

# The Brics Countries between Justice and Economy Methodological Challenges on Constitutional Comparison

Michele Carducci, Anna Silvia Bruno\*

Department of History, Society and Human Studies, University of Salento, Cittadella della Ricerca, Brindisi, Italy

\*Corresponding Author: [bruno.annasilvia@gmail.com](mailto:bruno.annasilvia@gmail.com)

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**Abstract** The paper wants to underline why the BRICS as a legal network represents a new challenge for the European Union. The state of the art on the BRICS theme can be resumed in few thematic profiles: on which parameters are the relationships of the BRICS countries with the other world players, from the European Union to Italy, observed and judged; what convergences of constitutional significance do the BRICS countries present; what theories and methods of comparison are Legal Scholars using to study the BRICS phenomenon; what conditional convergences do the BRICS countries produce within their own “network of transfer” for practices and policies; what is the role of national Constitutions as conditional factors in the BRICS economic relationships and what competitive benefit do the BRICS countries have on the global market. But all these points leave the new geography drawn by the BRICS countries out of consideration and the fact that it operates as a legal network and network to transfer practices and policies is neglected. The paper tries to sketch a critical outline of this new international and atypical subject.

**Keywords** Horizon 2020, BRICS, Legal Network, Constitutional Borrowing, Policy Transfer

## 1. Introduction to the BRICS Phenomenon as a Legal Network

Legal literature shows an increasing need to discuss the legal problems of BRICS: for example the BRICSLAW Project at the Wisconsin Law School; [1] the seminars at the Fordham School of Law; [2] or the reports of the International Union for Conservation of Nature; [3] also [wikibric.wordpress.com](http://wikibric.wordpress.com). But the main focus of these works is always the relationship between single legal systems and their economic development, where the BRICS phenomenon

is just a simple effect of economic and commercial relationships. [4]

The inadequate knowledge of the BRICS countries and the BRICS phenomenon is acknowledged both in Italy [5] and in Europe. [6] From the viewpoint of comparative constitutional law, there are no studies which can strengthen the basis of knowledge of each single country. And there is no research on the Horizon 2020 objectives. The state of the art on the BRICS theme in international literature can be resumed in six thematic profiles: 1) how do the BRICS

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4 In order to highlight the large number of meetings in which the BRICS were involved, the following list shows only those that occurred in 2011: “January 19-21 – Coordination Meeting of the Statistical Institutes, Beijing; February 19 – Meeting of BRICS Finance Ministers at the margin of the G-20, Paris; March 24-25 – II BRICS “Think Tanks” Seminar, Beijing; April 13 – Meeting of BRICS Trade Ministers, Sanya; April 13 – Meeting of the BRICS Development Banks and Financial Seminar, Sanya; April 13-14 – II BRICS Business Meeting, Sanya; April 14 – III BRICS Summit, Sanya; May 17 – Meeting of Health Ministers of the BRICS, at the margin of the 64<sup>th</sup> World Health Assembly, Geneva; May 18 – Meeting of BRICS Twin-cities partnerships, which formalized cooperation between Rio de Janeiro, St. Petersburg, Mumbai and Qingdao, Qingdao; May 19 – Meeting of BRICS heads of delegation at the margin of the II G20 Parliamentary Summit, Seoul; June 14 – II BRICS Cooperatives Forum, Beijing; June 17 – Meeting of Presidents of the BRICS Development Banks, at the margin of the XV International Economic Forum in St. Petersburg, and signing of a Memorandum of Understanding, St. Petersburg; July 11 – Meeting of BRICS Health Ministers, Beijing; August 3-6 – Meeting of the BRICS Working Group of Experts on Agriculture, Beijing; September 15 – Meeting of BRICS Senior Officials in Science, Technology & Innovation, Dalian; September 20 – Meeting of BRICS Health Ministers on prevention and control of noncommunicable diseases, at the margin of the UN High Level Meeting on Noncommunicable Diseases, New York; September 21 – II BRICS International Conference on Competition, Beijing; September 22 – Meeting of BRICS Ministers and Central Bank Governors, at the margin of the Annual Meeting of the IMF and World Bank, Washington, D.C.; September 23 – VI Meeting of BRICS Foreign Ministers at the margin of the 66th UNGA, New York; September 25 – III Meeting of BRICS Heads of Statistical Institutes, Beijing; October 29 – II Meeting of the Working Group for Agricultural Cooperation, Chengdu; October 30 – II Meeting of BRICS Ministers of Agriculture and Agrarian Development, Chengdu; November 3 – Meeting of BRICS Heads of State and Government at the margin of the G-20, Cannes; November 24 – BRICS Meeting of Deputy Foreign Ministers on the situation in the Middle East and North Africa, Moscow; December 2-3 – BRICS Conference of Twin Cities and Local Governments, Sanya; December 2 – Meeting to discuss the establishment of the Contact Group for Economic and Business Affairs of the BRICS, Beijing; December 13 – BRICS Working Group on Access to Medication during the 29<sup>th</sup> Meeting of the Manager Committee, UNAIDS (Geneva, 13 December) – December 14 – BRICS Ministers of Foreign Trade, Geneva”. Data available at: [http://www.brasil.gov.br/para/press/press-releases/march-2012/fact-sheet-brics-partnership-for-global-stability/br\\_model?set\\_language=en](http://www.brasil.gov.br/para/press/press-releases/march-2012/fact-sheet-brics-partnership-for-global-stability/br_model?set_language=en)  
5 G. Massolo. L'Italia e i BRICS: spunti per un'agenda globale, in *La Comunità Internazionale*, No. 1, 361, 2011.  
6 Points E/S Proposal for the Resolution of the Eur.Parliament (2011/2111(INI)).

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Even if the article is the result of cooperation between M. Carducci and A.S. Bruno, they are authors of the following paragraphs, respectively: M. Carducci, nn. 2,3,7,8; A.S. Bruno nn. 1,4,5,6.

1 Available: [www.law.wisc.edu/gls/bricslaw/html](http://www.law.wisc.edu/gls/bricslaw/html).

2 Available: [www.law.fordham.edu/corporate-law-center/23998.htm](http://www.law.fordham.edu/corporate-law-center/23998.htm).

3 Available: [www.iucn.org](http://www.iucn.org).

countries come about; 2) on which parameters are the relationships of the BRICS countries with the other world players observed and judged; 3) what convergences of constitutional significance do the BRICS countries present; 4) what theories and methods of comparison are Legal Scholars using to study the BRICS phenomenon; 5) what conditional convergences do the BRICS countries produce within their own “network of transfer” for practices and policies; 6) what is the role of national Constitutions as conditional factors in the BRICS economic relationships and what competitive benefit do the BRICS countries have on the global market.

The term BRIC was first coined in 2001 by Jim O’Neil in the Building Better Global Economic report of the global investment banking Goldman Sachs, to identify Brazil, Russia, India and China. [7] The first meeting of the BRIC countries was in Yekaterinburg (Russia), in 2009. In that occasion the common will to develop a strong comparison (or a challenge) toward the United States was clear. “We are committed to advance the reform of international financial institutions, so as to reflect changes in the global economy. The emerging and developing economies must have greater voice and representation in international financial institutions, whose heads and executives should be appointed through an open, transparent, and merit-based selection process. We also believe that there is a strong need for a stable, predictable and more diversified international monetary system”. [8] The second meeting was in Brasilia in 2010, where South Africa also took part. On that occasion, the BRIC countries decided to promote mutual exchanges of investment, innovative experiences, and information. In this way, the BRICS countries were institutionalized as a legal network of transfer of knowledge and practice. In April 2011, even South Africa, as the main African economy able to influence economic growth and investments all over the world, took part in the third summit in Peking on the official invitation of the Chinese president Hu Jintao. From that moment on, the BRIC countries became BRICS. The Joint Statement of the BRIC countries’ Leaders highlights the importance of the South-African economic growth, supporting it toward sustainability and development: “36. We attach the highest importance to economic growth that supports development and stability in Africa, as many of these countries have not yet realized their full economic potential. We will take our cooperation forward to support their efforts to accelerate the diversification and modernization of their economies. This will be through infrastructure development, knowledge exchange and support for increased access to technology, enhanced capacity building, and investment in human capital, including within the framework of the New Partnership for Africa’s Development (NEPAD)”. 37. “We express our commitment to the alleviation of the humanitarian crisis that still affects millions of people in the Horn of Africa and

support international efforts to this end”. [9]

The literature believes that the BRICS countries have three economic-structural characteristics, mutually convergent, but different from those of the European countries and from those of the United States. [10] These characteristics are as follows: A) low levels of borrowing that can support social policies of cohesion. B) monetary reserve that can encourage global financial leadership. C) demographic dynamics with more than 42% of the world population, able to satisfy internal demand and consumption. Furthermore, all the BRICS countries are nations characterized by a considerable level of State intervention in the economy. Finally, another common characteristic is vast territorial extension, full of natural resources and raw materials, that produces territorial (and social) inequalities, underlining the structural divergences within the institutional dynamics of each legal system. [11] The relationships of the BRICS countries with other world players are observed and judged through prevalently economic parameters.

The aspect of the BRICS phenomenon as a self-standing legal system not based on constitutional identities or common legal tradition, nor on express legal forms, is totally neglected; in fact, it is supported by “legal flows” and mutual interactions of policy transfer and constitutional borrowing, that allow it to be a possible alternative to the models of regionalization tested in the western world.

The BRICS phenomenon as a legal network is a witness of the real post-Atlantic “constitutional geopolitics”; it emerges as not totally consistent with the procedures of supranational constitutionalization (where Europe was the protagonist of the 20th century), destined to influence whole geographical areas, characterized by the coexistence of different constitutional systems. For all these reasons, and considering the “sustainability of differences”, the BRICS phenomenon is within the perspective of the “Next 11 countries” but also a real challenge for constitutional comparison. In order to verify this sustainability it is necessary to take into account three different aspects: studying the constitutional characteristics of each legal system with a particular attention to the relationship between constitutional factors and economy; identifying the “legal flows” that are internal to the mutual relationships between the BRICS countries and their impact on the economic Constitution of each legal system; verifying the role of the BRICS countries as “New Leading Powers” within the flows of policy transfer and constitutional borrowing toward the regional or cultural areas of influence. Furthermore, it is necessary to verify which constitutional factors condition the convergences between the BRICS countries.

The European Union itself paid attention to this specificity when it programs its own bilateral relationships with each single BRICS country, by taking into account its “strategic” role not only as a single economic-international partner but

7 in Goldman Sachs Global Economic Paper, 66, 2001.

8 Joint Statement of the BRIC Countries’ Leaders, Yekaterinburg, 16 June 2009, available at <http://archive.kremlin.ru/eng/text/docs/2009/06/217963.shtml>.

9 See note 8, points 36 and 37.

10 A. Goldstein. BRIC. Brasile, Russia, India, Cina alla guida dell’economia globale, Bologna 2011.

11 5 Lessons from the Rise of the BRICS, in *The Atlantic*, 14 February 2012.

also like a “referent” of a geo-political-economic area, extraordinarily full of implications, interests and suggestions, “imitable” by other regional players in the wake of a BRICS countries-New Leading Powers. Concerning this, it is possible to talk about a “Carrot and Stick” logic as regards the contexts with “constitutional standards” not mutually homogeneous and that often disclose conditions of a strong uneasiness and contradiction. [12] There is the need to discuss about the methodological problem of the “abandon of the Atlantic dimension of the comparison” in order to reply to the international challenges. As already outlined, the BRICS reality requires to compete with new dimensions of constitutional comparison that are not based on “ideal-typical/universal” but “circular” logics, in order to highlight phenomena (and contradictions) that arise within the single realities, and to underline those parallel or common elements in comparison with the economic and geo-political strategies of convergence of the involved countries, even considering their relationships with the “centers” of the constitutionalism (Europe and United States).

## 2. Some Methodological Attempts to Study the Relationship between the BRICS Countries and the European Union

The document of the European Parliament 2011/2111(INI)-January 2012: “Report on EU foreign policy towards the BRICS and other emerging powers-objectives and strategies” calls on EU States to “study” the institutional reality of BRICS. From a methodological viewpoint, in order to strengthen the scientific knowledge and understanding of the constitutional dynamics of the BRICS countries, it is possible to plot a parallelism of knowledge of each country and of legal flows inside and outside the BRICS. This target is scientifically significant because BRICS is considered by analysts as a “model imitable” of “four-continental” regional institutionalization, “soft”, “fragmentable”, [13] alternative to the imitation of the mono-Continental and multilevel “hard” EU regional structure. Indeed, the mono-Continental European Legal Order has the effect known as “Hollowing out of the State”. [14] A Legal Network as BRICS, in contrast, appears to contribute strengthening the domestic and international role of the State. Not coincidentally, is a functional model to polycentrism of the “New International Systems Change” in which precisely fit the “Next Eleven Countries”: “new” players in the comparison with U.S. and

EU. [15]

Currently, in comparative law, the legal and constitutional dimension of these “new” players with emerging economies is analyzed in two ways: according to a vertical approach, which considers each legal system separated from the other and studies it by taking into account the economic interests present inside; according to a horizontal approach, which looks at legal systems as fragments of a global history of legal flows and cultural influences. To the first group can refer the U.S. methods of the Legal Origins Theory and the Theory of Ground Rules. [16] Relate to the second, the Legal Traditions Theory [17] and a European trend that dates back to Geny, Erbe, Otto Hintze-Koschaker-Carl Schmitt-Kaden-V.Knapp-Ascarelli-Rotondi until L.J.Constantinesco. [18]

The EU looks forward to becoming a model of policy transfer just in terms of its cohesion in the global competition. The geographical space must be considered as a problematic fact of comparison [19] and economic relations cannot be as the goal depending on which make the comparison, as the Legal Origins Theory and the Ground Rules Theory would like, but rather as one of the factors, along with the historical-social-political-ideological, that differentiate the legal systems. Only from this perspective it is possible: to know and not simply to juxtapose BRICS countries; to make circular forms of comparison between these countries; to identify their “determinant factors”, or the “scale of values” which allows any legal system to survive and makes it open to “legal flows”. L.J. Constantinesco explained that vertical approaches for individual systems produce “parallel monologues” on the description of each system and assume that economic relations are completely equivalent and specular each other. These approaches, can be interesting for the analysis of the transplant effect of individual instruments useful to specific economic relations. [20] It could be interesting a deep analysis on what C. Schmitt called “konstitutionelle Verfassung” and O. Hintze “äussere Bildung”: [21] the “common constitutional standard” of individual states, which makes possible both interstate mutual relations and reciprocal legal influences, both influences and relations with other states and other Legal Orders. In literature is recognized that BRICS, as Legal Network, produces both interstate relations and legal

12 R. Leal-Arcas. How will the EU Approach the BRIC Countries? Future Trade Challenges, 2008 available at [www.icl-journal.com](http://www.icl-journal.com), accessed 29 September 2013 and *ivi* bibliography.

13 A. Paulus. Between Constitutionalization and Fragmentation Concepts and Reality of International Law in the 21st Century, available at <http://www.humboldt-forum-recht.de/english/5-2011/beitrag.html>, accessed 29 September 2013.

14 R.A. W.Rodhes. The Hollowing out of the State, in *Political Quarterly*, 65, 138-151, 1994.

15 J. d'Aspremont, F. Dopagne. Two Constitutionalisms in Europe: Pursuing and Articulation of the European and International Legal Orders, *ZaöRV*, Vol. 68, 939-978, 2008.

16 K. Pistor. Legal Ground Rules in Coordinated and Liberal Market Economies, in K.J. Hopt et al (eds.). *Corporate Governance in Context: Corporations, States and Market in Europe, Japan and the U.S.* Oxford University Press, Oxford, 2005.

17 H.P. Glenn. *Legal Traditions of the World*, Oxford University Press, Oxford, 2010.

18 J.L. Constantinesco. *Die Rechtsvergleichende Methode*, Köln, Berlin/Bonn, München, 1972 and the bibliography contained therein.

19 Y. Geny; M.G. Losano; see C. Costantini. *Comparazione Giuridica e Geopolitica Critica. Per una contro-narrativa sulle Tradizioni*, in *Cardozo Electronic Law Bulletin*, 2011 Fall.

20 K.Pistor, D.Berkowitz, J.F.Richard. The transplant effect, in *The American Journal of Comparative Law*, Vol. 51, 2003, and *Legal Institutions and International Trade Flows*, in *Michigan Journal of International Law*, Vol. 26, 2005.

21 A.Colombo. Spazio, Istituzioni e politica estera in O.Hintze in *Filosofia politica*, No. 11, 2011.

influences: which is the basis of "common constitutional standards" for this phenomenon has not yet been studied. The exhortation of the European Parliament. But both C. Schmitt and O. Hintze explained that these "standards" do not only coincide with the legal and formal aspects of each individual legal system (for this reason O. Hintze uses the term "Bildung" instead of "Forms"); they require interdisciplinary openings of knowledge and understanding. Not by chance, the exhortations of the European Parliament also recall the purposes of Europe 2020: purposes of knowledge and respect for the European plural identity (inside which fit the purposes of cohesion introduced by the Treaty of Lisbon) but also of understanding of multi-perspective and "multi-values" global governance.

For the economic and international literature, the BRICS countries are the "New Leading Powers"(NLP) [points 12-13-14-15-16 and k) of the mentioned Resolution of the European Parliament], that is, the emerging global players, in a regional and international dimension and with a double paradigmatic driving function (as an economic model of growth/development and as an institutional winning model for the combination of tradition and innovation). [22] In fact, considering relational logic, they are associated with other emerging countries (as Mexico, Indonesia, South Korea, Turkey) and classified as "NEXT 11", that is to say, as States characterized by a high rate of growth and extensive constitutional contradictions. Constitutional comparison understands this aspect as a common factor of "contextualized" comparison with the related regions and legitimizes the search of those "determinant elements" which allows any legal system to survive and makes it open to "legal flows" of each legal system, able to be a model of constitutional borrowing or policy transfer, both toward other BRICS countries, and toward other countries in the "region of influence". From this point of view, it is possible to explain the predictable extension of the BRIC relationship to the South Africa where the South-Saharan Africa plays a fundamental role for the NLP. For this reason, the BRICS countries pay particular attention to Africa, considering it not only as a commercial partner, but also as a "zone of influence" of constitutional developments, beginning from Angola; and it is also interesting to think about the "Luso-sphera", within the Brazilian context, with Cape Verde, Mozambique, and Guinea Bissau, affected by the commercial and investment interests of China. That is why the BRICS countries are both "models" and "ways of development".

But which theories and methods of comparison are used by Legal Scholars regarding the BRICS? Actually, literature places the theme of BRICS within the categories of the "New Law and Development Theory". If events and effects of constitutional borrowing, policy transfer are underestimated, then it is possible to assume that the BRICS countries can converge within a legal network unaffected by those determinant factors that represent the fundamental core of each single State. And if the "determinant factors" that

legitimize each legal order are neglected, the Constitution, that is the most determinant factor of each legal order, as structural coupling of law and politics, is neglected. And for this reason, this is one of the most dangerous challenge for the European Union called to face not only the BRICS as a legal network, with its "non binding" relationships, but also each BRICS countries with their own legal system and cultural background. The Indian Scholar D. Nayyar is persuaded that China, India, South Africa and Brazil will build up harmonic multilateral relationships beyond the economic matters. "It is necessary to recognize that the significance of China, India, Brazil and South Africa in the world would be shaped not only in the sphere of economics but also in the realm of politics. Their emerging significance in the world economy is attributable in part to their share in world population and in world income and in part to their engagement with the world through international trade, investment and finance. The early 2000s are perhaps a turning point. Even so, in the economic sphere, their potential importance in future far exceeds their actual importance at present. In the realm of politics, however, their importance is more discernible at the present juncture which is attributable in part to their size and in part to their rise. It is plausible to argue, though impossible to prove, that this represents the beginnings of a profound change in the balance of economic and political power in the world. (...). China, India, Brazil and South Africa are each engaged in a bilateralism that is both intra-regional and interregional. There are intra-regional initiatives led by China and India in Asia, by Brazil in Latin America and by South Africa in Africa. There are also some interregional initiatives on the part of these countries, such as China taking a lead in forging APEC and India seeking a partnership with ASEAN. China, India, Brazil and South Africa are also beginning to engage in a plurilateralism. There are two striking examples. At one level, India, Brazil and South Africa have constituted a plurilateral group, the G-3 or IBSA, attempting to develop a strategic alliance that would foster partnership among them, promote cooperation with developing countries and articulate a collective voice in international politics. At another level, China, India, Brazil and South Africa, together with Mexico, constitute the Outreach-5, who had been invited to the G-8 Summit in recent years. There is a hint of discontent about their status as observers peripheral to deliberations and decisions. And the Outreach-5 are now seeking a place at the high table with the G-8. From the perspective of the developing world, China, India, Brazil and South Africa, together, may be able to exercise significant influence through multilateralism, whether institutions or rules, in the global context. (...).

In conclusion, it would seem that China, India, Brazil and South Africa have a considerable potential for articulating a collective voice in the world of multilateralism. Coordination and cooperation among them carries a significant potential for exercising influence on multilateral institutions, which could reshape rules and create policy space for countries that are latecomers to development. Such

coordination and cooperation, which is in the realm of the possible, has not yet surfaced. There could be two reasons for the near absence of coordination and cooperation so far. For one, in the early stages of change, these countries might not have recognized their potential for exercising collective influence. For another, their relationship with each other may be characterized more by rivalry, economic or political, and less by unity. It is obviously difficult to predict how reality might unfold in times to come. Even so, it is important to recognize that once these countries become major players, there is a danger that they might opt for the pursuit of national interest rather than the spirit of solidarity among developing countries or the logic of collective action". [23]

### 3. Flaws of Comparison Produced by Some Legal Theories

From a general perspective, as already pointed out, there are at least two ways to investigate the BRICS countries as economies in transition and new global players. The first is called "vertical market focused approach", conforming to the Legal Origins Theory [24] and to the Ground Rules Theory; and the second way is the "horizontal rights focused approach", that considers the legal systems as made of fragments of a global history of legal flows and cultural influences. These theories produce various classifications on the BRICS countries. For example, in the studies published on the *Quarterly J. of Ec.* [2002, 2003, 2004] and on the *J. of Ec.* [2003] S. Djankov paid attention to the convergence of these countries as regards the bounds produced by the legal system on the economy and on the banks, affecting the attractive capability of the external investments. But this kind of investigation is not enough to explain, for example, the economic success of China. Who takes into account the rights focused approach verifies this kind of convergence even considering the exogenous institutions within the various legal systems. Furthermore, these theories emphasize differently the ways of communications of the constitutionalism: the first theory supports the technique of the legal transplants as a tool to quickly reply to the needs of the market; the second one observes the flows of policy transfer, where the players are both public (State, Agencies, etc.) and private and interact not only for economic interests, but also for affinities of culture, language, tradition. This

contraposition between the market focused approach and the rights focused approach seems to reproduce a typically Western demarcation of the XX century: that between M. Weber and E. Durkheim with reference to the relationship between law and economic connections. Weber's idea of a link between evolution of law and economic development (market focused) conflicts with Durkheim's observation on division of labor as a cause of new subjective expectations and necessities, therefore conditioned by social and cultural factors that law must fulfill (rights focused). There is this demarcation within the legal formants of the BRICS legal systems. And also in this case, economy has a spillover effect on the constitutional development but through ways that are not always conform to the Western Euro-American taxonomies.

But if we try to find a common trouble for the BRICS legal systems, we will find it in the home market as a factor of growth and on this point, the mentioned theories are not functional to pursue our goal. Countries like India, China, Russia and South Africa, differently classified in accordance with the Legal Origins Theory, agree to emphasize the political role of the State as warrantor of the home market against the relationships with the foreign investors. In fact, these relationships look at the State, and not at the market, as the main factor of development. While in Brazil, as a mixed legal system (civil law and common law) in accordance with the Legal Origins Theory, there is a growing spread of theories on the new-constitutionalism that focus on the activist role of the judiciary power (see the Supremo Tribunal Federal) to protect the home market.

These examples underline various flaws of comparison if used as a unitary reading key of the BRICS countries. First of all, it cannot be accepted the idea to know and understand the BRICS realities, imaging a sort of parallelism and specular perspective within their relationship between law and economy. This idea is based on the assumption of the "complementarity" of the legal systems as regards the "needs of the market" (proposed by the mentioned BRICSLAW project at the Wisconsin law School), where the comparison is based on parallel perspectives that cannot find a common point but that are complementary to the market.

The second flaw is founded on the assumption that there is a philosophy of history where the West of the North of the world is the paradigm to interpret the emerging situation. See Figure 1:

23 D. Nayyar. China, India, Brazil and South Africa in the World Economy. Engines of Growth?, in Unu-Wider, Discussion Paper, No.26, 05/2008.

24 J. Reitz. Legal Origins, Comparative Law and Political Economy, in American Journal of Comparative Law, Vol. 57, 2009.

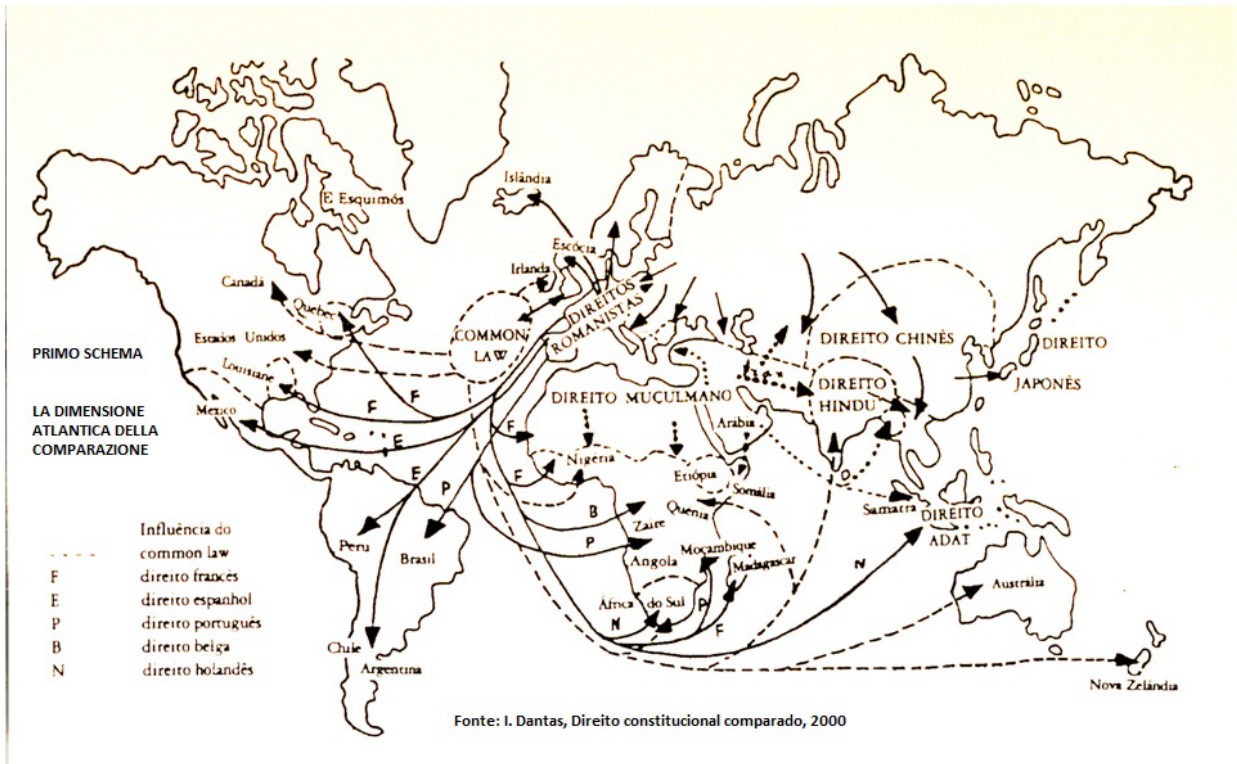


Figure 1. The Atlantic dimension of comparison

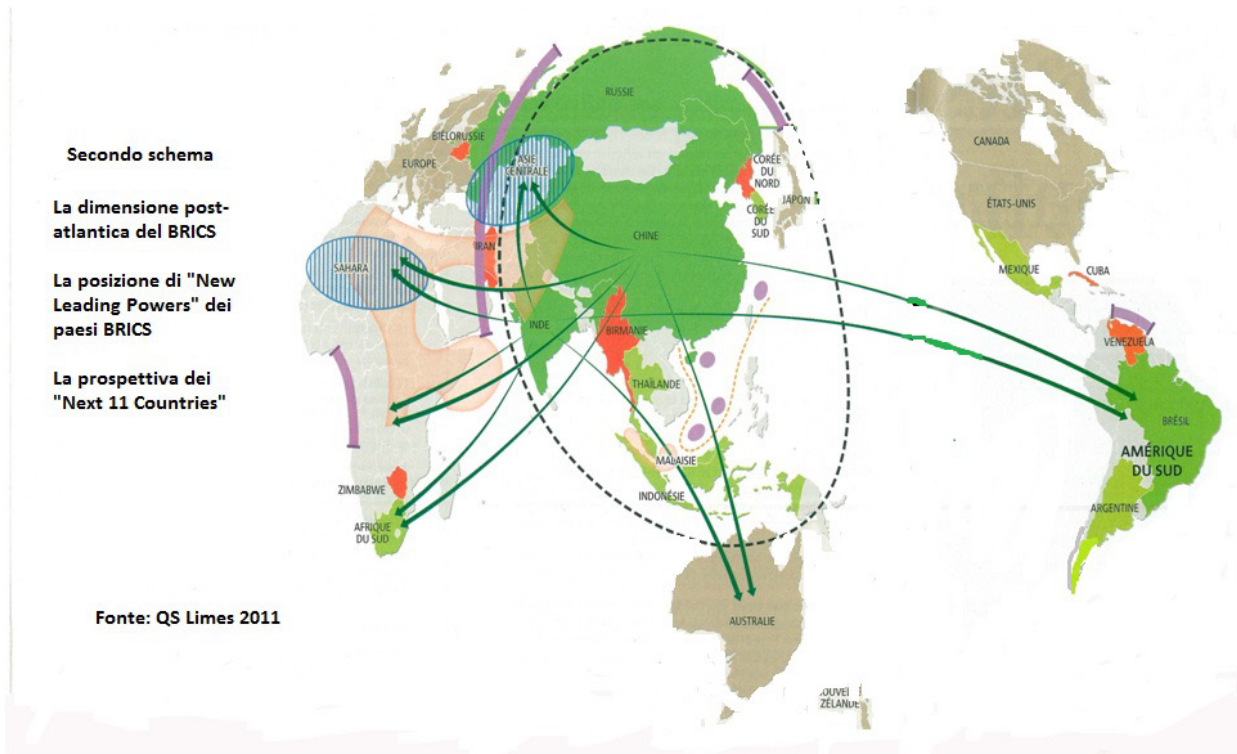


Figure 2. The post-Atlantic dimension of the BRICS countries.

The BRICS is a phenomenon of interstates post-Atlantic relationships. It express a post-Western globalization and for this reason it discusses about constitutionalism as a monopoly of the Western legal traditions of the North. [25] The third flaw was described by L.J. Constantinesco as the comparison in “subcontract” and through a third party. [26] This way, it leaves the new geography drawn by the BRICS countries out of consideration and the fact that it operates as a legal network and network to transfer practices and policies is neglected: a knowledge producer. [27] See Figure 2.

Therefore those phenomena of contamination of the legal categories, produced among these countries by the communication, are totally ignored; nor techniques, tools and places of creation of the legal discourse within the BRICS geography are taken into account. This means that there is just one legal language and that it can be similarly understood within each single legal order, while, in order to know each single country, it is necessary to refer not only to historical criteria but also to the geographical ones of contextualization.

Finally, the relational dynamics of the BRICS is not only based on unidirectional export of legal transplants, useful and efficacious for the market. It is more complicated. It is made of constitutional borrowings and policy transfers, whom effects often belong to the “Mute Law”, because they are processes of decision making that do not make clear the -convergence of the BRICS as a legal network, then the determinant factors of each country, beginning from the Constitutions, shape the process.

#### 4. Is the BRICS a “Multiple Modernity”?

The analysis on the BRICS countries can be open to a interesting critical scenario about constitutional comparison.

The contemporary extra-western dynamics cannot be taken into account as a specular imagine of the Euro-American center of constitutionalism. When the material and immaterial “flows” between States do not cross the West, the constitutional realities arise as a constellation of processes or as the result of multiple factors that cannot be classified within any paradigm of universal comparison. The problematic connection between economic modernization and democratization of political life, that is offered by the experience of the BRICS countries, demonstrates this aspect. The BRICS phenomenon does not put us in front of a simple “spread” of an already known, analyzed and experimented constitutional modernity. It is an “elsewhere” that disorientates us because highlights the “leakage” from the previous “certainties”.

In this perspective, the methodological reductionism of the BRICS analysts that pursue the Legal Origins Theory or

the Ground Rules Theory, becomes clear. In fact, the mentioned theories accept the heuristic presumption of the split between “modernity as a *telos*” (that is to say as a goal of a process developed over time) and “modernity as a *status*” (that is to say, as a privilege of the modernity): [28] the West world holds the “status”; the BRICS reality describes a “telos”. Comparative scholars have to address these realities toward the concretization of the “telos”.

In the approaches of Legal Origins Theory and Ground Rules, the intention is exactly this: [29] the emphasis is shifted from the search for what it might mean legal and constitutional modernity- which is taken for granted – to the description of the path that makes the individual countries and their legal processes “modern”. [30] For this reason, the study and the comparison of these “new” realities become a predetermined path; they also serve the “modernization” of social relations, which is useful to the economic logic of the West. [31] Evidently, the background of these theories is purely political and ideological; their analysis are based on a normative model that is considered universally convergent to the Western approach in all fields of the social observation. [32]

However, one thing is questioned by the BRICS phenomenon: it concerns exactly the ethnocentric presumption that imagines the constitutional processes as never ending “replicas” of the West. This does not mean that we do not witness a processes of “modernization”, but that manifestation of “modernity” is different from the ethnocentric ideal type proposed by the comparatist scholar. Moreover, the emergence of the BRICS also reduces approaches *à la Wallerstein* : [33] how can the distinction between centers and peripheries of economy survive, when the axis of the system, with its activities and its strategic decision-making power, seems inexorably away from the “center”?

Among other things, as has been mentioned, the BRICS does not want to be an “alternative world” (in comparison with the West). [34] But then, if the BRICS does not represent an “alternative” or a “repetition” of the West, what can it become within the constitutional processes developed inside the West?

This is the unprecedented challenge of contemporary comparative constitutional law.

Evidently, for comparative law, it is time to handle the “scale of values” that support dialogue and cooperation between legal systems that are so different, just as those of

25 M. Neves. *Transconstitucionalismo*, São Paulo, Malheiros, 2011.

26 *Die Rechtsvergleichende Methode*, Cologne, Heymann, 1972.

27 X. Yao, C. Watanabe, Y. Li. Institutional structure of sustainable development in BRICS: Focusing on ICT utilization, in *Technology in Society*, No.31, 1, 2009.

28 J. Ferguson. *Global Shadows. Africa in the Neoliberal Order*, Durham and London, Duke Univ. Press, 191, 2006.

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30 B. Marquesinis. *Il metodo della comparazione*, Milano, Giuffrè, 2004.

31 A. Martinelli. *La modernizzazione*, Roma-Bari, Laterza, 2004.

32 See M. Berman. *L'esperienza della modernità*, Bologna, il Mulino, 1985; M.Di Meglio, *Lo sviluppo senza fondamenti*, Asterios, Trieste, 1997.

33 I. Wallerstein. *Il sistema mondiale dell'economia moderna*, trad. it., Bologna, il Mulino, 1978-1995.

34 It is not useful to describe the BRICS phenomenon according to the approach of an “alternative modernity” (about this, P. Gaonkar (ed.), *Alternative Modernities*, Duke University Press, Durham and London, 2001).

the BRICS, competing with multiple dimensions of experience, [35] including the legal experience, that are neither uniform nor universalizable, but however sustainable and comparable, because “multivalent”. [36]

Furthermore, from a methodological standpoint, the reality of the BRICS requires to take into account the necessity of abandoning that intellectual attitude of “constitutional protectionism” which produced and reproduced standardized understanding of law. [37] However, it is possible that the BRICS can be analyzed and understood as a “not equal” phenomenon, because based on a “multiple” interstate dynamic: a serial dynamic, we can say, according to the Fuzzy logic actually practiced in comparative law, [38] to understand how very different complex systems can “live together” through “serial similarities”. [39] Of course, the effect of this process is a “hybrid” subject.

But the future of the global institutionalism is probably marked by forms of “hybridism”. [40]

## 5. The Turning Point in New Delhi

The above mentioned constitutional implications of the BRICS phenomenon are confirmed by the Declaration of the Fourth Summit of the BRICS countries, held in New Delhi on 28 and 29 March 2012 where the BRICS countries underline their own importance on the global scenario. [41] “The BRICS are now making an impact on global governance. The theme of the fourth Summit, ‘BRICS Partnership for Global Stability, Security and Prosperity’, signaled its strategic intent through an alternative interpretation of interdependence. The Delhi Declaration has elements that primarily have an economic dimension though these are essentially political, suggesting a new system of multilateralism. The strategic overtones have elicited a cautious response from the United States, recognizing that a multi-polar world has emerged where global leadership is increasingly shared”. [42]

35 The multiplicity of modernity, developed by S.N. Eisenstadt (*Sviluppo, modernizzazione e dinamica delle civiltà*, in *Civiltà comparate*, Napoli, Liguori, 1990; *Non una ma molteplici modernità*, in *Sulla modernità*, Soveria Mannelli, Rubettino, *Comparative Civilizations and Multiple Modernities*, Leiden and Boston, Brill, 2003), is the main theme that arises together with the manifestations of the globalization (see P. Jedlowski, *Memoria, esperienza e modernità*, Milano, Franco Angeli, 2002).

36 H.P. Glenn. see note 15 at 352 ss.

37 Cfr. M. Carducci, S.P. Moreno Flórez. *Teoría constitucional de las necesidades pedagógicas como método de enseñanza en la investigación*, in *Memoria del X Congreso Iberoamericano de Derecho Constitucional*, Vol. 2, Lima, Idemsa, 55, 2009.

38 See S. Baldin. *Riflessioni sull'uso consapevole della logica fuzzy nelle classificazioni fra epistemologia del diritto comparato e interdisciplinarietà*, in *Revista General de Derecho Público Comparado*, Vol. 10, 1, 2012.

39 The concept of “serial similarities” is developed, among others, by R. Needham, *Polithetic Classification: Convergence and Consequences*, in *Man*, No. 3, 351, 1975.

40 S. Drichel. *The Time of Hybridity*, in *Philosophy Social Criticism*, No. 34, 587, 2008.

41 The Fourth BRICS Summit Delhi Declaration available at <http://www.mea.gov.in/mystart.php?id=190019162>.

42 M. Sanwal. *BRICS Now Matter In The Changing Global World Order*, in *Institute for Defence Studies and Analysis*, 16 aprile 2012, available at [http://www.idsa.in/idsacomments/BRICSNowMatterInTheChangingGlobalWorldOrder\\_MukulSanwal\\_160412](http://www.idsa.in/idsacomments/BRICSNowMatterInTheChangingGlobalWorldOrder_MukulSanwal_160412).

It is a document with 50 points, followed by an action plan specifically determined in 17 goals and an explicit reference to an in-depth report, a summary of what the BRICS phenomenon is today: “In a post-global crisis world largely shaped by financial instability and weak growth in major economies, the BRICS countries have a remarkable opportunity to coordinate their economic policies and diplomatic strategies not only to enhance their position as a grouping in the international economic and financial system, but also to be a stabilization factor for the world economy as a whole. The BRICS should increasingly harmonize and coordinate their policies with a view to sustaining their growth momentum and capacity to weather global turbulence. The benefit of cooperation is immense not only for the BRICS but also for the global economy. A strategic agenda for forging closer links among the BRICS, as outlined in this joint report, may contribute to consolidating and expanding their roles in global affairs”. [43]. More concretely, the 17 objectives describe the framework of the activities that the BRICS aims to promote in 2013 as an interstate unit, articulated in four parallel levels: inter-ministerial meetings; intergovernmental summits; intersectorial work (for example, between the various Authorities of the competition and the market); cooperation between institutional bodies, within each State (for example, between the Twin Cities and Local Governments).

Therefore, the project has a functional multidimensionality, based on cooperation, interstates and interdepartmental relationships: a way to hold relationships with the BRICS countries through shared or common strategies on some particular issues, and according to a “top down approach” similar to that experienced in Europe at the origin of its progressive economic, political and cultural integration. [44]

But not only this. In accordance with J.B. Auby, “Globalization is a set of phenomena which is transforming our world by leading it from segmentation to intermingling, from separation to transitivity, from a territory-based organization to despatialization, from a state-centered configuration to a less state-centered arrangement. Its main manifestation is economic and is related to the dramatic growth of international commerce, the development of increasingly powerful transnational economic actors, and the international liberation of various markets, primarily the financial ones. However, even if the economic aspect is essential, and maybe lying at the very heart of the whole process, I think that reducing globalization to this aspect is an error. The dynamics of globalization are also technical, cultural, social, and political”. [45]

At paragraph 13 of the Declaration, it is stated that the

43 AA.VV. *The BRICS report. A study of Brazil, Russia, India, China and South Africa with special focus on synergies and complementarities*, New Delhi, Oxford University Press, 2012.

44 About the various interdepartmental meetings and cooperation, see the website

[http://www.brasil.gov.br/para/press/press-releases/march-2012/fact-sheet-brics-partnership-for-global-stability/br\\_model1?set\\_language=en](http://www.brasil.gov.br/para/press/press-releases/march-2012/fact-sheet-brics-partnership-for-global-stability/br_model1?set_language=en).

45 J.B. Auby. *Is legal globalization regulated? Memling and the business of baking camels*, in *Utrecht Law Review*, vol. 4, 2008.



Finance Ministers of the BRICS countries have confirmed their desire to create a “bank of common development”. The news comes at a time when many doubts have been raised about the ability of the BRICS group to function as a cohesive political bloc, as highlighted by the opinion of Stratfor Global Intelligence. [ 46 ] Today, the BRICS countries represent almost the 28% of the global economy and the 19% of the world PUB; they have a large portion of foreign exchange reserves and almost half the world's population. Therefore, the implementation of such a bank would allow these countries to access funds out of the global financial system and to reduce financial dependence from Europe and from the United States. Considered the “conditionality” that the financial dependence on the West has always produced on the rest of the world, [47] this would be a critical and fundamental turning point from the viewpoint of constitutional law. Would be enough to reflect on the following question: what impact will produce a “bank of common development” on the Constitutions of each individual economic State (from the matters concerning the budget, or the savings to that concerning the employment policies)? We do not know and we cannot imagine if the strategic choices will be different from those imposed by the Euro-American West to the South of the World and now suffered by the European Union.

At the Summit in New Delhi the five countries have also established to strengthen, as stated in paragraph 18, both the mutual commercial flows and scientific and technological knowledge: therefore economic-financial “flows” (the “Bank of common development”) and “flows” of knowledge will intertwine in activities of cooperation (not only interstates).

And there is more. In paragraph 42 of the Declaration, we find that most of the BRICS States, having to face a number of similar challenges in the field of public policies (for example, those concerning the right to health, universal access to public services, access to technologies, increase of costs): this requires the institutionalization of the processes of Policy Transfer. The Policy Transfer was one of the determinant factors in the process of European regionalization. [48]

With other words, material and immaterial “flows”, combined with potential paths of Policy Transfer, leave a prelude that these countries can be strengthened in an unprecedented geopolitical alliance in the history of international relations, in which the West is no longer the only center of gravity. On the other hand, the mutual approaching of the BRICS countries testifies the fact that the Euro Atlantic area (Western Europe with North America) is gradually losing its informal status of “geopolitical Headquarter” of the contemporary world; in fact, the U.S. Report of the NIC (National Intelligence Council), about

“Global Trends 2025: A Transformed World” talks about an unprecedented transfer of wealth and economic influence from West to East. [49]

## 6. Constitutional Unhomogeneity and Non-conditionality

A further competitive advantage of the BRICS, compared to those systems based on a regional integration, lies in its internal constitutional unhomogeneity. This element is clear from a comparison with the European Union. Just consider the articles 4.2 and 6 of the Treaty on European Union after the Lisbon reform: they speak of “common constitutional traditions” to the Member States and “respect for national identity”. It is well known that there are two elements that have contributed to building up the process of integration and consolidation of its “Constitutional Synallagma”. [50] In the BRICS phenomenon there is not any requirement of constitutional homogenization and this is because the BRICS countries want to be competitive and alternative on the global scene, without being structurally influenced by their constitutional identities. Paradoxically, their constitutional unhomogeneity becomes a strong global competitive advantage, because it does not produce the “costs” of structural adjustment required by any process of integration. [51]

But the BRICS have another global competitive advantage: they activate an economic cooperation without any clause of conditionality. This is also a very strong difference compared to the current European context.

The revision in simplified form art. 136 TFEU, adopted by the European Council on 25 March 2011, adds a paragraph stating that, for the Euro-zone countries, the granting of any required financial assistance will be subject to a “strict conditionality”. The criterion of “strict conditionality” [52] was a fundamental clause in the process of European integration. This mechanism was considered “a copy of the regional IMF” and it is totally intergovernmental, helping to increase the complexity of the institutional structure of the Union as a community integration and making the perspective of a real federative process more difficult. [53] On the contrary, the relationships of the BRICS countries are going on in the opposite direction: they do not promote a real community integration; but they maintain the different constitutionality of each single State without any claim to build “common traditions”; [54] all together, they pursue the

49 See <http://www.dni.gov>.

50 G. Martinico. Complexity and Cultural Sources of Law in the EU Context: from the Multilevel Constitutionalism to the Constitutional Synallagma, in *www.germanlawjournal.com*, 2007.

51 M. Bodenstern, H.W. Ursprung. Political Yardstick Competition, Economic Integration, and Constitutional Choice in a Federation, in Independent Institute Working Paper, No. 37, 1, 2001.

52 C. Pinelli. Conditionality, in Max Planck Encyclopedia of Public International Law, 2009.

53 M. Ruffert. The European Debt Crisis and European Union Law, in Common Market Law Review, 1789, 2011.

54 L. Martínez Alfonso, H. Ramanzini Jr., M. Vazquez. Anuario de la Integración Regional de América Latina y el Gran Caribe 2010, No. 8, Argentina, CEGRE, 2010.

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48 C. Radaelli. Policy Transfer in the European Union: Institutional Isomorphism as a Source of Legitimacy, in Governance, No. 13, 25-43, 2000.

goal to contribute to the emancipation from the logic of “conditionality” in order to promote a financial support. [55]

## 7. A critical Relationship between the European Union and the BRICS Countries

As regards the relationships between the BRICS countries, the European Union and the individual countries, several paths of mutual cooperation are being pursued, for example in the higher education field; but the main lack of preparation regards the role of the European Union in order to be united towards this worldwide “network”. It is possible that this fact depends on specific European interests to preserve the shared relationships with the single regional areas; otherwise, it can be a consequence of the asymmetries within the BRICS countries.

In January 2012, the report of the European Parliament on the foreign politics of the European Union declared an explicit unitary commitment toward the BRICS countries considered as a unitary global subject [cit. (2011/2111(INI)]. In the relationship with the BRICS countries, the European Union must consider that these new world players contribute to the “fragmentation” of international law and European law itself with its external relationships, also because the BRICS structure supports “non binding” external relationships. In other words, from the constitutional viewpoint, the dynamics of the BRICS countries seem to take into account their own international interlocutors, particularly the European Union, not as a unitary and monolithic legal order, but as a “club of States”, useful for a logic of Public Choice to be used with any other formal international organization (as the WTO, World Bank etc.). This fact makes the BRICS countries, as a legal network, an international “atypical” subject but, at the same time, strongly competitive on the world scene compared with the formal structures with a regional dimension and a supranational nature. The BRICS countries are not a supranational legal order, nor an international organization or a simple interlocutory summit. In fact, in 2010 these countries evaluated the role of judiciary power within the BRICS countries, by thinking to interact with structures of informal judicial dialogue, like the Iber-Rede and the Dep. Int'l Legal Coop. and the Recovery of Assets (DRCI). After it took part in the Tenth Conference of the Presidents of the Lower Houses (Paris 2011) and in the Global forum of legislators for the dialogue on climate change and in the Forum of legislators for the dialogue on illegal deforestation, the BRICS countries are now an active part of the parliamentary dimension of G8. Just recently in Italy, with a detailed ISPI report [56] and with a specific study of the Chamber of Commerce of Milan, [57] the

legal-institutional dimension of the BRICS countries as a world legal network has been recognized. The BRICS countries can be described as a “legal network” able to produce legal flow of policy transfer, constitutional borrowing, constitutional dialogue as a “Knowledge Producer” and a “Community Interest”, so it leads these conceptual acquisitions about the convergence to an epochal challenge. It is creating new parameters, new bonds, new opportunities, strongly affected by the “scale of values” of each single country. The BRICS countries may share objectives but do not necessarily share the tools, especially if the tools are conditioned by internal legal and constitutional factors. Furthermore, the sharing of the objectives does not necessarily produce formal or informal constitutional changes within the single legal order. These observations are very important to understand the differences of the constitutional policy making of the BRICS, compared with multilevel regional realities, as the European Union.

The convergences between these countries, produced through constitutional borrowings and policy transfer, happen through indirect ways of a voluntary lesson-drawing; while the European multilevel approach directly affects the Constitutions, with informal transformations and formal changes. [58] Notwithstanding, the BRICS countries, strong and resolute on the “regional” scene, have several problems of internal constitutional policy, affected by low consumptions, a huge inequality between rich and poor, backwardness in social services and innovation. For this reason, the BRICS States have some conditional convergences both in mutual and external comparison with other countries and contexts. They converge on common constitutional problems, for example: sustainable development, the protection of common goods, exploitation and protection of natural resources, affirmative actions of social inclusion, protection of minorities and oppositions, freedom of speech and the right to a collective memory, access to information, protection of weak subjects, child labor, social accountability of joint ventures, level of education, child mortality rate, endowments of sanitary and pension structures etc ... These convergences are affected by other constitutional characteristics, especially pertinent to the political system. From this viewpoint, the BRICS countries are very different: there are three developing democracies (Brazil, India, South Africa) and two systems that are still contradictory (Russia and China).

We can classify these differences in various ways. In the most recent Italian literature of comparative law, [59] considering the distinction between the Rule of professional law, political law and traditional law, Brazil and Russia have been classified together as legal systems with prevailing law & politics; India and South Africa are systems with prevailing law and tradition; China is the only system with a prevalence of tradition & politics. All the BRICS systems are

55 What Next for the BRICS Banks?, in Institute of the Development Studies, Issue 3, May 2013.

56 P. Quercia, P. Magri (eds.). I BRICS e noi: l'ascesa di Brasile, Russia, India e Cina e le conseguenze per l'Occidente, ISPI-Strategitaly, 2011.

57 I Paesi BRIC e le relazioni con l'economia italiana e milanese, Milano 2011, available at

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58 U. Fastenrath, R. Geiger, D.E. Khan, A. Paulus, S. von Schorlemer, C. Vedder (eds.). From Bilateralism to Community Interest, Oxford University Press, Oxford, 2011.

59 G.F. Ferrari. Atlante di diritto pubblico comparato, Torino, UTET, 2010.

still located among the developing countries and they are asymmetric interlocutors of information and exchange from the viewpoint of the industrialized countries of the “First World”, beginning from the European Union. The strategies of the European Union toward these new players reveal various interesting features for constitutional comparison.

The Constitutions of the BRICS countries are real and proper “Strategic Constitutions”, as they produce “competitive benefits” (for example as regards to the access to the State helps) or legitimize grants of “national reserves of market” to support the home demand (as in case of Brazil, with the regulation of the foreign capital of companies). In this way, they increase phenomena of “capture” of the market, that affect the role of the BRICS as a global competitor compared with the Legal Orders (as the States of the EU), where the Constitutions, on the contrary, must be (formally or informally) conformed to the global competition. [60]

## 8. Conclusion

The strategic goals of Horizon 2020 are revealed by mutual attention from the European Union to BRICS; from BRICS to the European Union.

The European Parliament Resolution proposal doc. [2011/2111(INI)] follows the “Report on the EU foreign policy” published in January 2012. It highlighted the need for the EU to develop a global policy system based on dialogue and common values with Brazil, Russia, India, China and South Africa. Moreover, the European Parliament calls for strengthening political dialogue with BRICS countries not only at government level but also at the level of research institutions, inviting to develop forms of multilateral cooperation. There are some strategic points in the European Parliament Resolution: it encourages the promotion of dialogue and partnerships aiming at strengthening convergences on “democratization, the consolidation of the rule of law, better education and the reduction of social disparities”; Paragraph 22 of the Resolution highlights the fact that EU Member States have to become interlocutors of the BRICS countries, developing bilateral relationships with the highest transparency and taking into account the potential effects that these relationships may have on the Union's policies and positions (this is the issue of the relationships between BRICS and European cohesion policies); “Europe 2020” supports three lines of smart growth (developing an economy based on knowledge and innovation), sustainable growth (promoting a more efficient economy on the resources and the environment), inclusive growth (promoting an economy that favors territorial and social cohesion). Two of the three

fundamental priorities of the Horizon 2020 Program (“excellent science” and “societal challenges”) overlap the objectives of the European Parliament Resolution (scientific partnerships for consolidating democracy in BRICS, and the effects of BRICS relationships on European social policies).

The BRICS as well promoted their interests in the HORIZON 2020 Program: at the Brasilia summit in 2010, BRICS declares its commitment to sustainable development; the following meeting of the BRICS Agriculture Ministers decides to set up a database for the evaluation of food safety and the negative effects climate change may have on it; the development of alternative energy sources, energy efficiency, research and information have been considered strategic sectors for BRICS. These objectives are clearly overlapping the third part of the HORIZON 2020 Program on sustainability of economy, research, energy policy, etc.

This mutual correspondence highlights the first priority of the HORIZON 2020 Program: “completely bottom up basic research in fields where there is still no acquired scientific knowledge”. Furthermore, it should be remembered that the program will become effective on January 1st 2014, therefore any research proposal on this theme could be a start up for the combination of the European Parliament's guidelines with the HORIZON 2020 issues, through the “determinant element” of the BRICS countries' Constitutions and their dynamics. In conclusion, one can note that the issue of constitutional comparison of BRICS requires a critical dialogue for the “consolidation of the rule of law, better education and the reduction of social disparities” (European Parliament Resolution). All these topics (together with health, common goods, energy policies, etc.) are at the centre of the relationships between Constitutions - as “determining factors” of the BRICS countries - and economy; and in the legal literature addressing particular attention to the BRICS phenomenon, references are made to the centrality of these topics (from the issue of education to the issue of climate change to society). With specific reference to Europe, this interest is confirmed by the next international meeting on BRICS. [61]

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