certainly an important characteristic of legal rules, it should not be regarded as a "general principle," especially considering that only ideas (moral, ideological, philosophical, and human) and values can be called principles: in Ssulmane, op. cit., p. 237.

6 "Professor T. Alexander Aleinikoff […] compares the 'archeological metaphor' [referring to statutory interpretation] with a 'nautical metaphor,' in which Congress turns the statute out to sea and leaves it to drift

resilience of law, which is a step forward from the traditional idea of the effectiveness of the law.

The notion of the "resilience of law" and its relation to the notion of the "effectiveness of law" is one of the leading original contributions of this article. Although the former notion has been used in preceding academic articles, it was only considered a desired feature of the law, without any relation to the effectiveness of the law. The notion of the "resilience of the law" developed in this article, however, goes far beyond the traditional approach; indeed, it includes a subjective part that proposes that the roles of judges and legislators need to be modernised to satisfy the current expectations of a contemporary and demanding society.

In this article, the suggested notion of the resilience of law is based on the idea of the estimated sufficient effectiveness of law. Thus, it is important to highlight the differences from similar notions, such as "legal resilience," to explain later the so-called shock that may challenge legal regimes. Finally, it is crucial to delve into the concepts of static and dynamic resilience and the conjunction between them to provide society with resilient laws as a new expectation of judges and legislators within an idea of aspirational constitutionalism.

The "estimated sufficient" effectiveness of law

The effectiveness of law, according to Allott, should be measured by the degree of compliance; a) in so far as a law is preventive, i.e., designed to discourage behaviour which is disapproved of, one can see if that behaviour is indeed diminished or absent; b) in so far as a law is curative, i.e., operation *ex post facto* to rectify some failing or dispute, we can see how far it serves to achieve these ends; c) in so far as a law is facultative, i.e., providing formal recognition, regulation and protection for an institution of the law, such as marriage or contracts. Hence, presumably, the measurement of its effectiveness is both the extent to which the facilities are taken up by those eligible to do so and the extent to which the institution so regulated is, in fact, insulated against attack, says Allott.[7]

In this direction, notwithstanding other criteria employed in legal theory for assessing the effectiveness of law, the dominant legal view in social science research is based on the idea of a gap between what the law states and how people act. When behaviour does not follow the law, the legal system is not considered completely effective. In fact, in a general philosophical

unpredictably," says Eskridge, Jr., William N.: *Dynamic Statutory Interpretation*, Univ. Penn. L.R., Vol. 135, N. 6, 1987, p. 1482.

7 Allott, op. cit., p. 235.

analysis, effectiveness is related to the observance of norms. Therefore, a legal norm is effective when its addressees observe it.[8]

Within the "general principle of law effectiveness,"[9] it would be ideal that *perfect effectiveness* could be reached and proved for every legal norm. However, this is unlikely, especially since complying with it implies that society must accept and comply with the law. Hence, only one individual is enough to jeopardise the perfect scenario when he does not respect the norm, whether they are aware of its existence or not.[10]

Besides, society tends to expect that all laws produced by the relevant authority are designed to achieve their intended purpose, at least in theory. In Mousmouti's view, substantive content and legislative expression are the fundamental elements determining the effectiveness of law. Thus, the rules' design is ineffective if the selected rules address the problem ineffectively or do not contribute to the law's overarching objective.[11] However, a law (or Act) generally comprises a set of legal rules; one or more of those rules may not be appropriately designed to achieve the law's intended purpose despite the others doing so. In the latter case, accordingly, the effectiveness of the law could be jeopardised by those rules which are neither pertinent nor relevant.

In this regard, *perfect effectiveness* is an unattainable ideal since it requires compliance with the law by the whole of society and a perfect congruence between the legal rules of a law and its intended purpose. In contrast, *sufficient effectiveness* is a form of legal realism in which the rule has a reasonable expectation of being complied with by most citizens, even if not by all. In the instance of tax laws, the fact that citizens try to avoid paying taxes does not automatically render these laws ineffective. Therefore, separating the ideal and absolute concept of *perfect effectiveness* from the notion of *sufficient effectiveness* would be necessary. This seems more appropriate and, above all, achievable.

The "effectiveness of law" is not absolute. To reach and prove the *sufficient effectiveness* of the law, it would be vital to test how far a law fulfils its purposes.[12] The latter would represent the objective element of "effectiveness." Although

8 Addink, op. cit., pp. 141–156.

9 Which is deeply explained by J. Touscoz in: *Le Principe d'effectivité dans l'ordre international.* Dupuy R-J. Preface, pp. I–II., Paris, LGDJ, 1964; Francis Snyder in *The effectiveness of European Community law: Institutions, processes, tools and techniques*, The Modern Law Review 56.1, 1993; Matej Accetto and Stefan Zleptnig: *The Principle of Effectiveness Rethinking Its Role in Community Law.* European Public Law 11.3, 2005; and Addink, op. cit., pp. 141–156.

10 In France, for example, they should know more than 10,000 statutes, 120,000 decrees, 7,400 treaties, and approximately 17,000 EU texts (Ssulmane, op. cit., p. 238).

11 Mousmouti, Maria, *Effectiveness as an Aid to Legislative Drafting*, The Loophole, Issue N. 2, 2014, pp. 15–24; Mousmouti, Maria, *Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking*, European Journal of Risk Regulation, Vol. 9, N. 3, 2018, pp. 445–64.

12 There is one important difficulty: the purpose of a particular law may not be clearly stated by its maker. Besides, as the law acquires a history, those who apply it, follow it, or disregard it reshape both the law and its purposes. Allott, op. cit., p. 233.

the addressees of the law are part of the study, the fundamental analysis here is about the design and objectives of the law. Thus, for a law to accomplish the "objective element" of "effectiveness," it is not necessary to design all its rules properly. Otherwise, this would challenge the effectiveness of many existing and future laws. Yet, it is not easy to determine whether a law is effective when some of its particular legal rules are appropriately designed, and others are not. In those situations, the method to establish whether or not a law has the objective element of the notion of "effectiveness" should vary widely, depending on the specific case. For instance, as seen later in this research, in the case of a law that regulates a specific contract, it could be said that the essential elements, based on their function and not on hierarchy, are more relevant than the accidental elements. Therefore, under the same example, if well-designed rules are more "relevant" than those that are not, it could be stated that such a law is *sufficiently effective* despite those deficient rules, provided that the subject element is also present.

Nonetheless, succeeding with the objective element of "effectiveness" is not enough by itself to catalogue a law as an effective law; it needs to be accompanied by an equally important test that assesses what proportion of the intended addressees of that law were persuaded to accept it and complied with it.[13] This would represent the subjective element of the notion of the "effectiveness of the law," where a pertinent analysis must refer to the relationship between said law and the addressees of the law. However, only two law-abiding individuals out of an entire society do not prove the effectiveness of such a law; on the contrary, they evidence its ineffectiveness. The "required percentage or number of people" to qualify a law for *sufficient effectiveness* is unknown. In addition, proposing an arbitrary formula without any comprehensive method to qualify this seems incorrect. Is the law effective if 50 % + 1 of society respects the law? Should it reach at least two-thirds of the addressees of such law? Can this be numerically calculated? Therefore, it can never be "confirmed" with absolute certainty that a particular law is *sufficiently effective*. Yet, both society and lawmakers may "estimate" the latter is efficient in a large proportion, as in the case of the rules of the road, or they may also "estimate" that a particular norm is vastly disregarded, as in the case of the prohibition of alcoholic beverages in the United States of America between 1920 and 1933.[14]

Consequently, when a comprehensive test about the sufficient effectiveness of a new law is made,[15] it is normally grounded on "estimations": *estimated suf-*

13 Tyler, Tom R: *Compliance with the Intellectual Property Laws: A Psychological Perspective,* NYUJ Int'l L. & Pol. 29, 1996, pp. 219, 224–226; Stout, Lynn. *Cultivating conscience: How good laws make good people,* Princeton University Press, 2010, pp. 5–6; Fell, James C: *The relationship of underage drinking laws to reductions in drinking drivers in fatal crashes in the United States,* Accident Analysis & Prevention 40.4, 2008; Manning, Bayless: *Hyperlexis: Our national disease,* Nw. UL Rev. 71, 1976.

14 Report on the Enforcement of the Prohibition Laws of the United States, National Commission on Law Observance and Enforcement (The Wickersham Commission Report on Alcohol Prohibition, Par. IX and X), January 7, 1931.

15 Nevertheless, the number of reports and strategies seeking to test the ESF is almost insignificant compared to the total amount of enacted rules.

ficient effectiveness sounds more appropriate, but, still, it is far from any precise analysis that is needed in modern times. Yet, scholars and legal observatories have admitted and estimated the effectiveness level in analysing whether laws achieve their purpose. A clear example was provided in the spring of 1999 when the effectiveness of a 1997 Florida law was evaluated; this law took effect mandating that all cyclists under 16 wear a helmet while riding to prevent fatal accidents; 64 counties in Florida had enacted this law, while the other three had opted out. Under that evaluation and prior studies, "*it was estimated*"[16] that such a law sufficiently met its objectives given that in counties where the law was in place, children riders were twice as likely to wear helmets as children in counties without the law. As another example, in Botswana, from 1981 to 2001, the death rate in traffic accidents was 32.4 per 100,000 population. In 2014, a study was conducted into a law passed in 2009, which imposed an initial 30 % tax on alcoholic beverages and increased penalties for drunk driving. The study found that there has been a 12 % decrease in traffic accidents since the law came into force. Moreover, by 2011, there had been a further 12 % decrease. Thus, it was estimated that such a law was sufficiently effective.[17]

Furthermore, there has been a tendency to 'blame the law's estimated ineffectiveness on the wrong segment of society: those who make the laws rather than those who should keep or break them,[18] who are primarily responsible for the failures.[19] Furthermore, the examination of the quality of specific laws is rarely performed. Antony Allott stated: "[…] legislators fail to realize that it is not enough to make a law, and even to communicate it effectively to its subjects, if there is no monitoring of its reception and implementation: no feedback, in other words. Iceland is one of the few countries in the world which has institutionalized such monitoring of new laws."[20]

In addition, monitoring law results enables learning about the real effects of legislation and allows the conjunction of initial purposes and real-life results.

16 Kanny, Dafna; Schieber, Richard A.; Pryor, Vickie, and Kresnow, Marcie-jo: *Effectiveness of a State Law Mandating Use of Bicycle Helmets among Children: An Observational Evaluation,* 1074–1075, Oxford Journals, American Journal of Epidemiology, Vol. 154, Issue 11, 2001 p. 1072. Similarly in Foldvary, L. A., and J. C. Lane: *The effectiveness of compulsory wearing of seat-belts in casualty reduction (with an appendix on chi-square partitioning-tests of complex contingency tables),* Accident Analysis & Prevention 6.1, 1974, pp. 63, 67, and De Waard, Dick, and Ton Rooijers: *An experimental study to evaluate the effectiveness of different methods and intensities of law enforcement on driving speed on motorways,* Accident Analysis & Prevention 26.6, 1994, pp. 753–756.

17 Sebego, Miriam; Naumann, Rebecca; Rudd, Rose; Voetsch, Karen; Dellinger, Ann; Ndlovu, Cristopher: *The impact of alcohol and road traffic policies on crash rates in Botswana, 2004-2011: A time series analysis*, Accident Analysis & Prevention, Vol. 70, 2014, pp. 33–39, and Celleri, Milagros; Brunelli, Maximiliano; Cesan, Marianela; De Lellis, Martin: *Public policies for the reduction of traffic accidents due to alcohol consumption in Argentina*, Journal of psychology and related sciences, Vol. 38, N. 3, 2021, pp. 275–286.

18 A law is, despite its imperative form, essentially a kind of persuasion, and society will accept it and comply with it in exchange for a certain cost normally seen as the law's benefit. Allott, op. cit., p. 235.

19 Allott, op. cit., p. 229.

20 Allott. op. cit., pp. 236–237. England, as seen below, has followed the European directives in this respect and has created several policies such as the "Good Law Initiative 2013" set forth by the Parliamentary Counsel Office, or "Reducing the Impact of Regulation on Business" by the Better Regulation Executive in the Department of Business, Innovations and Skills.

Without information on results, effectiveness cannot be evaluated, and legislative errors cannot be identified and addressed.[21]

Unfortunately, nowadays, this kind of examination is not institutionalised in every country.[22] However, it is a more frequent process for new laws to test their quality. For instance, a "Better regulation strategy" was implemented in Europe, which deals with the contemporary problems of "inflation of legislation." This is strongly related to effectiveness as a principle since the latter falls due to such "inflation." Thus, impact assessment, consultation, evaluation, and recasting are methods to analyse whether the legislative efforts have met their objectives. Accordingly, the Communication "Smart Regulation in the EU" in October 2010 set forth the European Commission's plan to ensure the quality of regulation,[23] which was similarly tackled in England, as seen below.

So, here is where the "resilience of law" arises with similar, albeit larger, functions, creating, therefore, "new expectations" over legislators and judges in favour of the law's addressees, as a notion that implies the *estimated effectiveness of laws.* Within the context of this article, it would be incorrect to speak about the "resilience of law" if there is no sufficient effectiveness of law.

The resilience of law and similar concepts

This concept of *resilience* has been described as "the ability of a substance or object to spring back into shape; elasticity…" or "the capacity to recover quickly from difficulties; toughness…."[24] Therefore, using this concept in a legal context would signify, so far, "the ability of the law to maintain in function when shocked" or "the capacity of the law to recover when shocked." But which of these two concepts would be more accurate in the legal context? In fact, both notions should be considered equally accurate and could be the explanation of two variables that are part of the same concept: *the resilience of law*. To differentiate these two variables, we will refer to them as *static resilience* and *dynamic resilience*, respectively.

The *resilience of law*, first of all, seems to have been used synonymously with "legal resilience" despite the marked linguistic difference between them. In the former, the subject of resilience is the law, whereas in the latter, the subject of resilience is unknown. Thus, "legal resilience" could refer to society, to the individual, to a particular system, or any other subject; this would measure the level of "legal resilience of such subject, and not the "level of

21 Mousmouti, op. cit., 2014, pp. 15–24.

22 Feng Lu, Susan, and Yang Yao: *The effectiveness of law, financial development, and economic growth in an economy of financial repression: evidence from China,* World Development 37.4, 2009, pp. 6, 13.

23 Ssulmane, op. cit., p. 238. European Commission, *Better Regulation — simply explained,* Luxembourg: Office for Official Publications of the European Communities, 2006.

24 Definitions from the Oxford Dictionary of English, Oxford University Press, 2010.

resilience of law."[25] In other words, admitting they are synonymous would signify, for instance, that the "behaviour of the economy" is equal to the "economic behaviour of…"; and this might lead the analysis along the wrong path. Hence, this research will refer to the *resilience of law* as a notion related to the effectiveness of law.

The *resilience of law* and "legal resilience" have not been often used. However, the latter was adopted to test the flexibility or strength of the law in order to become suitable for reaching the addressees of the law integrally. For instance, Neil MacCormick's idea was that when the law settles an issue in one way, it is never inappropriate for a person to form a contrary moral view—to the effect that the issue ought to have been settled differently. Nonetheless, he says, it may be wrong for a person to act on his reserved moral judgment; it may be necessary or proper for him to follow the law, but he cannot surely be required to abandon his own moral judgment. But, according to Jeremy Waldron, the law is robust enough in this area so that particular legal orders can command general respect and be complied with, even in the face of significant criticism.[26] Therefore, the law must be sufficiently strong to reach the addressee with all its effects to penetrate the individual scope of moral reservations. Thus, Waldron affirms that "law has made itself resilient so that it can withstand the mischievousness and self-indulgence of our vaunted moral autonomy."[27] According to the distinction given above, the author believes that "neither the resilience of law" nor "legal resilience" should be used in this context. First, the legal system has not been shocked by moral autonomy; secondly, it has not measured the person's legal resilience level. People's ideas refer to the operability of the general principle of law effectiveness mentioned above, as the law is only trying to reach society despite said moral reservations.

An originally effective legal system may become partially or ineffective at some point. Nevertheless, that is different from the fact that, due to certain reservations (moral, for instance), the law is not reaching society. In the latter case, effectiveness was never achieved, as in the previous paragraph. The problem then refers to the scenario where the law was initially and sufficiently effective, but the law becomes ineffective due to changes in certain conditions (herein, those relevant changes are referred to as "the origin of the shock"). One example is the copyright law in Colombia, which is faced with the challenges of the evolution of technology. It is easy to see that the transmission of works through networks has challenged copyright regulation. Technological development has transformed how information, often protected by copyright, is created and acquired in digital environments and on the Internet.

25 As regarded by Hornstein, Donald T.: *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking,* NCL Rev. 89, 2010, pp. 1552–1556.

26 Waldron, Jeremy: *Legal Judgement and Moral Reservation,* Law and Democracy, EUI, 2010, p. 22.

27 Idem, p. 24.

It is apparent that, in contemporary cultural exchanges, there are new cases of copyright infringement that the law could not have foreseen. For example, there is a lack of clarity surrounding the infringement of rights in the massive reproduction of a work on the Internet when the copies are of equal or better quality than the original, which makes it extremely difficult to identify the original. In addition, the work may be used by anyone without the author or owner exercising total control over it since the Internet has few protocols to control or supervise the exploitation of works.[28] As can be seen, this regulation, which at first reached a certain level of effectiveness, is currently affected by the evolution of technology, which has considerably diminished its effectiveness in the digital environment.

Therefore, it is possible to think of two options so far to prevent the appearance of law ineffectiveness due to certain shocks. The first and the most obvious would be avoiding the occurrence of those changes. In that case, lawmakers could just keep designing effective laws and, in doing so, disregard the resilience or vulnerability of the law; this is what they have been doing for centuries because nothing could possibly affect the *status quo*. However, in real life, those changes can hardly be avoided, and, indeed, most of the time, changes are vital for the development of society. Those changes are not always endogenous,[29] voluntary, or expected;[30] they may also be exogenous,[31] involuntary[32] and unexpected, as seen later on, and no person would have control over them. That means that non-avoided changes would always challenge said vulnerability, if any; hence, the number of ineffective laws would constantly increase, which, as stated before, could lead to the disintegration of a disciplined society. It is of paramount importance, however, to establish that some changes (given their remoteness, nature, pettiness, or similar reasons) will never produce a shock.

Nevertheless, there is another option to prevent the appearance of ineffectiveness, which is situated on the other side of the problem, i.e., not upon those changes but upon the law itself. The second option is then to provide the law with certain "tools" that allow it to resist the effect of those uncontrollable

28 Woolcott, Olenka: *Copyright infringement in Colombia: some reflections about works on the internet and the influence of new regulation*. Revista Chilena de Derecho, 2018, Vol. 45, N. 2, pp. 505–529.

29 An "endogenous change" finds its origin or occurs inside the same system or framework that is finally shocked, such as the rise of a monopoly.

30 The author believes that "voluntary change" ought to be understood as those provoked by lawmakers. For instance, the signature of a Free Trade Agreement and its due legislative approbation can be considered a "voluntary change"; this example may also be useful to illustrate an "expected change," also referred to as an "anticipated change," where the shock should be foreseen even before the change. However, Maria Savasta-Kennedy (in Adaptation and Resiliency in Legal Systems, Introduction to the North Carolina Law Review Symposium, 89 N.C L. REV) has highlighted another difference. 1365, 1365 (2011), p. 1365, where she recalls that the latter symposium opened with a brief description of how the evolution of "earthquake-ready" building designs in the San Francisco Bay area might serve as an example of creating a resilient system in response to "anticipated but unpredictable" events.

31 "Exogenous change" is understood as finding its origin or occurring outside the system or framework that is finally shocked, such as political, economic, or social factors.

32 In the presence of "involuntary change," lawmakers do not provoke it, for example, in the case of a coup, a revolution, or a liberalization process.

changes or to recover if it cannot resist it; in short, to make the law resilient against those shocks.[33] As seen below, such tools refer to resistance, recovery, and preventive elements. But how can the notions of *resistance* and *recovery*, the two features of resilience so far, be defined in a legal context?

Resilience is more than a property of the law

A group of scholars,[34] particularly in climate change[35] and environmental law, have worked on the notion of the "resilience of legal systems." For instance, J. B. Ruhl, perhaps the scholar that went farthest in this matter, says that climate change will soon begin to disrupt the settled expectations of humans; this will give rise to the need to formulate new policies and resolve new disputes.[36] Therefore, he argues that if the law is up to the task, it is partly because it proves to be *resilient* and *adaptive*.[37] J. B. Ruhl, therefore, going beyond previous scholars, outlines some foundational principles of what he calls the "resilience theory" and then tries to apply them in the context of the legal system.[38]

In that sense, J. B. Ruhl starts by structuring his idea, stating that *resilience* is "the capacity of a system to experience shocks while retaining essentially the same function, structure, feedback, and therefore identity."[39] Therefore, based on the ideas of Walker[40] and Holling,[41] Ruhl mentions two features of resilience that are similar to *static resilience* and *dynamic resilience*, both concepts developed in this article. According to Holling's model, the first feature of resilience is "recovery"—the time required for a system to return to an equilibrium or steady state following a disturbance. He calls this feature "engineering resilience,"

33 Indeed, in October 2010, a group of scholars from diverse legal fields gathered at the University of North Carolina School of Law in Chapel Hill, North Carolina, to discuss the shock waves of recent events hitting the environment, financial markets, and the criminal justice system and consider how the law can better enable these systems to deal with unanticipated challenges; see Savasta-Kennedy, op. cit., p. 1365.

34 Karl N. Llewellyn: *The Common Law Tradition: Deciding Appeal,* 513, 1960; Joni S. Charme: *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making sense of an Enigma,* 25 Geo. Wash. J. Int'l L. 5 Econ. 71, 104, 1992; Janet C. Neuman: *Drought Proofing Water Law,* 7 U. Denv. Water L. Rev. 92, 106, 2003; Oren Perez: *Purity Lost: The Paradoxical Face of the New Transnational Legal Body*, 33 Brook. J. Int'l L. 1, 48, 2007, in Ruhl, J. B.: *General Design Principles for Resilience and Adaptive Capacity in Legal Systems – with applications to Climate Change Adaptation,* 89 NCL Rev. 1373, 2011, p. 1378. Joseph Vining, from the field of law and economics, explains why law is not, and cannot be, a social science, which has no relation at all to the context proposed herein (*The Resilience of Law, Law and Democracy in the Empire of Force*, Jefferson Powell, James B. White, eds., Univ. of Michigan Press, 2009).

35 Driessen, Peter P. J. and Van Rijswick, H. F. M. W.: *Normative Aspects of Climate Adaptation Policies,* Climate Law 2, DOI 10.3233/CL-2011-51, IOS Press, 2011, p. 561; Ebbesson, Jonas: The rule of law in the governance of complex socio-ecological changes, Global Environmental Change 20, 2010; Van Rijswick, H. F. M. W: *Moving water and the law, the distribution of water rights and water duties within river basins in European and Dutch water law,* Europa Law Publishing, 2008.

36 Ruhl, J. B, op. cit., p. 1374.

37 Ibid, p. 1374.

38 Ibid, p. 1375.

39 Ibid, p. 1375.

40 Walker, Brian: *A handful of Heuristics and Some Propositions for Understanding Resilience in Socio-Ecological Systems*¸ Ecology and Soc, in Ruhl, op. cit., p. 1375.

41 Holling, Crawford S.: *Resilience and Stability of Ecological Systems,* 4 Ann. Rev. Ecology and Systematics 1, 1973, in Ruhl, op. cit., p. 1376.

given that it would be based on reliability, efficiency, quality, control, and similar strategies to pursue a single objective: returning to equilibrium. His "engineering resilience" could be paralleled to *dynamic resilience*, as it will be treated later in this work. On the other side of Holling's model is "ecological resilience" (which could be paralleled to *static resilience* in this article). The latter is measured by the amount or magnitude of disturbance a system can absorb without having its fundamental behavioural structure redefined—a property known as resistance.[42]

Hence, in a legal context, says Ruhl, scholars have used the terms "resilient" and "resilience" to describe the positive qualities of a legal system.[43] Moreover, those scholars seem to believe that a resilient legal system enjoys consistency in overall behavioural structure "notwithstanding the continuous change of external and internal conditions."[44] In other words, the legal system must resist and recover quickly after those shocks. Nevertheless, at some point, Ruhl's stated argument digresses from that proposition in the context of this article; Ruhl is aiming at a different target. He believes that resilience theory does provide a coherent set of questions and analytics for stepping back to assess how to coordinate and apply those strategies to design a legal system that is *durable* in the face of change.

On the contrary, it appears that the objective is to design a legal system that is *sufficiently effective* even in the face of change. By doing that, Ruhl states that resilience is no more than a property of the law. This idea is against the viewpoint presented in this article, where resilience is a larger notion that comprises the principle of law effectiveness. However, a different stance is taken regarding how Ruhl incorporated these two features (resistance and recovery) into the legal scenario. Therefore, a different road must be set to analyse whether a legal system is resilient.

Scholars cited in this section have also suggested that the term "resilience" refers to the "adaptability" of laws to new political, social, environmental, and economic conditions, amongst others. Departing from this belief, however, it seems clear that norms cannot adapt to anything. Consequently, these norms may easily become partially or fully obsolete, particularly when enacted and left to drift. These norms need an external propeller to evolve and recover from those new situations or "changes." This is precisely what legislators and judges do, as seen below when using dynamic resilience elements.

Structure of the resilience of law

Framing the notion of recovery in this legal context may simplify this section. Thus, the resilience of law has two features: 1) static resilience and 2)

42 Ruhl, op. cit., p. 1376.
43 Ruhl, op. cit., p. 1376.
44 Also described herein as "endogenous" and "exogenous" changes.

dynamic resilience. Static resilience has only one element: resistance. However, dynamic resilience has two elements: a) recovery and b) prevention. This also sums up society's "new expectations" of those in charge of making the law resilient or, from another perspective, what is "expected" from parliamentarians and judges in the context of this article, at least in the form of aspirational constitutionalism.

"Changes" and the subsequent shock

Before expounding on the structure of the *resilience of law*, it is vital to clarify the scope of other concepts that precede the emergence of the *resilience of law*. Such concepts refer to particular changes that may trigger shocks, further highlighting the need to ensure resilience for the law to resist or recover from the shock and prevent ineffectiveness from future shocks.

In that sense, the first point that needs to be clear is that there must be a "change" and a consequent *shock,* as mentioned above. The *shock* is, therefore, the *conditio sine qua non* of the *resilience of law*. Without the *shock,* it would be senseless to discuss resistance or recovery—resistance to what? Recovery from what? Thus, in the absence of the *shock,* this article would discuss no more than the known effectiveness of law, which is done under motionless conditions over a certain period. Nevertheless, the effectiveness of law herein is mentioned from another scenario that includes the "changes" mentioned above and their resulting *shocks*.

The *shock* is then the action resulting from one or more "changes" whereby the standard situation is altered and challenged by themselves or together, thus the essential element of the *resilience of law.* Perhaps this can be better illustrated in a different scenario using heuristics. Imagine one typical and commercialised "aluminium can" filled with Coke at a standard temperature and at a normal location. In this case, whether the "can" is or is not able to maintain that liquid inside under these standard conditions is simply a matter of effectiveness or ineffectiveness of the "can," but that is not the issue in this research. In the case of the initial effectiveness of the "can," if the *status quo* is maintained, the said gaseous liquid will remain inside the "can" for a long time because the latter was designed with that purpose. A similar conclusion should be given if such an irrelevant "change" cannot produce a *shock* over that "can."

Nonetheless, what would happen if that same "can" full of Coke is taken progressively outside the atmosphere? Or, more straightforwardly, what would be the result if put in the freezer or the oven for a long time? Or what would happen if the "can" were shaken without being opened? Firstly, the *status quo* would have disappeared, and those "changes" would cause severe pressure within the flimsy structure of that "can of Coke," that pressure is the *shock.* Secondly,

it is only then, in doing so, that the resistance capacity and the recovery ability of that "can of Coke" can be tested against that particular "change" and its subsequent *shock.*

Static resilience—maintaining the law in function: Resistance is not durability

Accordingly, the aforementioned "resistance or static resilience" is the ability to maintain the law in function despite a shock. Nevertheless, as the first feature of *the resilience of law,* it is important to consider how the words "maintain in function" should be understood in this legal context. Ruhl stated that the idea that "a legal system is or is not resilient implies nothing about the system normatively. Resilience is a quality of a social system, but it does not make the system 'good' or 'bad,' and then he said that "[w]hat Americans might consider a contemptible legal system—feudalism, for example—might nonetheless be resilient (as it [lasted] for centuries)."[45] Hence, he seems to be putting resilience on an equal footing with durability,[46] disregarding whether or not the system achieves its aims. According to this interpretation, a law completely disobeyed by an entire society could also be resilient.

However, "maintain in function" may be interpreted in another sense that seems more compatible with the legal context. For this research, resilience should not be confused with durability. Therefore, it cannot be understood as "maintaining the law valid or unamended" for extended periods because that could never be the function of a law. Generally, the law has a facultative, curative or preventive function that does not depend on a temporal factor.[47] To repeat a previous example, the compulsory use of helmets for children under 16 years old when cycling to prevent fatal accidents is the function of that law; the said function is not to have such a rule lasting as long as possible. Thus, unlike Ruhl, a distinct perspective is that "maintaining in function" refers to keeping that particular law valid and, above all, achieving the purposes for which it was designed, i.e., being an effective law. Under the argument presented throughout this article, "maintaining in function" equals maintaining effectiveness. This is the important link between the principle of law effectiveness and the resilience of law; the difference is that the latter includes the "changes" and "shocks" mentioned above. In the example of the compulsory use of hands-free devices while driving, Ruhl could say that such a norm is resilient (durable), though ineffective. However, following the article's thesis, the same norm is simply not resilient against "technological changes" because its effectiveness was lost consequent to the "shock."

45 Ruhl, op. cit., p. 1381.
46 Ruhl, op. cit., p. 140.
47 Lawmakers will try to make any law durable, but it has nothing to do with its specific function.

Accordingly, a legal system can be considered "resistant" if it remains sufficiently compelling despite a shock. Moreover, as mentioned above, "resistance" is a feature of the static *resilience of law.* For that reason, it could be better believed that what measures the level of static resilience is not the amount of time the law exists; it is rather the amount of shock the legal system can resist before losing its sufficient effectiveness.

Static resilience—maintaining the law in function: Resistance is not justice

A statically resilient norm has no direct relation with the notion of justice. The resilience of law is based upon the effectiveness of law, not upon its justice, which is not the function of the law and may vary depending on whether it is explained from a perspective of liberty, welfare, or virtue.[48] If, hypothetically, we were to accept that justice or injustice could determine the resilience of law, we would have to accept that certain laws, from the very moment they are enacted, could be resilient to some people and not resilient to others, depending on their understanding of justice. Furthermore, determining whether the law is statically resilient and needs to be fixed would be subjective and harder, if not impossible. It must be clear that a resistant legal system is such that it is able to resist a shock without losing its effectiveness, even if the latter were unjust.[49] It may occur that society, or a significant part of it, starts considering a law unjust. Hence, they may stop accepting it and complying with it. In this case, the social opposition to such injustice would be the origin of the shock that could cause the ineffectiveness of law, but the static resilience of law is not measured by the justice that is lost. In short, injustice could be the cause but not the effect of the poor resistance of the legal system. Then, if the problem concerning the resilience of law is not about durability or justice but about the effectiveness of law, what should happen when the legal system cannot resist the shock? It is here, consequently, when the second concept arises: recovery, as the first element of dynamic resilience.

Recovery as the first element of dynamic resilience

Therefore, recovery should be understood as the capacity of the law to recover when it has been shocked. Nevertheless, the level of recovery should not be measured only by the rapidity or number of times a law can be reformed, revalidated, or reinterpreted. As mentioned, legal recovery should be measured

48 A clear explanation of these three perspectives of justice can be seen in Sandel, Michael J.: *Justice, What's the Right Thing to Do?* Chapter 1, Penguin Books, 2009.

49 Bobbio may confirm this, as he stated that the fact that a norm is universally respected or used does not demonstrate its justice, in the same manner that not respecting it does not imply its injustice. Bobbio, Norberto: *Teoría General de Derecho*, Debate, Madrid, 1993, p. 35.

by the "effectiveness of law" recuperated after the shock;[50] v.gr., a jurisdiction may have 20 reforms in one area of the law in a short period. However, if none of them, or all together, is capable of re-establishing effectively the purpose for which the law was created, the level of legal recovery will be equally low.

Accordingly, successful recovery in those terms differs from "attempting to recover." "Amending or rationalising the law" belongs to the scope of dynamic resilience, not static resilience. However, "amending or rationalising" is only a possible vehicle to acquire a certain level of dynamic resilience[51] and, subsequently, the required effectiveness of law. In addition, another critical vehicle to obtain the desired level of dynamic resilience is the sole "interpretative process" carried out by the courts. Nevertheless, amendability and legislative or judicial interpretation do not signify successful recovery or prevention (elements of dynamic resilience). This is because they depend on the level of effectiveness of law that is finally achieved; hence, unsuccessful amendments or interpretations of the law only demonstrate the low level of its dynamic resilience.

Having a high level of legal recovery, even reaching more than the sufficient effectiveness of law expected by law designers, does not mean such a law will remain effective afterwards. In other words, recovering said effectiveness does not signify that such a law will become resistant to future shocks. For example, a legal system may recover its effectiveness very easily but can lose it in the same way after a slight shock. That would show that laws can have a poor level of static resilience but, at the same time, a high level of recovery. Therefore, if resistance is a static or immobile element, and the recovery ability does not guarantee future resistance, the question would be: Through which instrument is it possible to achieve static resilience for a legal system? Prevention ought to be the answer.

Prevention as the second element of dynamic resilience

Static resilience is not achieved by itself; it needs a dynamic element—different from recovery—that makes the law resistant to future shocks. Hence, the second element of dynamic resilience is "prevention," where legal amendments or interpretations are not performed after the shock. Indeed, the ineffectiveness of law that a future shock could cause is what law designers should

50 The measure's result should not conclude that the system is resilient or not resilient, in absolute terms; resilience should have levels, perhaps catalogued as low, medium, or high, or under any further classification. However, it would seem extremely rigid to affirm that because a regime resists the first shock but not the second, for example, it is not statically resilient.

51 Within the context of "the resilience of law," there is no difference between "textual amendment" and "non-textual amendment."

"prevent." Therefore, static legal resilience always depends on the preceding level of "prevention" achieved by law designers. Imagine the case of a massive *shock* originating from a Free Trade Agreement, for example, which causes the total ineffectiveness of a legal system. Firstly, that would provide the legal "resistance" level of that legal system. However, secondly, "legal recovery" would be needed to re-establish the effectiveness lost. In addition, and, above all, "legal prevention" would be needed to make the legal system "legally resistant" against future shocks; that level of "legal resistance" achieved would remain unalterable by itself. Any alteration would imply the presence of dynamic resilience.

However, "prevention" can, and sometimes must, be carried out independently, particularly against two situations: a) unprecedented or pioneer Acts,[52] and b) simple prevention, as seen below. Therefore, "preventive resilience" can be performed before or after the shock. However, its function is to make the legal system resistant to future shock, whether there was or was not a previous shock. The vehicles to achieve "prevention" are those available to recover the effectiveness of law, with a tiny difference: When a new law is created, it is not through an amendment (or any other type of modification of the law) or an interpretation; it is done through another vehicle which is the "production of law." Thus, the process of producing unprecedented Acts, as there is no previous shock, is similar to cases of "exclusive legal prevention" over an existing provision, where non-recovery is needed,[53] although the vehicles mentioned above are different. Indeed, unprecedented Acts should be considered as having the first preventive legal process to benefit those addressees of the law that require the intervention of the State against a situation of lawlessness.

Accordingly, "exclusive resilient prevention" refers to one part of these "new expectations"; this one is related to strengthening the static resilience level against future shocks in cases where there is no preceding shock against a valid legal system already in force. Anticipating those shocks is never an easy task for lawmakers, as seen below. However, in some cases, the shock is voluntarily provoked by the same lawmaker, even where the "change" is not directly related to the legal system that could be shocked. This provocation should imply a heavier weight over a diligent lawmaker whereby if he is provoking a "change," he is therefore required to protect that legal system against the shock. He must also foresee the consequences that the said

52 An unprecedented or pioneer Act refers to those Acts of Parliament that cover new areas of activity previously not governed by legal rules.

53 By pioneer (unprecedented) law, it is important to differentiate between two possible meanings. Firstly, a pioneer law in a domestic scenario. Most of the time, these laws are based on comparative law, and the experience of previous and non-domestic *shocks* can be borrowed; therefore, the analysis of non-domestic *shocks* can be performed. Secondly, a pioneer law worldwide (v.gr., the first law that regulated performance bonds in the United Kingdom). On the other hand, this law was the first to explicitly regulate such types of contract, by which law designers could not base their analysis on preceding experiences, domestic or non-domestic.

"change" will generate. As a result, he must increase static resilience in advance through the preventive vehicles. A clear illustration of this is developing countries' signature and legislative approval of Free Trade Agreements, where previous legal amendments are commonly carried out to *resist* the forthcoming shocks.

Legal prevention of "unanticipated changes"[54]

Legal modification, then, can attempt to achieve recovery, prevention, or both simultaneously. Yet, the preventive element of dynamic resilience is the most crucial element within this study. This conclusion arises from the fact that it seeks to strengthen the level of static resilience for the future. The latter can refer to two different challenges, regardless of whether they are voluntarily or involuntarily provoked or not provoked by the State: a) anticipated challenges or b) unanticipated challenges. Anticipated challenges demand the presence of preventive measures (Free Trade Agreements in developing countries, for instance). Still, these challenges are not the most difficult problem regarding prevention, as they are foreseeable.[55] Not preventing the effects of foreseen challenges is more a lack of diligence of law designers than a difficulty.

Preventing unanticipated challenges,[56] on the other hand, is the Achilles' heel of law designers with regard to static resilience. Frequently, legal modifications, or further vehicles, contain the recovery element but not the preventive one of dynamic resilience. Therefore, the legal system remains fragile. For instance, Douglas Arner, a scholar relating financial markets and resilience, stated concerning the financial crisis:[57] "…efforts to create a resilient global financial system have far to go, and in their current iteration could not prevent or effectively address the future global financial crisis."[58] In other words, the current financial and legal framework is effective so far but still weak against the next unanticipated challenge, so it is not statically resilient in the end.

Nevertheless, it may be thought that legal prevention of unexpected challenges is not achievable in practical terms or cannot be demonstrated until the shock

54 Prevention, in the context of this section, does not refer to the "preventive purpose of a norm" but to prevention against a scenario of ineffectiveness of law. In the former case, prevention is aimed at controlling the conduct of society such as would desired in criminal law (Husak, Douglas: *The Criminal Law as Last Resort,* Oxford Journal of Legal Studies, Vol. 24 N.2, 2004); in the latter, prevention is aimed at avoiding that the *sufficient effectiveness* of laws is lost as a result of "changes and their resulting shocks."

55 Not preventing the effects of foreseen challenges is more a result of the law designers' extreme lack of diligence than a difficulty.

56 The term "unanticipated" does not refer to a totally unknown challenge or to any challenge; it means the lack of knowledge of the "approximate period" in which the system will be hit by determined components (shock). This is given that prevention and recovery, as mentioned herein, are designed to deal with a particular shock.

57 This quotation is also a clear example of legal modifications that contain the recovery element but not the preventive one of dynamic resilience.

58 Arner, Douglas W.: *Adaptation and Resilience in Global Financial Regulation,* 89 N.C., L. Rev. 1579, 2011, in Savasta-Kennedy, op. cit., p. 1368.

hits the legal system. Yet, it could also be argued that preventive actions can also be compared to excessive protectionism, for example, from a scenario of economic liberalism, for which legal prevention and recovery would likely be criticised.

First, it is suggested that legal prevention against unanticipated challenges is viable and has succeeded in several cases. Nevertheless, the proof that those preventive measures (leading to a resistant system) were effective relies on the posterior analysis of the shock. This would imply that the quality of those preventive components cannot be assessed *ex-ante*, leading to a significant level of uncertainty about their possible efficacy against future shocks, a potential criticism of the preventive element of dynamic resilience. To maintain the same recent example, in April 2011, the Federal Deposit Insurance Corporation (FDIC)[59] published the results of an expert report.[60] The report retrospectively analysed how it would have been able to handle the crisis of Lehman Brothers[61] if the Dodd-Franck Act had existed.

But, again, this is an *ex-post* analysis that probably would have been catalogued as an unproven conclusion if given before the crisis. Therefore, to evaluate the level of the preventive element of resilience, i.e., if the legal system is genuinely resistant or not against unexpected challenges, it is necessary to wait until the shock hits the system; no one can assess an exam that has not been taken. The recovery element, however, can certainly be analysed as soon as the reforms come into force.

Another aspect seems to have been forgotten by the FDIC, which is also frequently overlooked when attempting to incorporate the preventive element into legal reforms. As mentioned above, the cause of the ineffectiveness of law is not the specific weakness of the system; it is the "challenge" perpetrated by the components of the shock against a system that is not highly resilient. Thus, in terms of legal prevention, analysing the particular weakness of the legal system (systemic risk, under the same example) is not the best approach to strengthen the system for future occasions, although it should be used for recovery purposes. The analysis to design prevention should be based mostly on the components of the shock and their respective influence over the legal

59 The Federal Deposit Insurance Corporation (FDIC) is an independent agency of the federal government responsible for insuring deposits made by individuals and companies in banks and other thrift institutions. The agency also identifies and monitors risks to its deposit insurance funds and tries to limit the effects on the U.S. economy if a bank or thrift institution should fail. The FDIC is funded through premiums paid by banks and thrift institutions to pay for deposit coverage and from the interest the agency earns on U.S. Treasury securities.

60 Federal Deposit Insurance Commission: *The Orderly Liquidation of Lehman Brothers Holdings Inc. under the Dodd-Franck Act,* April 18, 2011. http://www.fdic.gov/bank/analytical/quarterly/2011_vol5_2/lehman.pdf. Last revised, 29/05/2012

61 The bankruptcy filing of Lehman Brothers Holdings Inc. (LBHI) on September 15, 2008, was one of the signal events of the financial crisis. The disorderly and costly nature of the LBHI bankruptcy—the most prominent financial bankruptcy in U.S. history—contributed to the massive economic disruption of late 2008.

system. Yet, under the same example, the Dodd-Franck Act was based primarily on the weakness in order to recover the effectiveness and to prevent future challenges; a similar situation occurred with Basel II[62], to mention another clear example.

On the other hand, prevention can also be compared to excessive protectionism from the perspective of economic liberalism, which is so common these days. However, two points need to be mentioned. Firstly, the concept of the effectiveness of law and the notion of legal resilience, in general, are independent of the notion of justice or the idea that public policy is better. The law must be effective—whatever the social, political, or economic tendency. Thus, whether prevention is or is not considered excessive protectionism should, *ab initio,* be ignored from the point of view of the resilience of law.

Nevertheless, if the latter protectionism provokes a scenario of ineffectiveness of the legal regime, the problem is not related to the *preventive* element but to a poor *recovery* process. This is because the preventive element should protect the system from future challenges, and hypothetical excessive protectionism is not a future event; on the contrary, it is intrinsic from the beginning of the modified regime. Therefore, the cause of the ineffectiveness in this case would not be an anticipated or an unanticipated challenge; the cause would be poor recovery after a previous shock. Conclusively, cataloguing prevention as an impossible task or as synonymous with excessive protectionism seems complicated.

Thus, the preventive element is essential in two senses within this context. Firstly, because social, financial, political, or economic realities, among others, are in constant evolution, the law always suffers from a tendency to become obsolete.[63] Consequently, legal regimes and, ultimately, the addressees of the law are exposed to the massive effects of a potential shock unless effective prevention is developed. As an example, Brett McDonnell and Daniel Schwarcz, who explored the role of "regulatory contrarians"[64] in enhancing the ability of financial regulators to adapt to emerging challenges in the financial sector, affirm that: "the crisis was also a product of the failure of regulators to carry through on their mandates in the face of evolving market risk." In that way,

62 Basel II is an agreement between the financial authorities of the major developed countries referring to prudential regulation in order to create a framework to strengthen the soundness and stability of the international banking system, based on three pillars: 1) Regulatory Capital (Credit, Risk, Operational Risk, and Market Risk), 2) Supervisory Review Process, and 3) Market Discipline.

63 Particularly in civil law jurisdictions or with regard to statutes in common law jurisdictions: Posner, Eric: *Law, Economics and Inefficient Norms,* 144 U. Pa. L. Rev. 1697 1995–1996, p. 1699–1702; Tetley, William: *Mixed Jurisdictions: Common Law v. Civil Law (codified and uncodified),* 600 Louisiana Law Review 677, 2000.

64 A regulatory contrarian is an entity that is affiliated with, but independent of, a financial regulator charged with the task of monitoring regulators and the regulated marketplace, and publicly suggesting new initiatives or potential structural or personnel changes" McDonnell, Brett, and Schwarcz, Daniel: *Regulatory Contrarians*, 89 N.C.L. Rev. 1629, 2011, Savasta-Kennedy, op. cit., p. 1368.

prevention is vital as it avoids the weakness of the legal regime and subsequent ineffectiveness of law caused by an evolutionary tendency that is usually imperceptible. Nonetheless, it should be remembered that the real cause of a potential case of ineffectiveness, within the context of this article, is the *shock* and not the weakness of the legal system.[65]

Secondly, legal prevention is to be highlighted as it also avoids one of the most frequent problems within a legal system. This problem refers to the haste to recover effectiveness after a particular shock, occasionally accompanied by a certain degree of improvisation, to catch up with the new reality as quickly as possible.[66] Then, the obligation and the anxiety of law designers to provide effectiveness to that system may have three main adverse effects: a) not analysing the "change" and its subsequent "shock" properly; b) as a consequence, directing the legal modifications in the wrong directions, away from sufficient effectiveness; and c) omitting the preventive element once again. As a result, there will be a poor level of dynamic resilience that will lead to a poor level of static resilience once again. In other words, the lack of legal prevention tends to cause a harmful cycle of perpetual ineffectiveness of law.[67]

Conjunction of the features of resilience

When *prevention* is not previously performed, the legal system "may" not resist the shock due to its low static resilience. The word "may" is used in this context because, as mentioned before, the legal system can possibly be involuntarily resistant already. Nonetheless, if any ineffectiveness of law appears, then urgent and subsequent modifications or amendments are required to avoid a legal crisis (total ineffectiveness of a particular legal norm); the massive problem is not only the ineffectiveness of laws but believing, wrongly, that it has been solved. Typically, these hasty or rushed posterior amendments do not consider the required analysis and time to achieve sufficient effectiveness for the law under examination; this leads to qualifying them with a deficient level of legal recovery and overlooking the required legal prevention once again against further shocks.

65 Weak or defective legal regimes may be, nonetheless, completely effective for prolonged periods until there is a shock, as in the case of the financial market laws before the 2008 crisis.

66 "The first duty of the drafters must be to give effect to the intention of the department instructing them and to do so in as clear and precise a manner as possible. These aims, however, have to be achieved under pressure, and sometimes extreme pressure, of time": Slapper, Gary and Kelly, David: *The English Legal System,* 13th edition, Routledge, 2012, p. 88. In addition, it is not and never will be a simple task to recover the effectiveness of a legal regime after a particular shock. Improvisation may be the general rule while trying anxiously to achieve effectiveness. The author believes that this is likely to occur with more intensity concerning statutes or in civil law jurisdictions and with less intensity in "case law" due to the more frequent contact between judges and "case law."

67 For those in charge of making the law resilient, resistance, as the element of static resilience, is as important as the elements of dynamic resilience. On the other hand, for the addressees of the law, static resilience is more important than dynamic resilience because they suffer from the ineffectiveness caused by the low levels of resistance to the law or, hopefully, they benefit from the high levels of resistance. However, this does not mean that dynamic resilience should be a total stranger to the addressees of the law.

Furthermore, even when recovery is unsuccessful, those amendments create the belief that the problem has been solved. Therefore, the legal system is left to drift, i.e., the ineffectiveness of law is perpetuated. In terms of the resilience of law, it could be affirmed that the low level of legal *prevention* (element of dynamic resilience) may lead to a low level of future *resistance* (static resilience), whereas, after the shock, a low level of *recovery* (dynamic resilience) condemns from the beginning a future analysis over the level of resistance of law and makes the analysis senseless. It condemns a future assessment about the resistance of law because if the effectiveness of law is not achieved with the *recovery*, there is nothing to protect later on the grounds of static resilience; no resistance is needed to avoid the loss of a non-existent effectiveness. And besides, even if recovery is voluntarily or involuntarily achieved, prevention can be omitted once again, turning the life of such a legal system into a cycle of ineffectiveness.

Consequently, it is important to highlight the interdependence between static and dynamic resilience based on the effectiveness of law. In other areas, for example, in psychology, the notions of resistance and recovery are studied under a similar theory but are not strongly interrelated. A particular child, for instance, can have a low level of resistance but a high level of recovery from affective shocks; yet, not having a good level of recovery does not mean that that child will have a future insufficient level of resistance.[68] In legal terms, as argued above, those concepts are closely related, and a poor level of dynamic resilience normally will affect future static resilience. This is because there is no recovered effectiveness to be protected, or the effectiveness can be lost early as there was no prevention. It could be affirmed, therefore, that the elements of dynamic resilience of law are the means, whereas static resilience is the end.[69]

It is paramount to anticipate that seeking static resilience, which refers to the effectiveness of law over time, should not be regarded as the stagnation of law. A modern, general legal system needs to evolve permanently in light of changing social, economic, and cultural developments.[70] The resilience of law is not against such evolution; on the contrary, it fights against the stagnation that causes the ineffectiveness of law and against the reforms that do not protect the effectiveness of law. The resilience of law implies a scenario of estimated sufficient effectiveness of law.

68 Masten, Ann S., and Obradovic, Jelena: Competence and Resilience in Development, pp. 15–16, NY. Acad. Sci. 1094, 13–27, 2006; Puerta, M.: *Resiliencia: la estimulación del niño para enfrentar desafios,* Lumen, Mexico, 2002; Cyrulnik, B.: *Los Patitos Feos. La resiliencia: Una infancia infeliz no determina la vida,* Gedisa, Barcelona, 2006. Kalawski, Juan Pablo, and Haz, Ana Maria: *Y… ¿Dónde está la Resiliencia? Una Reflexión Conceptual*, Interamerican Journal of Psychology, Vol. 37, Num. 2, 2003, pp. 367–369.

69 Manciaux emphasises that [static] resilience is a capacity that results from a dynamic process: Manciaux, M., *La resiliencia: resistir y rehacerse*, Gedisa, Barcelona, 2005.

70 R v R (Marital Exemption) [1992] 1 AC 599.

Specific and comparative shocks

Therefore, a high level of static resilience is the main objective of the *resilience of law*, but even if it is achieved, that does not mean that the legal regime should resist any shock. Law protectors should base recovery and preventive processes on the "specific shock" the legal regime suffered. Otherwise, modifying the legal regime may not be supported by the analysis of the causes that led to the scenario of law ineffectiveness; therefore, legal modifications are likely to be sent off course. Therefore, it is not possible to speak about factors that promote resilience but about factors that promote resilience against a specific risk[71] (such as the implementation of economic policies or a financial crisis). Therefore, the legal system can be adequately recovered, and preventive elements should be implemented, but only based upon an analysed, specific, and related shock; the latter is one of the most critical differences between seeking the effectiveness of laws and seeking the resilience of laws.

Nevertheless, does the dynamic resilience need to be exclusively based on particular domestic shocks? Or is it possible to make use of foreign or international shocks as well? First, it is worth mentioning that using a non-domestic shock for resilience is far different from studying or importing foreign or international norms. On the one hand, comparative law has been as flattered[72] as it has been criticised.[73] However, studying further regimes differs from copying foreign or international norms and disregarding the "realities of the importing country."[74] The latter is one of the misuses (perhaps the most frequent) of the comparative law when law protectors attempt to recover effectiveness under a scenario of urgency, leading to poor dynamic and static resilience. On the other hand, unlike the copy of the norm, the use of non-domestic shocks could never disregard the realities of the importing country; on the contrary, the shock is the basis of the analysis that needs to be later harmonised with those realities to produce effective and resistant norms within a specific society. Consequently, it needs to be possible to use non-domestic shocks to improve the static resilience of the domestic legal regime (through the preventive element).

71 Kalawski and Haz, op. cit., p. 370.

72 Schadbach, Kai: *The benefits of comparative law: a continental European view*, 16 B.U. Int'l L.J. 331.1998.

73 Mattei, Hugo and Arbor, Ann: *Gulliver's troubled travels or the Conundrum of Comparative Law*, 67 Geo. Wash. L. Rev. 149, 1998–1999.

74 The bad habit of copying laws disregarding the reality of the importing country occurs in a large number of jurisdictions, but a significant example is given by Paul Cowling. He states concerning administrative law: "…the vast majority of the commissions were dismantled […] due to [a] failure that reflected the 'deep cultural difference' between the legal traditions of Japan and the United States. The Occupation Forces tried introducing the 'independent regulatory commission system'… because American administrative law had been developed by this method by its common law/equity styled 'precedent'-building. But this system was utterly and wholly without success because 'Japan belonged to the antipodal legal culture of building law from 'written' or literal materials, i.e., by mainly copying foreign laws." Cowling, Paul: *The Kanagawan Wave of Change: Pressures for Fundamental Reform of Japanese Telecommunications*, 59 U. Toronto Fac. L. Rev.117 2001, p. 126. See also: Jordan III, William S.: *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29, U.S.F. L. Rev. 1. 1994–1995, p. 18 et seq.

In conclusion, in every case, there are three options for the resilience of law. Firstly, they can attempt to make a legal change of the law to recover effectiveness; secondly, they can attempt to make a legal change of the law to recover the lost effectiveness and, in addition, to strengthen the regime to face a similar future shock without losing effectiveness; and thirdly, they can attempt to strengthen the legal regime in order to face similar future shocks (which also includes *unprecedented* laws). Thus, if possible and needed, the modified legal regime will be effective and composed of a) a resistance element, b) a recovery element, and c) a preventive element, although the latter two may seem imperceptible for the standard addressee of the law. These factors should also avoid entering into a harmful cycle of perpetual ineffectiveness of law, with short episodes of temporary effectiveness. It is then when the level of the past (the one that received the shock) and current static resilience and the developed dynamic resilience can again be entirely assessed; this will facilitate further preventive processes to avoid all the risks of a recovery process.

New expectations from legislators and judges and aspirational constitutionalism

The term "new expectation" does not refer to a "duty," "obligation," or "responsibility" borne by either legislators or judges, nor is it confined to a mere faculty, doctrinal recommendation, or a political discretionary public policy. New expectations should be understood as the "ought to do something" or "the aspirational conducts or results," which should find provenance among the personages mentioned above in pursuing resilience. The term "new expectations," and not simply "expectations" or "modern expectations," is preferred because there are many other desirable conducts or results that are expected from parliamentarians and judges, which, however, are outside the scope of this research. For clarification, having effective norms is a modern expectation, but herein, the present article refers to resilient norms (new expectations), which are different. In addition, modern expectations could include being coherent and fair and avoiding anti-technical laws.

Therefore, the resilience of law and the expectations it imposes on legislators and judges should be based on an approach that can be located in the middle of the world of duties and obligations and the world of recommendations. He states that the resilience of law and the new expectations it creates should be located within *aspirational constitutionalism.* This refers to a process of constitutional building in which decision-makers understand what they are doing in terms of goals they want to achieve and aspirations they want to live up to. Accordingly, "having resilient laws" should be an evolutive process, and once an aspiration is set out, all related conducts should be directed in a sense under said aspirational provision. However, this is a subject that, due

to its demands and depth, is beyond the scope of this article and, as such, is discussed here in the outline only.

Conclusions

- The "effectiveness of law" comprises two elements: i) *the objective element* related to the design and purposes of the law; here, it is vital to assess whether or not the law was designed correctly to achieve its objectives, i.e., fulfilling its purpose; and; ii) *the subjective element* related to the addressees of those laws, where a pertinent analysis should fall upon the relationship between said law and its addressees.

- Since the effectiveness of laws must be grounded in "estimations," the article offers the new idea of *"estimated sufficient effectiveness."* This concept is an estimation that, in practice, has already been used to assess the effectiveness of laws.

- The problem with effectiveness goes beyond the reception and implementation of, or voluntary compliance with, new laws, which are some of society's traditional expectations. Laws may become ineffective, even initially effective, due to social, political, legal, environmental, or economic changes.

- This article has provided a first step towards a theory that determines that the social, political, legal, environmental, or economic changes must be considered. This is to safeguard the estimated sufficient effectiveness of laws, naming it the *resilience of law.*

- The idea of the resilience of law, crafted in this article, is based on two aspects: first, upon the notion of the effectiveness of law, and second, on how the sufficient effectiveness of law can be challenged, and in some cases lost, as a result of *shock* (pressure) caused as a consequence of any change (social, political, economic, etc.).

- When a particular effective law is shocked, it may be resistant and can, therefore, resist the shock; in other words, the law will not lose its sufficient effectiveness due to the shock. This resistance is the only element of *static resilience* and is the ability of the law to stay functional despite a shock. Thus, static resilience is the first feature of the resilience of law.

- The second feature of the resilience of law is its *dynamic resilience,* which comprises two elements: i) recovery and ii) prevention. If the law is shocked but not resistant, it will start the process of becoming ineffective. There, a dynamic aspect enters into the process of re-achieving a level of sufficient effectiveness. Likewise, since it is dynamic, the intervention of both legislators and judges is required to *recover* the expected effectiveness. This may be termed *new expectations* of both legislators and judges.

- It is believed that, at present, there is no express constitutional foundation to sustain the resilience of law, especially from a positivistic perspective. Besides, such expectations over legislators and judges cannot be understood as obligations or duties, nor be confined to mere faculty, a doctrinal recommendation, or a politically discretionary public policy. Therefore, these new expectations should be located within *aspirational constitutionalism.*

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